2014 KSIEL/ KLRI International Conference

Trade and Global Governance: A Panoramic View of Free Trade Agreements and WTO

Date

6 - 7 November 2014

Venue

Novotel Ambassador Hotel, Gangnam, Seoul, KOREA

Hosts: Korean Society of International Economic Law (KSIEL)
Korea Legislation Research Institute (KLRI)

Sponsors: Ministry of Trade, Industry & Energy (MOTIE)
Korea Federation of Small and Medium Business (KBIZ)
CheilYang Holdings Co., Ltd.

Day 1 : Wednesday, 5 November 2014

Welcoming Dinner (Invitation Only) at Lobby Lounge

Day 2 : Thursday, 6 November 2014 — **Moderator : KIM Min-Jung (Seoul National University)**

09:00 – 09:30 Registration

09:30 – 10:00 Welcome Addresses — Room: Champagne A Hall

Opening Remarks
KIM Dae-Won, President of Korean Society of International Economic Law
Welcoming Remarks
LEE Won, President of the Korea Legislation Research Institute
Congratulatory Remarks
CHOI Kyong-Lim, Deputy Minister for Trade, Ministry of Trade, Industry & Energy

10:00 – 12:00 Session 1 Fundamentals of FTA — Room: Champagne A Hall

CHAIR : PARK No-Hyoung (Korea University)

Presenters
1. KIM Soo-Yeon (National University of Singapore): Negotiating the Nexus: Production Networks, Multinational Firms, and Regulatory Coherence in RTAs
2. ELMS Deborah (Asian Trade Center, Singapore): Trans-Pacific Partnership Negotiations: Where are We now?
3. HUR Jung (Sogang University): Do Free Trade Agreements Increase Economic Growth of the Member Countries?

Discussants
KANG Jun-Ha (Hongik University)
KWON Hyouk-Woo (Ministry of Trade, Industry & Energy)
SUH Jeong-Meen (Soongsil University)

12:00 – 13:30 Lunch — Room: Champagne B Hall

13:30 – 16:30 Session 2 Issues of FTA — Room: Champagne A Hall

CHAIR: SUNG Jae-Ho (Sungkyunkwan University)

Presenters
4. BI Ying (Zhejiang University): Could Predatory Pricing Rules substitute Antidumping Laws in the Proposed China-Japan-Korea Free Trade Agreement?
5. HSIEH Pasha (Singapore Management University): Examining the Liberalization of ASEAN's Legal Services Market - Challenges and Reforms –
6. LEE Ki-Pyeong (Korea Legislation Research Institute): Recent Trends of Investment Chapters in FTAs – Centering around Investor-State Dispute Mechanism-
7. YOO Joon-Koo (Korea National Diplomatic Academy): The Third Wave of International Intellectual Property Legal System - Focusing on the TPP IPR Charter-

Discussants
CHO Young-Jeen (Ewha Womans University)
CHOI Ji-Yeon (Korea Legislation Research Institute)
LEE Ji-Soo (Soongsil University)

Junior Discussants
HAN Xue-Hua (Ewha Womans University)
LEE Seu-Yeun (Yonsei University)
Kang Moon-Kyung (Chonbuk National University)

16:30 – 17:00 Coffee Break

17:00 - 18:00 Special Session for Small and Medium Enterprises and Sustainable Development I

8. A Conversation with NAKAGAWA Junji (University of Tokyo) on "WTO, Mega-FTAs and Global Governance"
(1) Chair: ELMS Deborah
(2) Panelists: KIM Soo-Yeon, HSIEH Pasha
(3) Open-Floor Discussion

18:30 Dinner (Invitation Only) — Room: Champagne B Hall

Day 3 : Friday, 7 November 2014	Moderator : LEE Jee-Hyung (Ewha WTO Law Center)
09:00 – 09:20	Registration
09:20 – 12:40	Session 3 Fundamentals of Global Trade Governance — Room: Champagne A Hall

CHAIR: CHOI Seung-Hwan (Kyunghee University)

Presenters

9. WANG Heng (Southwest University of Political Science and Law, China): Cultural Exceptions in International Trade : Challenges and the Prospect

10. DESIERTO Diane (University of Hawaii): Balancing National Public Policy and Free Trade

Discussants

PARK Deok-Young (Yonsei University)

WANG Sang-Han (Sogang University)

Junior Discussant

LEE Cheon-Kee (Korea University)

Presenters

11. KIM Jong Bum (Yonsei University): Mega-RTAs under the WTO Law

12. FUKUNAGA Yuka (Waseda University): Equivalence of SPS/TBT Standards and Public Policy Objectives

Discussants

YOO Hee-Jin (Anyang University)

OH Sun-Young (Soongsil University)

Junior Discussants

SOHN Ji-Young (Ewha Womans University)

KANG Sung-Jin (Korea University)

12:40 – 14:00	Lunch — Room: Champagne B Hall
14:00 – 16:30	Session 4 Issues of Global Trade Governance — Room: Champagne A Hall

CHAIR: HYEON Dae-Ho (Korea Legislation Research Institute)

Presenters

13. LEE Se-Ryon (Chonbuk National University) & KIM Dae-Won (University of Seoul): A Critical Review on the Relevant Market Concept in *Canada-Renewable Energy* Case - Judicial Integration or Fragmentation?-

14. LEE Sang-Mo (Korea Legislation Research Institute): Issues and Implications of Renewable Energy Policy in China

15. CHUNG Chan-Mo (Inha University): Anatomy of Confidentiality of Trade Negotiation

16. IRWIN Andrew (Productivity Commission, Australia): Policy Analysis Framework for Australian Bilateral and Regional Trade Agreements-

Discussants

LEE Jee-Hyung (Ewha WTO Law Center)

KIM Ha-Na (Yonsei University)

CHUNG Ki-Chang (Yoon & Yang)

Junior Discussant

KIM Min-Jung (Seoul National University)

16:30 – 17:00	Coffee Break
17:00 - 18:00	Special Session for Small and Medium Enterprises and Sustainable Development II

17. A Conversation with CHOI Won-Mog (National University of Singapore) on " Making International Economic Law a Friend of Global Governance of Environmental Protection - Reinterpretation of the National Treatment Principle - "

(1) Chair: WANG Heng

(2) Panelists: DESIERTO Diane, FUKUNAGA Yuka

(3) Open-Floor Discussion

18:30	Farewell Dinner (Invitation Only) — Room: Normandie Hall

BIOGRAPHICAL NOTES OF

2014 CONFERENCE PARTICIPANTS

(*Order of Program)*

BIOGRAPHICAL NOTES OF 2014 CONFERENCE PARTICIPANTS

(*Order of Program)*

KIM Dae-Won is a professor of international law at Seoul City University in Korea. Professor Kim received his legal education in Korea (Korea University, LL.B.) and further at the University ofEdinburgh (LL.M) in the United Kingdom, at the University of Konstanz (Ph. D course) in Germany, finally at Berne University (Ph.D., *Summa Cum Laude*) in Switzerland. Before working at the Seoul City University, he was a research fellow at the World Trade Institute in Switzerland. His main theoretical concerns lie in WTO dispute settlement mechanism and normative nature of WTO and EU law. He published Non-Violation Complaints in WTO Law (Peter Lang) in 2006. He is currently the President of Korean Society of International Economic Law (dwkim@uos.ac.kr).

PARK No-Hyoung is a Professor of Law at Korea University School of Law since 1990. He is currently the Director of the Cyber Law Centre at Korea University. He graduated from the College of Law, Korea University (LL.B., 1981), the Graduate School, Korea University (LL.M., 1983), Harvard Law School (LL.M., 1985), and the University of Cambridge (Ph.D. in International Law, 1990). He was the founding president of the Korean Society of International Economic Law, and served as commissioner of Korea Trade Commission. His main interests cover international economic law, negotiation and mediation, and cyber security and data privacy.

KIM Soo-Yeon is Associate Professor of Political Science at the National University of Singapore. She is a former Fellow of the Transatlantic Academy, based at the German Marshall Fund of the United States (Washington, DC), and of the Niehaus Center for Globalization and Governance, Woodrow Wilson School of Public and International Affairs, Princeton University. SooYeon Kim holds a Ph.D. in Political Science from Yale University and B.A. in Political Science and International Studies from Yonsei University. She is the author of *Power and the Governance of Global Trade: From the GATT to the WTO* (2010, Series in Political Economy, Cornell University Press). SooYeon Kim's main research area is trade politics, with research lines in the politics of the World Trade Organization, free trade agreements, WTO disputes, and rising powers in the global economy. She is currently at work on a book-length project on free trade agreements in Asia, which examines how multinational firms and production networks affect states' commitments in behind-the-border trade rules. SooYeon Kim's publications include "Regionalization in Search of Regionalism: Production Networks and Deep Integration Commitments in Asia's PTAs" (forthcoming 2015, in Andreas Duer and Manfred Elsig, eds. *Trade Cooperation: The Purpose, Design and Effects of Preferential Trade Agreements*, Cambridge University Press) and "Deep Integration and RTAs" (forthcoming 2015, in Lisa Martin, ed. *The Oxford Handbook of the Politics of International Trade*, Oxford University Press).

ELMS Deborah is Executive Director of the Asian Trade Centre in Singapore. She is also a senior fellow in the Singapore Ministry of Trade and Industry's Trade Academy. Previously, she was head of the Temasek Foundation Centre for Trade & Negotiations (TFCTN) at the S. Rajaratnam School of International Studies at Nanyang Technological University, Singapore. Her current research involves the Trans-Pacific Partnership (TPP) negotiations and global

value chains.

KANG Jun-Ha is a Professor of Law at Hongik University. He is also a member of New York Bar Association. Prior to joining Hongik University, he served as Deputy-Director of Ministry of Foreign Affairs and Trade (MOFAT). While working for MOFAT, He was involved in Korea's major FTA negotiations such as KORUS, Korea-ASEAN, Korea-India and Korea-EFTA FTA. He is currently a member of Advisory Committee for Ministry of Justice on International Investment and Intellectual Property Rights. His academic interest lies in international economic law and international environmental law. He serves on the editorial boards of Korean Journal of International Economic Law and Journal of Fair Trade. He received LL.B and LL.M degree from Korea University and New York University School of Law and studied in SJD program at Indiana University Maurer School of Law.

Kwon Hyouk-Woo is Director for the Office of Trans-Pacific Partnership(TPP), Ministry of Trade, Industry& Energy (MOTIE). He has been the lead negotiator for the Trade in Goods group in bilateral FTAs with Australia, Canada and New Zealand. He holds LL.M. degree from the Georgetown University Law Center and MIPP degree from the Johns Hopkins University School of Advanced International Studies(SAIS). He is a graduate of Seoul National University with B.A. and MPP degrees.

SUH Jeong-Meen is an Assistant Professor of Department ofGlobal Commerce at the Soongsil University. He holds Ph.D. degree in economics from Boston University and Master degree in economics from Seoul National University. Prior to joining academia, he workedfor Department of Trade and Investment Policy at KIEP (Korea Institute for International Economic Policy) which is a Korean government think tank, as research fellow and head of the team. He also served as a government delegate for UNFCCC and WTO.Suh's research focuses on international trade theory. He is particularly interested in modeling issues on international agreement with economic theories. On topic-wise, his interest is mainly on trade and environment.

SUNG Jae-Ho is a professor at Sungkyunkwan University Law School. He served as the president of this Society from 2009 to 2010 and, currently, serves as an editor-in-chief of the Korean Journal of International Economic Law. He has been elected to the president of the Korean Society of International Law, expecting to serve from next year. He has also published three books and dozens of articles and book chapters on international trade law issues and international law in general.

BI Ying is an Assistant Professor ("Qiu Shi" Distinguished Young Scholar) of law at Zhejiang University in Hangzhou, China, and is currently a visiting scholar at Waseda University in Japan fully sponsored by China Scholarship Council (CSC). She holds an LL.B. and LL.M. from Tsinghua University in Beijing, China, an LL.D. from Kyushu University in Fukuoka, Japan, and previously worked for the Japanese law firm Soga Uryu&Itoga in Tokyo. Her major research interest covers the topics on international trade law and competition law, regional trade agreements. She has published in these areas such as Dumping: Antidumping Law or Competition Law (Intellectual Property Publishing House 2011), and a series of papers in the well-known journals including Journal of East Asia and International Law, Journal of World Investment & Trade, Manchester Journal of International Economic Law. She may be contacted at: biying@zju.edu.cn

HSIEHPasha L. is an Assistant Professor of Law at the Singapore Management University School of Law. He holds Juris Doctor and LL.M. degrees from the University of Pennsylvania Law School, where he was a Senior Editor of the University of Pennsylvania Law Review. Prior to joining academia, he served as a Legal Affairs Officer at the Appellate Body Secretariat of the World Trade Organization and as an associate at Shearman & Sterling LLP. Hsieh's teaching and research focus on public international law, international economic law and East Asian legal studies. He is particularly interested in the roles of ASEAN and China in international law and cross- Taiwan Strait relations, and has published articles in the Michigan Journal of International Law, the Journal of World Trade and the Journal of International Economic Law. His works have been cited by the Federal Supreme Court of Switzerland as well as in leading texts on international law. In 2010, Hsieh was awarded Singapore's Lee Foundation Fellowship for Research Excellence. He also co-convened the International Law Association. (ILA) Asia-Pacific Regional Conference and the ILA-American Society of International Law Asia-Pacific Research Forum.

LEE Ki-Pyeong is a visiting researcher at Korea Legislation Research Institute, currently working in the FTA legislation project. He received his Master degree and Ph.D in Law from Tsinghua University School of Law in China. Before joining Korea Legislation Research Institute (KLRI) in 2012, he taught at Korea's Hallym University and Business School of Shandong Normal University in China. His main research areas include international economic law, climate change, and Chinese law, with a particular interest in international investment laws. Some of his academic achievements are Preparation for Negotiations on Competition sector in Korea-China FTA: Analysis of Merger Review by MOFCOM of PRC(2013), A Study on Negotiation Plan of Competition Chapter in Korea-China FTA(2013), and The Current State of the Establishment of Chinese Carbon Emissions Trading Scheme and its Implications(2012).

YOO Joon-Koo is a Visiting Professor of the Korea National Diplomat Academy, Ministry of Foreign Affairs. He concurrently serves a professor of the law school of Sungkyunkwan Univ. and an adjunct professor of Seoul National Univ. He is also a director of International Economic Law Association of Korea and a member of advisory committee of Ministry of Government Legislation. He currently specializes in international law focusing on economic cooperation and governance issues. Professor Yoo has been teaching International Economic Cooperation and International Organization in Seoul National Univ. GSIS and Yonsei Univ. He served as Deputy Director of the Presidential Committee for the G20 Seoul Summit. Before teaching, Dr.Yoo was a Law Consultant specializing in International Trade and Defence Acquisition with Aitken, Berlin &Brooman in Washington D.C.. He received a B.A. and M.A. from Sungkyunkwan University, LL.M. of international law from American University Law School, and Ph.D from Sungkyunkwan University, School of Law.

CHO Young-Jeen is an assistant professor of international trade law at EwhaWomans University, Graduate School of International Studies. Her interests include international trade law, trade negotiations, and trade and development. She went to Seoul National University, receiving a BA in law. She holds LL.M and S.J.D. degrees from Harvard Law School. She worked for the Ministry of Foreign Affairs and Trade for three years before she joined Ewha in 2008.

CHOI Ji-Yeon is a research fellow at Korea Legislation Research Institute. Jiyeon is also a licensed US attorney, admitted to the Bar of the State of Illinois since 2007. After obtaining her license, Jiyeon worked for a firm in Chicago, assisted corporate clients' contracts and employment issues for about a year, until she changed gears towards meeting the calling of serving those in need. For about four years until she returned to Korea in 2012, Jiyeon worked for a nonprofit organization advocating victims of domestic violence, representing asylees, and helping small business owners. Ji-Yeon obtained her Juris Doctor's Degree from DePaul University College of Law in Chicago, USA. During the course of study she also pursued and completed the Public Interest Law Certificate program, which aligned perfectly with her dedication towards legal services for public interests. Prior to her study in the legal field, she majored in Chinese Language and Literature and obtained her undergrad degree at Korea University. Currently, Jiyeon's research interests are placed on Employment Law, Social Services, Corporate Social Responsibility issues, and International ADR.

LEE Ji-Soo is currently a lecturer at Department of Global Commerce, Soongsil University. She holds Doctor of Juridical Science and LL.M. degree from the School of Law, University of Wisconsin and Master's and Bachelor's degree from the School of Law, Ewha Woman's University. She has experience with various organizations including the Ministry of Foreign Affairs and Trade (MOFAT) as a trade advisor/legal counsel and the Institute of Foreign Affairs and National Security (IFANS) as a visiting professor. JS Lee's career and research has been specialized in international economic law, international dispute resolutions and legal issues with international political implication. She is currently interested in international law issues on internet governance and trends of economic integration and global trade regime.

HAN Xue-Hua is a PhD candidate at EwhaWomans University, Korea. She is a state scholarship student sponsored by China Scholarship Council. She can be contacted at: iamsnowhan@gmail.com

LEE Seu-Yeun is a PhD candidate in Law at Yonsei University, Republic of Korea and is associate researcher at the SSK Center for Climate Change and International Law. Her main fields of research are international investment law and WTO law. Nowadays, she is particularly interested in treaty interpretation in those areas of law. Seuyeun Lee can be contacted at felarof@yonsei.ac.kr.

NAKAGAWA Junji is Professor of International Economic Law at the Institute of Social Science (ISS), University of Tokyo. Born in Hiroshima in 1955, he earned his B.A., M.A., and Ph.D. in law from the University of Tokyo. Before joining the ISS in 1995, he was an Associate Professor of Law at Tokyo Institute of Technology. He has also taught at University of Denver, El Colegio de México, University of Georgia, City University of Hong Kong, Tufts University, Shantou University (China), and Free University of Berlin. He is a Member of the Executive Council of the Society of International Economic Law, and is a Chairman of the Steering Committee of the Asian International Economic Law Network. His publications include *WTO: Beyond Trade Liberalization* (Iwanami Shoten, 2013, in Japanese), *Transparency in International Trade and Investment Dispute Settlement* (Routledge, 2013) and *International Harmonization of Economic Regulation* (Oxford University Press, 2011).

CHOI Seung-Hwan is a professor of international law and international economic law at

Kyung Hee University Law School, Seoul, Korea. He is the Director in charge of Kyung Hee International Security and Trade Law Research Center. He had worked as a visiting professor at China University of Political Science and Law (CUPL) and School of Law, City University of Hong Kong in 2011. He had also worked as a legal counselor of Korean Delegation for the WTO Committee on Agriculture (2000～2003), and a legal counselor of Korean Deleg ation for the Working Group on Liability and Redress in the Context of the Cartagena Protocol on Biosafety to the Convention on Biological Diversity (2006～2010). On 1 October 2014, he was appointed as a member (2015.1~2018.12) of Compliance Committee, at COP-MOP 7 of the Cartagena Protocol on Biosafety. He has served as the president of Korean Branch, International Law Association (ILA) since March 2012, and served as the president of Korean Society of International Law (2013) and Korean Society of International Economic Law(2007~2008). He is a member of editorial board of many journals including the *Korean Yearbook of International Law* (forthcoming). Prof. CHOI published many books and articles on WTO, FTA, GMO, export control among others: "The Applicability of International Human rights Law to the Regulation of International Trade of Genetically Modified Organisms: A New Haven Perspective," 22 *Asia Pacific Law Review* 67 (2014).

WANG Heng is professor at the Southwest University of Political Science and Law, China, and visiting professorial fellow at University of New South Wales, Sydney. His journal articles and book chapters appeared in highly-recognized journals and books published in America, Britain, Canada, China, Germany, the Netherlands, and Switzerland, including *Journal of World Trade* (2010, 2012), and *Cornell International Law Journal*. His research has been quoted by scholars from leading universities or institutions, such as Oxford University, and the Max Planck Institute for Intellectual Property, Competition and Tax Law. He has spoken at the WTO Headquarters, Harvard University, University of Virginia, University of Pennsylvania, LSE (2006, 2011), and other universities.He has conducted research at the WTO Secretariat, and taught at the University of New South Wales, Case Western Reserve University, the University of Ottawa, and Yokohama National University as visiting professor. He serves as a book manuscript reviewer for Cambridge University Press, and was a Max Weber Fellow at the European University Institute. Heng is a member of the Executive Council of Society of International Economic Law, a founding steering committee member of Asian International Economic Law Network, and a member of Asian WTO Research Network.

DESIERTO Diane A. is Assistant Professor of Law at University of Hawai'i Richardson School of Law. Her teaching and publication interests are in international economic law (international investment, trade, finance, law and development), international human rights law, international humanitarian law, ASEAN Law, and international dispute settlement. She holds a J.S.D. (Doctor of the Science of Law) degree and L.L.M. (Master of Laws) degree from Yale Law School, where she was Howard M. Holtzmann Fellow in International Arbitration and Dispute Resolution, Lillian Goldman Perpetual Scholar, YLS Public Interest Fellow, Editor at the Yale Journal of International Law, awardee of the *Ambrose Gherini Prize in International Law*, and Law Clerk (2010-2011) to H.E. Judge Bruno Simma and H.E. Judge Bernardo Sepulveda-Amor at the International Court of Justice, the Hague, Netherlands. She was Shearman and Sterling Scholar and Runner-Up Laureate of the Academie du droit de l'arbitrage in Paris, France (2011); Grotius Fellow (2012) at the

University of Michigan Law School, and Postgraduate Visiting Fellow at the Max Planck Institute for Comparative Public Law and International Law in Heidelberg, Germany (2008 and 2013). In addition, she holds an LLB (renamed J.D.) *cum laude* class salutatorian degree and a B.Sc. Economics *summa cum laude* class valedictorian degree from the University of the Philippines, where she was Chairman of the Philippine Law Journal, Prime Minister of the Law Moot Union and President of the University Debate Society, Phi Kappa Phi International Honor Society Distinguished Scholar, Pi Gamma Mu International Social Science Honor Society Most Outstanding Scholar, holder of the *Justice Irene P. Cortes Prize for Constitutional Law as well as the Gerardo P. Sicat Award (1st) for Best Economics Thesis*, Champion of the Jean Pictet International Humanitarian Law Competition, the All-Asian Intervarsity Debate Championships, and ASEAN Debate Championships.Dr. Desierto concurrently serves various international academic appointments: Director of Studies for Public International Law of the Hague Academy of International Law, the Netherlands; Member of the Scientific Advisory Board of the European Journal of International Law; Member of the Editorial Board of the Asian Yearbook of International Law; Content Editor of the International Journal of Dispute Prevention and Resolution; Correspondent for the Journal of East Asia and International Law; and Member of the Rechtskulturen Postdoctoral Fellowships Committee in Berlin, Germany. She is the author of several books: *Necessity and National Emergency Clauses: Sovereignty in Modern Treaty Interpretation*(Martinus Nijhoff Publishers, 2012), *Public Policy in International Economic Law*(Oxford University Press, forthcoming 2014), *ASEAN Integration and Philippine Treaties* (Cambridge University Press, forthcoming), I*nternational Commercial Arbitration* (University of the Philippines Press, forthcoming), and *Code of Professional Responsibility* (USAID, American Bar Association, and Philippine Judicial Academy, 2007), and has published around fifty journal articles and book chapters to date in the United States, Europe, and Asia, with Cambridge University Press, Edward Elgar Publishers, Yale Journal of International Law, Columbia Journal of Transnational Law, NYU Journal of International Law and Politics, Berkeley Journal of International Law, Manchester Journal of International Economic Law, Transnational Dispute Management, George Washington ILR, Kluwer Arbitration, the Max Planck Encyclopedia of Public International Law, Trade Law & Development, among others.Prior to joining UH Richardson School of Law, Dr. Desierto previously taught international law at Peking (Beijing) University School of Transnational Law, Shenzhen, China; the University of the Philippines College of Law; the Lyceum of the Philippines College of Law; and the Foreign Service Institute of the Philippine Department of Foreign Affairs. She also advises on ASEAN law and Philippine appellate litigation as a Partner (on leave) at DAPD Law, Metro Manila, Philippines.

KIM Jong-Bum has received BA from Columbia University, M. Phil. from the University of Oxford, and Ph. D. from the University of California, Riverside. In addition he was awarded his J.D. from the Duke University School of Law. Prof. Kim has published extensively in the field of international economic law in journals including Journal of International Economic Law, Journal of World Trade, and World Trade Review. Besides his scholarly background, Prof. Kim has also served as Director of FTA Goods Negotiation Division in the Ministry of Foreign Affairs and Trade and represented the Korean Government as Lead Negotiator in the KORUS FTA.

FUKUNAGA Yuka is Professor of International Economic Law, School of Social Sciences, Waseda University (Tokyo). She has published a number of articles in books and journals including the Journal of International Economic Law and the Journal of International Dispute Settlement. She has also presented papers at major conferences including meetings of the Society of International Economic Law and an annual meeting of the American Society of International Law. Attorney-at-law in New York; former Assistant Legal Counsel, Permanent Court of Arbitration (PCA) (The Hague); former Intern, World Trade Organization (WTO) Appellate Body Secretariat (Geneva); former Visiting Professor, Far Eastern Federal University (Vladivostok); former Visiting Fellow, Graduate Institute of International and Development Studies (Geneva); former Visiting Professorial Fellow, Georgetown Law Center (Washington, D.C.). She has received LL.D. and LL.M. from the Graduate Schools for Law and Politics, University of Tokyo, and LL.M. from the School of Law, University of California, Berkeley (sponsored by Fulbright). She has recently published a book, titled "Securing Compliance with International Economic Agreements and Dispute Settlement: The Role and Limits of the WTO Dispute Settlement and Investment Arbitration" (Japanese).

PARK Deok-Young received his B.A and Master's degree in law from Yonsei University, and obtained LL.M. degree from University of Cambridge. He finished Ph.D coursework in University of Edinburgh and obtained Ph.D. in law from Yonsei University.He is professor of International Economic Law at Yonsei Law School. He served as President of the Korean Society of International Economic Law in 2012 and Vice-President of the Korean Society of International Law in 2011. Currently he is a member of FTA Consulting Committee for the Korean Ministry of Industry, Trade and Energy, and a member of Advisory Committee of Legislation for Korean National Assembly. He is Editor-in-Chief of *Korean Arbitration Studies* (in English).At Yonsei University, he was Vice-President of Institute for Legal Studies, and Editor-in-Chief of *Yonsei Law Journal* (in English). Currently he is Head of EU Law Center, Networking Team Manager of Yonsei-SERI EU Centre, and Head of Center for Climate Change and International Law, for which he receives some amount of research fund from Korean Research Foundation, at least from 2010 to 2016, or to 2020.He is co-author of*International Environmental Law* (2014), *International Economic Law* (2012),*International Investment Law* (2012), *Lectures on European Union Law* (2010), *International Law* (2010), *International Copyright Protection and Trade Issues* (2009), co-translator of *Current Issues in International Economic Law* (2014), *Environmental Issues and International Law* (2013), *Climate Change and Trade Law Issues* (2012), *Case Studies on European Union Law* (2012), *American Law and Legal English* (2009), and editor of *Basic Documents in International Law* (2011), *Basic Documents in International Economic Law* (2010). He is a contributor to *Climate Change and International Trade Law* (Springer, to be published in 2015), *Legal Issues of Renewable Energy in the Asia Region: Recent Developments in a Post-Fukushima and Post-Kyoto Protocol Era*(Kluwer, 2014),*The Legal Protection of Foreign Investment* (Hart, 2012) and *Max Planck Encyclopedia of International Law* (OUP, 2012), *Trade Law and Regulation in Korea* (Edward Elgar, 2011). He is much interested in WTO and World Trade Law, International Investment Law, European Union Law, International Intellectual Property Law, and International Legal Issues on Climate Change. lawpd@yonsei.ac.kr / 82-2-2123-6029 (office), 82-2-2123-5988 (research center)

WANG Sang-Han is a professor of international trade law at the Sogang University School

of Law since 1996. He graduated from the Seoul National University College of Law in 1986 and he obtained his LL.M in 1994 and J.S.D. in 1996 from the Columbia University School of Law, U.S.A. Prof. Wang has worked for the Ministry of Foreign Affairs and Trade, the Ministry of Justice as an advisor. He has represented Korean government as an official delegate to the WTO, UNCITRAL, APEC, and OECD since 1997. He was a commissioner at the Korean International Trade Commission from 2007 to 2013. Prof. Wang is a member of New York bar and he is a Special Representative at the United Nations International Children's' Emergency Fund.

YOO Hee-Jin is an Assistant Professor at the Department of International Trade and Marketing, Anyang University, located in the city of Anyang, Gyeonggi Province, Korea. She holds Ph.D. and Master of Laws degrees in International Law from Korea University Law School.Her major research interest covers the topics of international economic law, international environmental law, international investment law and public international law. She is particularly interested in the interpretation of the WTO Agreements and the role of Article 31(3) of the Vienna Convention on the Law of Treaties, which was the topic of her Ph.D. thesis.

OH Sun-Young is an assistant professor of Global Commerce at Soongsil University. She received S.J.D. degree from American University, and LL.M.s from American University and New York University. She was a research Professor at Yonsei University for one year and half before she joined Soongsil in 2012. She also serves as a director of public relations at Korean Society of International Economic Law. Her interests include international trade law and international environmental law.

LEE Cheon-Kee is a PhD. Canadiate in law and works as a researcher at World Economic Law Center of Korea University Legal Research Institute. His major research areas includes WTO law, climate change, and renewable energy.

SOHN Ji-Young is a PhD candidate in International Economic Law, and works as a researcher at the WTO Law Center of Legal Research Institute, EwhaWomans University. She is working on ″Potential Legal Conflicts and Dispute Settlements in Nagoya Protocol″, sponsored by the National Institute of Biological Resources. B.A. in Political Science, European Studies, and Economics (minor); M.A. in International Economic Law. M.A. Thesis: A study on the Modification of the FTA Preferential Rules of Origin − focused on the Importer′s Customs Debt -

KANG Sung-Jin is a PhD Candidate at Korea University, Graduate School of Law. He received an LLM at the University of Michigan, and he is also a Member of the New York Bar. Before coming back to academia, Sungjin worked as an in-house counsel for LG Display, Co., Ltd., and LG Electronics, Co. Ltd., in Seoul, between 2012 and 2013. Prior to that, He spent four years in Belgium, working for international law firms, practicing the European Union (EU) antitrust, EU trade and WTO laws between 2008 and 2012. He was also a judge advocate officer at the Korean Ministry of National Defense, primarily in charge of international humanitarian law and international agreement negotiations. He is also a frequent speaker at various seminars from time to time.

HYEON Dae-Ho is a senior research fellow at Korea Legislation Research Institute. Hyeon

has been teaching at a number of universities including Kacheon University in Korea. He is a former expert adviser of the Prime Minister's Office and of the Presidential Council on Intellectual Property, and currently works as a non-standing member of the Consumer Dispute Settlement Commission at Korea Consumer Agency, a member of the Industrial Technology Dispute Resolution Committee of the Ministry of Trade, Industry and Energy (MOTIE), and a civilian member of the Regulatory Reform of MOTIE. After receiving his Master's degree and PhD in law from Cheongnam University, he joined Korea Legislation Research in 2000. He has received Presidential and OPC (Office of Government Policy Coordination) Ministerial commendations as well as commendations from other ministries for his excellent research in the civil law, special civil law, IP related laws and IT related laws. He has been in charge of the KLRI's FTA legislation team in 2014 and been actively involved in the research exchange project with Australian research institutes and in organizing this international conference.

LEE Se-Ryon is Associate Professor at Chonbuk National University School of Law in Korea. Professor Lee received her B.A in Political Science from the University of Chicago, an LL.M. in International Legal Studies from New York University School of Law and a Ph.D. in Law from Yonsei University in Korea. Professor Lee's main research interests are the Law of Treaties, International Dispute Settlement and International Institutional Law. Her recent publications include *Korea's Foreign Trade Policy and Institutional Framework of FTA* (2013), *Legal Feminism and the UN's Gender Mainstreaming Policy--still searching for the blind spot*(2013), *Efficiency of Law Enforcement Measures to Prosecute the Act of Piracy under International Law* (2012), *The Feasibility of Reforming the UN Security Council: Too much talk, too little action* (2011), and *The UN's Smart Sanction and Its Human Right's Implication* (2011).

LEE Sang-Mo is a visiting researcher at Korea Legislation Research Institute. He holds PH. D degree of China University of Political Science and Law. Prior to work at KLRI , He worked to teaching Korean Law and International law in CUPL as a foreign expert. His teaching and research focus on international economic law, energy law and China law studies. He is particularly interested in the FTA between China and Korea.

CHUNG Chan-Mo is a Professor at Inha University School of Law, Korea. Professor Chung teaches International Economic Law and Information Technology Law. Prior to joining Inha in 2007, he was a senior Research Fellow at Korea Information Society Development Institute (KISDI). In KISDI, he acted as a director of the Center for Law and Information Society and of the Center for IT Trade Policy. Dr. Chung is a graduate of Oxford University (D.Phil., 1995), Korea University (LL.M, 1989) and Seoul National University (BA, 1987). He was an Emile Noël Fellow of the Jean Monnet Center at NYU Law School (2005); Exchange Professor to Le Havre University (2012); and Fulbright Scholar at Yale Information Society Project (2012). His publication includes "Interpretation of 'Interconnection' by the WTO Mexico-Telecommunications Panel: A Critique", Journal of World Trade (2007); "FTA, Asian Regionalism and Korea: A Futuristic View", Korean Journal of International Economic Law (2009); and "The Kılıç Case and the Avoidability of Local-Remedy-First Requirements via MFN Clause in Investment Arbitration" Korean Journal of International Economic Law (2014). Professor Chung is 2015 President of the Korean Society of International Economic Law.

IRWIN Andrew is an Inquiry Research Manager at the Australian Productivity Commission (an independent microeconomic policy review agency). Since beginning at the Productivity Commission in 2003, Mr Irwin has worked on a range published inquiry and study reports such as: Mutual Recognition agreements, Australia's Health Workforce, Regulatory Burdens on the primary and manufacturing sectors, Parallel Imports of Books, Electricity Network Regulatory Frameworks, and has recently completed work on the Commission's Access to Justice inquiry examining reforms to the delivery of civil justice in Australia. Mr Irwin also contributed work on health care productivity to the Commission's 2013 research paper 'An Ageing Australia: Preparing for the Future'.Mr Irwin was part of the Commission's team working on the Bilateral Regional Trade Agreements study, focussing on the policy framework for, and analysis of, trade agreements. He has presented the Commission's report at a variety of forums, including a recent roundtable on Investor-State Dispute Settlement held at the Crawford School at the Australian National University. Before joining the Productivity Commission, Mr Irwin worked as a consultant at KPMG and at Econtech. He has a Bachelor of Economics (with honours) and a Bachelor of Law from the Australian National University.

LEE Jee-Hyung received a BA in law from EwhaWomans University, a J.D. from Georgetown University Law Center, and finished the coursework for a Ph.D. at EwhaWomans University. She is a practicing attorney in international contracts and a member of the Washington D.C. Bar Association. She has been published in the Korean Journal of International Economic Law and is researching legal issues of sustainable development as part of a government grant program.

KIM Hana is a research professor in the Institute for Legal Studies (ILS) at Yonsei University, South Korea. She received a B.Eng. degree in Civil Engineering and a M.S. degree in Urban Planning from Seoul National University, South Korea and a PhD in Energy and Environmental Policy from University of Delaware, United States. Her research interests are equity issues related to energy and climate change policies and sustainable deployment of renewable energy. Her dissertation has explored equity implications of carbon pricing mechanisms in South Korea. Currently, she is working on several research projects related to cap-and-trade program and fuel poverty issues.

CHUNG Ki-Chang is a foreign attorney at Yoon & Yang LLC. His major practice area is WTO/FTA dispute settlement. He received JD degree from Michigan State University College of Law where he served as Editor-in-Chief of Michigan State Journal of International Law. He also spent a year at Harvard Law School as visiting researcher. Prior to joining Yoon & Yang, Kichang had worked for the Ministry of Foreign Affairs and Trade (now Ministry of Foreign Affairs) and then spent a year in the Ministry of Trade, Industry and Energy. For years, he represented the Korean Government as a legal counsel before the Dispute Settlement Body of the WTO. He has handled WTO litigations where Korea was a party and a third party. These include Korea-Beef (DS391), Japan-DRAMs (DS312), EC-Airbus (DS316), US-Boeing (DS353), etc. He also represented the Korean Government as lead negotiator at the DSU review negotiations of which mandate is to clarify and improve the Dispute Settlement Understanding, the procedural law of the WTO litigation. Currently, he is advising and representing the Korean Government in the WTO dispute with the United States (DS464) where targeted dumping is one of the major issues.

KIM Min-Jung is a research fellow of Asian Center at Seoul National University. She received Ph.D. in International Studies (International Trade) from Seoul National University and Master of Public Policy (M.P.P) from KDI School of Public Policy and Management, both in Seoul, Korea. Her research interests are international trading system and trade policies including WTO law, FTAs and Asian economic integrations. Her dissertation explored technical barriers to trade and legal analysis of the TBT Agreement. Currently, she gives lectures on various WTO issues and Korea's trade policy and participates in researches for non-tariff measure issues such as standards, safeguards and China's subsidy programs.

CHOI Won-Mog teaches international law. He was the President of the Korea Society of International Economic Law and is the editor-in-chief of the *Korean Journal of International and Comparative Law.* Professor Choi is a member of editorial board of many journals including the *Journal of International Economic Law.* After receiving his legal education in Korea (SNU, LL.B/M.P.A.) and the US(Georgetown, LL.M./S.J.D.), Won-Mog has been providing law and policy advice to most of trade negotiations in which Korea has been participating so far. He was a visiting professor or professorial fellow to National University of Singapore, Hong Kong University, University of New South Wales at Sydney, and Southwest University of Political Science and Law of China. Prior to joining faculty of Ewha, he worked for the Foreign Ministry of Korea as a diplomatic officer in charge of numerous trade issues.He published more than 80 books or articles and is also widely recognized as a renowned columnist in Korea. His researches on like products in WTO Agreement and FTA issues are recognized as authoritative to be collected in the Max Planck Encyclopedia of Public International Law.

PARK Eon-Kyung is a visiting professor at college of law, Kyung Hee University, Seoul, Korea. He has received Ph.D. in international law from Kyung Hee University. He is currently teaching International Law, International Economic Law, International Society and Law, Global Leader for Academic Excellence Seminar, International Dispute Resolution, International Trade Law and so on, at Kyung Hee university, Sookmyung university etc. His research interests are International Public Law, International Economy Law, Export Control, Security Exception of GATT/WTO, Use of Force and Sef-defence. He is also a General Affairs Director of the Korean Society of International EconomicLaw(KSIEL, 2014), a Director of the Korean Society of International Law(KSIL, 2013~currently), a Director of ILA Korean Branch(2012~currently), a Research Director of the Korea Association of Security and Trade(KAST, 2014), and a Research Fellow of the Foundation for Development of International Law in ASIA(DILA, 2012~currently).

PARK Joo-Suk is a visiting professor at college of law, Korea National Open University, Seoul, Korea. He has received Ph.D. in Administrative law from University Of Seoul. He is currently teaching Administrative law at Korea National Open University, Kangwon National University School of Law etc. His research interests are Administrative law, Police Act, Police Information Act. He is also a General Secretary of the Korean Society ofInternational Economic Law(KSIEL, 2014) Joosuk Park can be contacted at ju310@hanmail.net.

Welcome Addresses

Room: Champagne A Hall

Opening Remarks

KIM Dae-Won, President of Korean Society of International Economic Law

Welcoming Remarks

LEE Won, President of the Korea Legislation Research Institute

Congratulatory Remarks

CHOI Kyung-Lim, Deputy Minister for Trade, Ministry of Trade, Industry & Energy

Opening Remarks of 2014 KSIEL International Conference

By KIM Dae-Won (President of KSIEL)

LEE Won President of Korea Legislation Research Institute, distinguished participants, and ladies and gentlemen,

It is my great honor to welcome you all and make an opening speech for this valuable event on global trading system. Today's seminar indeed includesa number of advanced topics in the context of the interactions between WTO and FTA: In fact, it has been designed to be practical with experts' presentations to provide penetrating insight on the present global trading system and at the same time to encourage participation of especially Korean junior researchers.

As you may be well aware, the on-going global trade liberalization has been accelerating further by regional trade agreements such as FTA or Customs Union. Thus, the research on the regional trade agreements is of national importance of Korea, which depends on the trade more than 70% of its GDP.

As is generally known, modern regionalism has been stemmed from the Rome treaty in 1958, the founding treaty of current European Union. Since that, regional economic integrations have played a crucial role in enforcing international trading mechanism, setting aside the enigma of whether such regional impacts would be a stepping stone or stumbling block to the multilateral trading system, now the WTO.

In the case of Korea, beginning with Korea-Chile FTA in 2004, we have, as of today, concluded altogether 13 FTAs covering 49 countries. The Korean government is advancing FTA-driven trade policy as main agenda.

Ladies and Gentlemen,

What doesthis global 'FTA frenzy'mean to us? For consideration, please allow me to raise three implications from this phenomenon. First, we need to recognize such regional integrations in the pursuit of our human civilization: that is, ifFTA is regarded as a useful tool for improving each nation's welfare, the final goal of managing the FTA

must be the enhancement of individual's happiness. This implication partly reminds us of the importance of supporting policy of domestic industries damaged by the introduction of FTA. Secondly, the economically positive effects by way of FTA have to be closely reviewed. Several recent reports tell us that overlapping conclusion of FTA may not achieve the expected economic effects which would have been realized by a single FTA. Thirdly, domestic institutional reforms, presumed by the introduction of FTA, must be carefully estimated, because ultimate results of the FTA could be materialized mostly by enhancing institutional competitiveness.

I would like to take this opportunity to express my sincere thanks to the staffs who have helped to preparethis event. And, this interesting program could not have been made possible without the generous funding of Korea Legislation Research Institute.

Finally, this is an opportune time for me to declare the official opening of the 2014 KSIEL International Conference of "Trade and Global Governance".

I should like to conclude with an earnest wish for the great success of this conferenceas well as your pleasant stay in Seoul.

Thank you very much.

2014 국제경제법학회 국제학술대회 개회사

존경하는 이원 한국법제연구원장님, 그리고 행사 참가자들을 포함한 내외 귀빈 여러분,'FTA와 WTO의 연계적 관점에서 본 국제통상체제'를 주제로 하는 오늘 행사에 학회장으로서 개회사를 할 수 있게 되어 큰 영광입니다. 이번 학술대회는 국내외의 관련 분야 전문가들을 모시고 최근 쟁점에 대한 귀중한 말씀을 듣고 또한 신진학자들의 참여의 장을 넓히기 위하여 여러 달 동안 준비하여 마련된 행사입니다.

잘 아시다시피 목하 국제통상의 자유화는 관세동맹이나 FTA와 같은 지역주의적 수단을 통해 그 속도가 배가되고 있습니다. 따라서, 국민총생산의 70% 이상을 무역에 의존하고 2004년 이래 49개국에 걸친 13건의 FTA를 체결하고 있는 우리나라로서는 이러한 지역무역협정에 대한 심도있는 연구가 국가적으로도중요한 과제라 사료됩니다. 이런 맥락에서도 오늘 행사는 시의적절한 학술대회로 평가될 것입니다.

이러한 FTA를 통한 세계화가 오늘을 살아가는 우리에게 어떤 의미가 있는 것일까요? 개인적으로 다음 3가지 점을 짚을 필요가 있다고 생각합니다.

먼저 세계화에 대한 철학적 성찰 입니다. FTA가 결국 교역자유화를 통한 국민의 행복 증진을 최종적 목표로 하는 이상 FTA로 만들어져 가는 세계화도 결국은 구체적 개인의 존엄과 행복을 고취시키는 방향으로 나아가야 한다는 것입니다. 이러한 철학적 화두는 FTA 체제 구축에 필연적으로 수반되는 국내 피해산업과 그 종사자들에 대한 지원 정책으로 구체화하고 그를 위한 정책적 노력으로 풀어나가야 할 것 입니다.

둘째로 FTA 체결에 따른 경제적 효과를 면밀히 살필 필요가 있다고 생각됩니다. FTA의 경제적 효과가 분명 월등하지만 단일의 FTA 체결로 예상되는 경제적 효과가 중첩적으로 진행되는 경우 예상되는 그 경제적 효과가 완전히 실현되지 못한다는 연구결과도 눈여겨봐야 할 것입니다.

마지막으로 FTA의 제도적 효과가 중요할 것입니다. FTA를 통한 경제활동의

자유화는 그것에 수반되는 정치사회적 제도의 경쟁력에 직간접적인 영향을 주기 때문에 국제적, 국내적인 관련 제도적 영향을 면밀히 살펴볼 필요가 있을 것입니다.

아무쪼록 소중한 인연으로 이루어지는 오늘 행사가 참가자 모두에게 의미있는 시간이 되기를 기원하면서 다시 한 번 오늘 행사를 위해 물심양면의 지원을 아끼지 않으신 한국법제연구원에 깊은 감사의 말씀을 드립니다. 또한 본 행사를 적극 후원해 주신 중소기업중앙회와 주식회사 진양홀딩스, 그리고 산업통상자원부에도 감사의 말씀을 드립니다. 마지막으로 본 행사의 준비를 위해 불철주야 수고하신 총무이사와 사무국장을 포함한 모든 분들께도 심심한 감사의 말씀을 올립니다.

2014년 11월 6일

한국국제경제법학회 회장 김대원

November 6, 2014

Welcome Address

Distinguished guests,

Ladies and Gentlemen,

I would like to express a very warm welcome to all of you attending the joint international conference hosted by Korean Society of International Economic Law(KSIEL) and Korea Legislation Research Institute(KLRI) despite your busy schedule.

Korea Legislation Research Institute is the only government-funded institute in legislative research in Korea, providing effective legislative solutions to current policymaking issues, collecting and providing information on legislation of other countries around the world to provide information to the government and the business sector.

Under the theme of 'Trade and Global Governance: A Panoramic View of Free Trade Agreements and WTO', today, we will raise a theoretical issue of "Does a free trade agreement contribute to economic growth?" and discuss on the key areas of a free trade agreement including goods, service, investment, intellectual property, and environment. This conference will also be a chance to look into Trans-Pacific Partnership, Regional Comprehensive Economic Partnership and the recently emerging issue of Mega FTAs. Furthermore, we will have discussions on some sensitive and difficult questions that the world has faced such as how to deal with the conflict in values between the authority of a state to implement public policy and the essential purpose of free trade agreement to increase economic interest through the extension of free trade, and how to address the conflict between the confidentiality during the negotiation process and the right to know of the public.

Today's international trade regime, which is represented by the WTO agreement and a free trade agreement, must evolve and advance continuously, keeping up with the changes in the internal and external environments. I hope

this conference contributes to be a part of the evolutionary process.

Today we have many renowned experts in presence not only from Korea but from China, Japan, Singapore, US, and Australia who, I believe, will make an excellent, in-depth discussion with their expertise.

And I hope to see continuous exchange and cooperation in the range of research activities that KLRI has conducted including today's theme trade and governance, as well as your interest and support in KLRI's research works.

Finally, thank you all again for attending today to make this conference even more interesting and productive.

KLRI President

Lee, Won

2014 한국법제연구원-한국국제경제법학회 공동주최
국제학술대회 환영사

존경하는 내외 귀빈 여러분 반갑습니다.
한국법제연구원 원장 이원입니다.

한국국제경제법학회와 한국법제연구원이 공동 주최하는 이번 국제학술회의에 바쁘신 중에도 소중한 시간을 내어 참석해 주신 국내외 전문가 여러분들을 진심으로 환영하고 감사드립니다.

우리 연구원은 한국 유일의 법제전문 국책연구기관으로서 정부 정책현안에 대해 실효성 있는 입법대안을 제시하고 있으며, 세계 각국의 법제에 관한 정보를 수집·분석하여 정부기관이나 연구기관・기업 등에게 제공하고 있습니다.

이번 학술회의에서는 「FTA와 WTO의 연계적 관점에서의 국제통상체제(Trade and Global Governance: A Panoramic View of Free Trade Agreements and WTO)」라는 대주제 하에 '무역협정이 경제성장에 기여하는가'라는 무역협정에 관한 원론적인 문제제기에서부터 상품, 서비스, 투자, 지적재산권, 환경 등 무역협정에 통상적으로 포함되는 분야별 쟁점, 그리고 TPP(Trans-Pacific Partnership), RCEP(Regional Comprehensive Economic Partnership) 등 최근에 새롭게 주목받고 있는 이슈에 이르기까지 매우 다양하고 폭넓은 주제들을 다루도록 하고 있습니다. 그밖에도 국가의 공공정책 추진 권한 확보와 자유무역의 확대를 통한 경제적 이익의 증대라는 무역협정의 기본목적 사이의 이익(가치) 충돌을 어떻게 조화시킬 것인가, 무역협정 협상과정상의 비밀주의와 대중의 알권리 보장 사이의 길항 문제를 어떻게 조화시킬 것인가 하는 주제가 포함되어 있습니다만, 이들 주제는 민감하고 해결하기 어려운 과제이자 세계 각국이 직면하고 있는 공통의 과제이기도 한 것으로 보입니다.

WTO 협정과 자유무역협정으로 대표되는 오늘날의 국제무역체제 또한 변화하는 내외부 환경에 맞춰 끊임없이 진화발전되어 나가야할 것입니다. 오늘의 학술회의도 그러한 진화발전의 한 과정으로서 기억되기를 기원합니다.

이번 학술회의에는 한국 뿐만 아니라 중국, 일본, 싱가포르, 미국, 호주 등에서 오신, 다양한 전공배경을 가진 저명한 전문가들이 많이 참석하시는 것으로 알고 있습니다. 참석하신 모든 분들의 적극적인 의견 개진과 활발한 소통이 이루어지기를 희망합니다. 그리고 향후에도 우리 연구원의 연구사업에 많은 관심과 지지를 보내주시고, 또한 오늘 회의의 주제인 무역통상분야를 포함하여 우리 연구원이 수행하고 있는 다양한 연구분야에서 지속적인 교류와 협력이 이루어지기를 기대합니다.

끝으로 오늘 학술회의가 유쾌하고 유익한 교류의 장이 되기를 바라며, 참석하신 모든 분들께 다시 한번 감사드립니다.

2014. 11. 6.

한국법제연구원 원장

이 원

Session 1 Fundamentals of FTA

Room: Champagne A Hall

CHAIR : PARK No-Hyoung (Korea University)

Presenters

1. KIM Soo-Yeon (National University of Singapore): Negotiating the Nexus: Production Networks, Multinational Firms, and Regulatory Coherence in RTAs
2. ELMS Deborah (Asian Trade Center, Singapore): Trans-Pacific Partnership Negotiations: Where are We now?
3. HUR Jung (Sogang University): Do Free Trade Agreements Increase Economic Growth of the Member Countries?

Discussants

KANG Jun-Ha (Hongik University)

KWON Hyouk-Woo (Ministry of Trade, Industry & Energy)

SUH Jeong-Meen (Soongsil University)

Negotiating the Nexus:

Production Networks, Multinational Firms,

and Regulatory Coherence in RTAs

Soo Yeon Kim**

Department of Political Science
National University of Singapore
sooyeon.kim@nus.edu.sg

**The author is grateful to Baey Xiang Ling, Hanson Mah, Terence Tan, Melvin Tay, and Annabelle Wong for research assistance in coding the trade agreements for this paper.

Abstract

Deep integration is a defining feature of the 21st century regional trade agreement. This paper investigates the role of production networks in shaping behind-the-border commitments in trade agreements. Building on existing studies of production networks and regional trade agreements, this paper examines the role of multinational firms as the political actors that drive governments to conclude deep integration commitments that are geared toward regulatory coherence among partner countries. The analysis provides a case study of RTA commitments in technical barriers to trade (TBTs), a regulatory area of particular importance to the operation of production networks and trade long the international supply chain. TBTs concern standards, regulations, and assessments of the production process, integral to the manufacturing operations of multinational firms. The empirical analysis compares trade in parts and components, a standard measure of production network trade, with the role of multinational firms as they influence the strength of commitments regarding TBTs. The analysis also takes account of parallel institutional provisions regarding investment to reflect the interdependence across provisions in the design of trade agreements. This study finds that the number of multinational firms in agreement partner countries has a positive impact on the strength of TBT commitments: multinational firms amongst RTA members and foreign affiliates hosted by individual countries more broadly are both associated with higher 'scores' in TBT commitments.

Negotiating the Nexus:

Production Networks, Multinational Firms, and Regulatory Coherence in RTAs

One of the most important developments in global trade that shifts the terms of debate regarding the compatibility of regional trade agreements (RTAs) with the multilateral trade regime is the increasing complexity of the international supply chain. When Viner (1950) first broached the question of trade-diversion and trade-creation due to RTAs, much of international trade consisted of finished goods. Today, however, trade in intermediate goods has flourished, to the extent that the WTO/OECD have launched the "Made in the World" initiative in order to measure and to analyze trade in value-added.[1] How has global production sharing transformed the governance of trade? In particular, what is the impact of production network trade and multinational firms in the design of regional trade agreements? A production network is a group of interconnected firms that are dispersed across different countries, in which each firm contributes to a different stage of the manufacturing process depending on the relative cost advantage of their location. Production networks have become an integral part of global trade. They consist of firms linked along the international supply chain, and they reflect the internationalization of the production process and the cross-border linkages between firms and subsidiaries.

The internationalization of the supply chain first began among developed nations, in what Richard Baldwin has called the "second unbundling" (Baldwin 2011,3). US-Canada or French-German trade in autos and auto parts in the 1970s are early examples of this phenomenon.

[1] http://www.wto.org/english/res_e/statis_e/miwi_e/miwi_e.htm.

However, the big push in the second bundling occurred between developed and developing countries, pushed by systemic advancements in international communications and technology (ICT) and huge wage discrepancies (Feenstra 1998, Ando and Kimura 2005). This "new" trade that promoted the internationalization of the supply chain involved production unbundling known as outward processing trade, or vertical specialization trade (Manger 2009, Hummels, Ishii and Yi 2001), in which intermediate inputs are imported and used in goods that are subsequently exported. By some estimates, this vertical specialization trade was more important for Europe and North America until the 1980s, after which North-South vertical specialization trade boomed and especially in Asia, which has earned the label "Factory Asia" to denote the extensive production unbundling that has occurred in the region (Ando and Kimura 2005, Athukorala 2005).

Production networks form a "trade, investment, and services" nexus (Baldwin 2011). They involve trade intermediate goods, the production of which is driven by investment and supported by services that ease communications and operations of firms that are geographically separated. The prominence of production networks in global trade and the international institutions required to accommodate their activities reflect an evolutionary stage in the global trading system in which private-public distinctions in international trade law are increasingly contentious. Governance of the international supply chain calls for achieving greater regulation of domestic laws and their compatibility across countries, as they are directly related to the cost of doing business abroad and indispensable for facilitating cross-border production activities.

This study examines RTA commitments in technical barriers to trade, a modality of trade governance that is particularly relevant to the operation of production networks. TBTs concern standards, regulations, and assessments of the production process, integral to the manufacturing operations of multinational firms. Building on existing studies of production networks and regional trade agreements, this paper examines the role of multinational firms as the political actors that drive governments to conclude deep integration commitments that are geared toward regulatory coherence among partner countries. The empirical analysis compares trade in parts and components, a standard measure of production network trade, with the role of multinational firms as they influence the strength of commitments regarding TBTs. The analysis also takes account of parallel institutional provisions regarding investment to reflect the interdependence across provisions in the design of trade agreements. This study finds that the number of multinational firms in agreement partner countries has a positive impact on the strength of TBT commitments: multinational firms amongst RTA members and foreign affiliates hosted by individual countries more broadly are both associated with higher 'scores' in TBT commitments.

Motivations

This study is motivated by three major developments in global trade and the scholarship on trade governance of recent years. First, the rise of production networks shifted the locus of trade governance. Today's trade agreements are far more concerned with "deep integration" (Lawrence 1996), the disciplines that underpin the "trade-investment-services" nexus. They increasingly emphasize "behind-the-border" regulations that support the internationalization of supply chains. This has taken place against a backdrop of a global trading system in which tariffs have fallen to historic lows and intermediate goods comprise an increasingly large share of

international trade. Yeats (2001) found, for example, in an extensive study of the structure of international trade that intermediate input trade accounted for approximately 30% of world trade in manufactured goods in 1995. Others have also found that the share of intermediate goods in global trade has increased significantly in recent years.[2]

Second, global trade is suffering from a serious governance gap as a result of the failure of multilateral trade negotiations under the Doha Round to conclude. The legislative function of the WTO has grown weak, displaced in its turn by the explosion of regional trade agreements that now form the part and parcel of existing trade rules. According to the WTO's 2011 World Trade Report, which focused on regional trade agreements, there were over 300 RTAs in effect in 2010, including those notified and not notified to the WTO. Especially without progress in concluding the Doha Round, RTAs are likely to continue unabated as permanent fixtures of the global economy and an important venue for negotiating trade liberalization.

Finally and most immediately relevant to this paper, this study is also motivated by the trend in "mapping" of regional trade agreements, featuring projects that have sought to move away from the RTA-dichotomy (a country is a RTA-member or not) to assessing their qualities and the strength of liberalization commitments encoded in them. They reflect a shift in analytical focus, from examining the determinants of institutional formation—whether and why countries cooperate through international institutions—to institutional design, or how countries cooperate through the terms of the agreement.

[2] See also Feenstra and Hanson (1996b), Feenstra (1998), Hummels, Ishii and Yi (2001), and Borga and Zeile (2004).

The extant mappings of RTAs range from comprehensive to issue-specific. They include Horn, Mavroidis, and Sapir (2010), which offers a classification of US and EU RTAs based on whether provisions are legally enforceable and identifies provisions as "WTO-plus," going beyond existing commitments under WTO agreements, or "WTO-X," address trade-related issue areas that are not (yet) within the purview of the multilateral trade regime. This classification was further applied to additional RTAs for presentation in the most recent World Trade Report on RTAs (WTO 2011). Comprehensive mappings of RTAs also include Baccini, Dür, Elsig, and Milewicz (2011) that catalogues hundreds of extant RTAs, while Hicks and Kim (2012) classify Asian RTAs according to their respective levels of credible commitment. More specialized mappings of RTAs focus on particular issue areas such as dispute settlement (McCall Smith 2000; Pevehouse and Buhr 2005), flexibility and trade remedies more broadly (Teh, Prusa, and Budetta 2009), TBTs (Piermartini and Brudetta 2009), services (Roy 2011), competition (Teh 2009), investment (Kotschwar 2009, Büthe and Milner 2011), and government procurement (Kono and Rickard 2011).

These developments strongly indicate the need to examine how changes in the structure of international trade affect how states cooperate through RTAs. Production networks demand deep integration commitments from members to facilitate operations for multinational firms. At the same time, the RTA-mappings provide the necessary data to unpack commitments encoded in RTAs, distinguishing strong from weak agreements. Finally, analysis of commitments in behind-the-border rules also provides important insights into how successful RTAs are mending the gap in global trade governance by advancing the development of key modalities.

Production Networks and Trade Agreements

In the absence of a new multilateral trade agreement, regional trade agreements have served as the prevailing institutional form for managing trade. To address the institutional needs of production networks and the multinational firms, trade agreements are increasingly including strong commitments in behind-the-border trade rules. The success of production networks relies not only on low tariffs but also on the infrastructure, institutional apparatus, and regulations that facilitate cross-border production. Offshoring by international firms that geographically split up input suppliers and final goods producers are strongly affected by domestic regulations that drive up (or down) the cost of doing business. Local rules matter. This is where RTAs can and do play an important role, especially in delivering commitments on domestic trade-related rules that lower the cost of doing business for international firms. As such, where trade in intermediate goods is prevalent, trade agreements need to extend beyond traditional market access conditions such as tariffs to cover the conditions of competition that exist in member countries.

Moreover, the nature of offshoring generates a politics of its own, as a result of cross-border spillover effects (WTO 2011, 117, fn 54) that are inherent to contracts that are incomplete and relation-specific between geographically separated input suppliers and final goods producers. It raises commitment problems not only in the form of liberalization-- unilateral, bilateral or multilateral agreements (Yarbrough and Yarbrough 1992), but also the provisions of international agreements. According to Antràs and Staiger (2008), the prevalence of offshoring by multinational firms "complicates" the politics of trade agreements, as the means by which governments can shift the terms of trade extend to "wider set of policies" than traditional market access (19). Thus trade agreements must address domestic trade-related rules that could affect

the conditions of bargaining between foreign suppliers and domestic buyers of specialized components. Provisions must secure input trade policies that will facilitate trade in components as well as ensure international competitiveness of locally produced final goods.

RTA Provisions on Technical Barriers to Trade (TBTs)

Technical barriers to trade (TBTs) is one category of behind-the-border commitments covered in RTAs that is strongly relevant to trade within a production network. TBTs refer to national regulations concerning product standards, technical regulations, and conformity reassessment procedures for goods, whether produced domestically or imported from abroad. Standards and technical regulations delineate the technical characteristics of a product, such as the level of safety of an electronic device. The main difference between the two is that standards are voluntary measures, often relying on standards set by recognized international bodies, while technical regulations are mandatory measures instituted by governments. Examples of TBTs include US regulations that specify a larger minimum size for red tomatoes as compared to green tomatoes, or Chile's meat quality grading system, which is incompatible with systems in, for example, Argentina and the US, which effectively limits the latter countries' access to the Chilean market (Piermartini and Budetta 2009, 251). Conformity assessment procedures specify the process by which products are evaluated against specific standards and/or technical regulations. They provide formal proof that a product's compliance with the standards and technical regulations of the country in which it is being offered on the market. Countries may differ in the certification processes they conduct or recognize for their products, thus requiring exporting firms to undergo a separate certification process for each country in which they sell

their goods. For the multinational firm whose production activities are dispersed across several countries, such conformity assessment adds both cost and time to the production timeline.

Trade liberalization through TBT commitments in RTAs can promote efficiency of production, redress information asymmetries between the producer and consumer, and expand trade between agreement partners. Commitments toward harmonization and/or mutual recognition of standards, technical regulations, and conformity of assessment measures promote regulatory compatibility across the different countries in which multinational firms carry out their production activities. Something as simple as a metrology provision that recognizes a common unit of measurement greatly facilitates trade and production because goods produced under, for example, the metric system do not have to be re-processed for export to a county that employs the imperial system. Mutual recognition or harmonization of conformity assessment measures can also shorten the production timeline, if firms need only undergo a single conformity assessment that is accepted in all the countries in which it carries out production activities. Regulatory compatibility can also redress the informational asymmetry between foreign producers and domestic consumers.[3] Consumers would be better able to gauge the quality and safety features of an imported good, for example, if the labeling conformed to domestic regulations concerning the information to be printed on a product. Finally, though there are trade-offs to harmonization such as less variety in traded goods, a small body of existing scholarship shows that shared standards may have trade-creation effects for trading partners (Swann, Temple, and Shurmur 1996)

[3] This point extends the information effects of standards in the domestic context to foreign goods.

This paper relies on a coding of RTA provisions developed by Piermartini and Budetta (2009), which examines RTA commitments in standards, technical regulations, and conformity assessment. Their approach essentially takes the WTO's TBT Agreement as the baseline by identifying references to the WTO agreement, affirmations of rights and obligations under the agreement, and making specific references to the provisions of the WTO agreement. The core of the coding scheme evaluates the integration approach in liberalizing TBT measures, specifically whether agreement members make any commitments toward mutual recognition (also called "equivalence") or harmonization in the above three areas. Appendix 2a provides the specific coding scheme applied to TBT provisions in RTAs. In evaluating the strength of TBT commitments, this approach also takes into account the supporting institutional mechanisms provided in the trade agreement. The agreement accounts for agreement-wide provisions concerning transparency that provide for notification and contact points, and a dispute settlement process that produces binding decisions and that do not have a 'carve out' for disputes concerning TBT measures. Last but not least, the coding scheme also accounts for provisions on technical cooperation in areas such as metrology and areas beyond trade, such as investment and infrastructure quality. The overall approach of this template places equal emphasis on TBT measures and on the supporting institutional features that ensure monitoring, enforcement, and cooperation extending beyond trade.

Multinational Firms and the Political Economy of RTAs

In examining how production networks shape institutional design outcomes for trade, this study focuses on the role of multinational firms as one important set of political actors in the political economy of RTAs. In acknowledging the importance of the global value chain in

international trade, a substantial body of scholarship has been devoted to measuring trade in value-added or in intermediate goods. What is less evident in the literature is how multinational firms, who are the key actors in global production-sharing, have affected the politics and political economy of trade-policy. As export-oriented interests that strongly resisted protectionism during the 1980s (Milner 1988), the multinational firms have been the driving force behind the construction of production networks and the increasing complexity of the global supply chain. In examining their association with regulatory commitments such as TBTs in RTAs, the expectation is that a strong presence of multinational firms in a particular country is likely to be associated with stronger commitments toward regulatory coherence.

Research Design

The analysis utilizes a sample of regional trade agreements (RTAs) from Asia, a region which has been particularly active in global production sharing.[4] Exports of manufactured parts and components from countries in the region grew by 15 per cent per annum for the years 1984-2006, and intra-Asian exports grew at an even higher rate of about 21 percent (Hoekman and Kostecki 2009, 13). The region exhibits diversity in the depth of integration commitments in RTAs as well as the political and economic factors that influence them. The sample includes trade agreements of roughly the last decade during which time trade along the international supply chain has burgeoned in the international economy. The unit of analysis is the RTA-dyad, formed by pairing the signatories of each agreement. The sample consists of undirected dyads, making no distinction in the direction of trade among the countries. Thus each RTA includes one observation per country pair.

[4] Appendix 1 lists the trade agreements included in the analysis.

Dependent Variable

The dependent variable captures the strength of commitments to liberalizing trade rules in technical barriers to trade (TBTs). In constructing a measure of the strength of TBT commitments, this study applies a template drawn from a large-scale mapping effort, as documented in Estevadeordal, Suominen, and Teh (2009) that sought to assess institutional variation in RTA commitments. This study applied the TBT template proposed in this volume to the RTAs signed by countries in Asia and constructed a measure of the strength of TBT commitments that is an average of the presence or absence of commitments along 23 components.

This paper employs a 24-point scale [0,23] of TBT commitments based on the mapping scheme developed by Piermartini and Budetta (2009). The mapping scheme relies as its initial reference point on the TBT Agreement of the WTO, which facilitates comparisons between existing multilateral rules on TBTs and also shows the extent to which TBT commitments have advanced beyond those in the WTO Agreement. The scale captures i) whether there is reference to the WTO's TBT Agreement and attendant rights and obligations, as a means to ascertain the intended relationship of the RTA to the WTO; ii) approach to integration, namely harmonization or mutual recognition of standards; iii) transparency requirements that reduce information costs for traders; iv) provisions for settlement of TBT-related disputes; and v) the extent of common policy-making in the field of standards envisioned in the RTA. Higher values on the variable reflect stronger TBTs on the part of RTA signatories.

Independent Variable of Interest: Production Network Trade and Multinational Firms,

Production network trade is measured as the log-transformed, average annual dollar value of bilateral trade in parts and components between the FTA-dyad members. Trade in parts and components refer specifically to goods that are 'parts and accessories of capital goods (except transport equipment)' (code 42*) and 'parts and accessories of transport equipment (code 53*) under the UN Registry of Broad Economic Categories (BEC).[5] Data were obtained from the UN Comtrade Database. It is perhaps the most commonly used measure for capturing global production sharing (Ng and Yeats 1999; Hoekman and Kostecki 2009), due to data availability, though other studies have sought to expand the range of intermediate goods covered under this label (Athukorala 2010) or have proposed measures such as trade in value-added (Elms and Low 2013). This study employs trade in these categories of intermediate goods for reasons of data availability, but also to capture the importance of the industries (such as auto parts manufacturing) that are especially important in the production networks of the region. These data were weighted by the GDP of each country in the dyad, averaged across the dyad to reflect the importance of production network trade to the domestic economy in both countries, and log-transformed. This dyadic measure was then averaged once again across the ten-year period preceding the signing of the FTA, utilizing the years for which data were available.

The analysis employs two measures to capture the presence of multinational firms in agreement partners. The first measure—*FTA-wide MNCs*--is the total number of multinational firms that the agreement partners have in common, whether as parent or host country. That is, the variable is the sum of all multinational firms in which an FTA member is a parent or host

[5] http://unstats.un.org/unsd/tradekb/Knowledgebase/Intermediate-Goods-in-Trade-Statistics.

country of the firm. This measure is intended to capture the linkages provided by multinational firms of FTA member countries. The second measure utilizes information on all foreign affiliates in a country. This measure—*Foreign Affiliates*—is the dyadic average of the total number of multinational firms present in each FTA member. This figure includes multinational firms from FTA members and non-members. This variable reflects the extent of a countries linkages with the international supply chain rather than the FTA-specific linkages provided by multinational firms. Data on multinational firms were obtained from the Investment Map database of the International Trade Centre, and the analysis utilizes information on foreign affiliates established before the signing of the FTA.[6] The analysis employs the log-transformed, 10-year dyadic average (or less depending on data availability) for the two variables.

The analysis also controls for several factors that may affect both production network trade and the depth of integration in FTAs. Perhaps the most important of the controls is foreign direct investment (FDI), which has been the engine of production networks, enabling multinational firms to establish and to operate manufacturing sites. FDI is measured as the dyadic average of annual FDI inflows as a proportion of GDP. Data were obtained from the World Development Indicators (WDI 2013). The analysis controls for trade openness and economic growth, both also averaged across the dyad. Trade openness for each member is measured as the sum of the country's exports and imports weighted by its GDP. The two trade openness figures where then averaged across the two dyad members. The analysis takes account of two key political variables that reflect the domestic politics of trade, namely regime type and veto players (Mansfield and Milner 2012, Mansfield, Milner, and Pevehouse 2007). Regime type

[6] http://www.investmentmap.org/searchCompany.aspx.

is operationalized as the average Polity score for the two dyad members, and veto players as the dyadic average of the *Political Constraint* index provided in Henisz (2000).[7] Values of all control variables were also averaged across the ten-period period before the FTA was signed for those years where data were available.

Last but not least, an additional independent variable—an index of commitments in investment in the same RTA—reflects the interdependence of institutional design components and the close links between trade and investment. Commitments in investment comprise one of the pillars of a regional trade agreement that promotes the formation of production of production networks and also facilitates their operations where they exist. For Asian countries, in particular, attracting investment has been one of the major motivations behind government decisions to sign a free trade agreement. In the case of the ASEAN Free Trade Area (AFTA) Agreement, for example, officials were been explicit about the need to attract investment to the region and to prevent the diversion of FDI, as a key argument for the AFTA project. Already in the early 1990s and well before the Asian Financial Crisis, FDI was on the decline (Nesadurai 2003, 82-87). AFTA negotiators, in their consultations with experts during the drafting the agreement, took into account the general conclusion of numerous studies that the major impact of trade agreement projects such as NAFTA and the European Single Market would be further decline in FDI flows to the region. The need to address this FDI "crisis" and to prevent further diversion of FDI, especially to China, spurred the cooperation that produced AFTA in 1992 (Khong and Nesadurai 2007, 51).

[7]The Polity data were obtained from http://www.systemicpeace.org/polity/polity4.htm, and the Political Constraint Index from http://www-management.wharton.upenn.edu/henisz/.

This paper utilizes information from a detailed coding of investment provisions in FTAs, which captures the dimensions of protection and liberalization (Kotschwar 2009) that are explicitly stated as agreement provisions. The coding of investment provisions covers 33 components across the following 10 broad categories:

1) Sectoral coverage to include portfolio investment as well as FDI, which reflects how broadly investment is defined;
2) Investor-state dispute settlement and the ability of private economic actors to protect their economic interests in host countries;
3) Positive or negative-list bindings in MFN and national treatment (NT);
4) Scope if MFN and NT as they concern the stages of investment: establishment, acquisition, post-establishment and (re)sale;
5) Investment protection, covering 'fair and equitable treatment,' repatriation of profits, and expropriation;
6) Restrictions on transfers and payments;
7) Performance requirements;
8) Restrictions on senior management and board of directors, in terms of membership and temporary entry provisions;
9) Denial of benefits for third-party investors; and
10) General transparency provisions regarding the publication of laws and regulations and the availability of a national inquiry point, which are applicable to all provisions in the trade agreements.

These categories encompass provisions emphasized in both Kotschwar (2009) and Miroudot (2011), in which the latter focus on the FTA-formation strategies of developing countries. They comprise a comprehensive set of provisions on investment that are found in FTAs in general. The analysis relies on an additive index that was constructed by summing up the level of protection and/or liberalization that is captured by each category. The Appendix provides the detailed 33-point coding scheme and the values assigned to each component.

Findings

Table 1 presents the results of the regression analysis. The three columns show the results of including different measures of production networks, as seen through trade in parts and components, multinational firms common to FTA members, and the number of foreign affiliates in FTA members.

The results show that trade in parts and components do not have an impact on the strength of TBT commitments in RTAs. As a widely used measure of production network trade, studies have found that trade in parts and components do influence the broader depth of integration provided in RTAs that takes account of all agreement provisions. For individual areas such as TBTs, however, such trade appears to have only a weak influence on the strength of commitments. In contrast, the strong presence of multinational firms in agreement partners, where multinational firms originate and are hosted in partner countries, appears to have a positive effect on TBT commitments. Similarly, the presence of foreign affiliates, irrespective of whether these firms' parent companies hail from other member countries or originate outside the RTA membership, also have a positive impact on the strength of TBT commitments. The results suggest that strong linkages at the firm level and the degree to which countries participate in the

Table 1. Production Network Trade and RTA Commitments

Dependent Variable:	Commitments in Technical Barriers to Trade (TBTs)		
Trade in Parts & Components	0.680		
	(0.403)		
FTA-wide MNCs		1.553	
		(0.532)**	
Foreign Affiliates			1.947
			(0.873)*
Investment Commitments	0.328	0.718	0.350
	(0.168)	(0.188)**	(0.167)*
Democracy	0.972	0.716	0.941
	(0.361)**	(0.362)*	(0.350)**
Veto Players	4.864	12.498	9.964
	(11.907)	(11.703)	(11.434)
Trade Openness	-0.017	-0.009	-0.013
	(0.032)	(0.030)	(0.031)
FDI Inflows	1.471	1.180	1.417
	(0.556)**	(0.543)*	(0.560)*
Constant	11.247	12.825	9.835
	(6.811)	(4.205)**	(5.815)
R2	0.29	0.39	0.30
N	165	149	168

Standard errors in parentheses. * p<0.05; ** p<0.01

international supply chain through the production activities of multinational firms are important factors that influence how countries approach integration in standards, technical regulations, and conformity assessments of traded goods. Moreover, multinational firms may be the most enthusiastic advocates of integration in TBTs, as these rules directly impact the cross-border linkages created by regional or global production sharing activities. The analysis also finds support for the argument that institutional provisions in RTAs are interdependent. In the case of TBTs, they are associated with strong commitments toward protection and liberalization of investment in the same agreement. The positive association between RTA commitments and investment and in TBTs is indicative of the trade-investment nexus that underpins the effective operations of a regional production network.

Among the control variables, the strength of TBT commitments appears to be driven by long-term FDI inflows into partner countries, which further corroborates the close link between trade and investment. General trade openness, however, has no significant impact on TBT commitments. Among the political variables, democracies are associated with stronger TBT commitments, while veto players appear not to have an impact.

Conclusion

Deep integration is a defining feature of the 21st century regional trade agreement. This paper examined the role of production networks in shaping behind-the-border commitments in RTAs, focusing on TBT provisions as a case study. In doing so, this paper built on existing studies on production networks and regional trade agreements to analyze the role of multinational firms as political actors that lobby governments to conclude deep integration

commitments that are geared toward regulatory coherence among partner countries. TBTs comprise a regulatory area of particular relevance to the operation of production networks and trade long the international supply chain. TBTs include standards, technical regulations, and conformity assessments for products that are integral to the manufacturing operations of multinational firms. The empirical analysis compared the impact of trade in parts and components, a widely employed measure of production network trade, with the presence of multinational firms in RTA partners on the strength of commitments regarding TBTs. The results of the analysis show that the presence of multinational firms have a positive effect on the strength of TBT commitments: countries linked by multinational firms are generally likely to sign RTAs with higher 'scores' in TBT commitments. The analysis also found that provisions geared toward stronger protection and liberalization of investments are associated with stronger commitments in TBTs, which not only supports strong linkages between trade and investment but also the interdependent nature of institutional design across issue areas.

Future work on this project will consider two main issues that have emerged from the analysis. First, multinational firms should be differentiated by the sector in which they conduct their activities. The 'line of business' that distinguishes multinational firms across different sectors should be utilized to test the hypothesis that firms from different sectors—manufacturing, services, primary products—may have different institutional preference in the design of RTAs. Second, this project may also consider further the interdependence of institutional components in RTAs by going beyond TBTs and investment to consider other regulatory areas such as competition and services.

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Appendix 1. Regional Trade Agreements Included in the Analysis

ASEAN - Australia - New Zealand
ASEAN - China
ASEAN - India
ASEAN - Japan
ASEAN - Korea, Republic of
Australia - Chile
Brunei Darussalam - Japan
Chile - China
Chile - India
Chile - Japan
China - Hong Kong, China
China - Macao, China
China - New Zealand
China - Singapore
China-Iceland
China-Switzerland
EFTA - Korea, Republic of
EFTA - Singapore
EU - Korea, Republic of
Economic Cooperation Organization (ECO)
Gulf Cooperation Council-Singapore FTA
India - Bhutan
India – Japan
India - Malaysia
India - Singapore
India – Nepal
Iran-Pakistan
Japan - Indonesia
Japan - Mexico
Japan - Philippines
Japan - Thailand
Japan – Malaysia
Japan-Peru Free Trade Agreement
Japan-Vietnam
Jordan - Singapore
Korea, Republic of - Chile
Korea, Republic of - India
Korea, Republic of – Singapore
MERCOSUR – India
Malaysia-Australia
Malaysia-Chile Free Trade Agreement
Mauritius-Pakistan
New Zealand - Malaysia
Pakistan - China
Pakistan – Malaysia
Panama - Singapore
People's Republic of China-Costa Rica
Peru - China
Peru - Korea, Republic of
Peru-Singapore
Singapore - Australia
Singapore-Costa Rica FTA
Thailand – Australia
Thailand - New Zealand
Thailand-Peru Free Trade Agreement
Trans-Pacific Strategic Economic Partnership
Turkey-Korea
US - Singapore

Appendix 2a. Mapping of TBT Provisions

I. Reference to WTO-TBT Agreement [0,3]			Values	
1. Definitions of standards and regulations in RTA same as those of WTO-TBT Agreement?			No=0	Yes=1
2. General reference to rights and obligations of WTO-TBT Agreement?			No=0	Yes=1
3. Does reference to WTO-TBT Agreement cover specific provisions?			No=0	Yes=1
II. Integration Approach [0,9]				
A. Standards [0,3] B. Technical Regulations [0,3] C. Conformity Assessment [0,3]				
(Mutual) Recognition (MR)	O	Harmonization		
Burden of explanation for non-equivalence on importing country?	R	Specified existing standards/rules to which countries will harmonize?	No=0	Yes=1
MR Agreement in force? (Not complete; excluded from analysis)		Use/creation of regional standards/rules promoted?	No=0	Yes=1
Time schedule for achievement of MR?		Use of international standards/rules promoted?	No=0	Yes=1
III. Transparency Requirements [0,3]				
Notification:	Time period allowed for comments specified?		No=0	Yes=1
	Time period allowed for comments longer than 60 days?		No=0	Yes=1
Are there contact points/consultations for the exchange of information?			No=0	Yes=1
IV. Institutional Organization [0,5]				
Administrative bodies: regional body established?			No=0	Yes=1
Dispute Settlement Mechanisms	Regional dispute settlement body?		No=0	Yes=1
	Regional consultations foreseen to solve disputes?		No=0	Yes=1
	Mechanism to issue recommendations?		No=0	Yes=1
	Recommendations mandatory?		No=0	Yes=1
	Recourse to dispute settlement disallowed?		Yes=0	No=1
V. Further Cooperation [0,3]				
Common policy/standardization program (beyond trade-related objectives?)			No=0	Yes=1
Technical assistance?			No=0	Yes=1
Metrology?			No=0	Yes=1
Total Range for TBT commitments [0,23]				

Appendix 2b. Classification of Investment Provisions in FTAs

1) Sectoral Coverage
   a) Definition: is investment defined as FDI or does it also include portfolio investment?
   b) Is there a separate Investment Chapter?
   c) Are investment provisions found in the Services Chapter as mode 3 (commercial presence)?
   d) Endeavours without specified scope: Is there a general commitment to cooperation/liberalization/promotion of investment (often in the preamble to the agreement) but without specific commitments such as *b* or *c* above?

2) Does the FTA provide for Investor-State Dispute Settlement?

3) MFN and National Treatment
   a) Positive-list bindings: FTA investment provisions list sectors to be liberalized; all others remain "unbound" (not subject to commitments)
   b) Negative-list bindings: FTA investment provisions stipulate MFN and national treatment as general principles applicable across the board, but with exemptions for those sectors that are to remain closed.

4) Scope of MFN and National Treatment: phases of investment covered by MFN and national treatment.
   a) "Establishment"
   b) "Acquisition"
   c) "Post-establishment"
   d) "(Re)sale" [of investment]"

5) Investment Protection: the terms should appear in the provisions.
   a) "fair and equitable treatment"
   b) Free transfer of funds
   c) Expropriation and compensation: expropriation on a nondiscriminatory basis and with adequate compensation

6) Transfers and Payments
   a) Does FTA place restrictions on transfer of funds in the event of balance-of-payments difficulties?
   b) Does RTA place restrictions on transfer of funds in other prescribed circumstances?

7) Performance Requirements: i) obligations to export a particular percentage of goods and services; ii) to use a particular level or percentage of local content; iii) to give preference to local goods or services; iv) to observe trade and foreign exchange balancing requirements; v) to transfer technology; or vi) to act as the exclusive supplier of goods and services
   a) Prohibition of local content, trade, or other specified requirements?

b) Prohibition of local content or trade requirements only? Prohibits any of i) – iv) only from above list; allows v) and vi) and other specified requirements

c) Provisions more limited than TRIMs (performance requirements not banned/prohibited)? No provisions on local content?

8) Senior Management/Board of Directors: Restrictions regarding the nationality of managers and members of the board; hiring of top managerial personnel regardless of nationality; stipulating nationality of majority of board of directors
   a) Provisions allowing for temporary entry of key personnel? (may be in another part of FTA)
   b) Cannot restrict either senior management/board of directors based on nationality?
   c) Can partially restrict board of directors?
   d) Can partially restrict management or both?

9) Denial of Benefits: Description: concerns rights of third-party (non-FTA partner country) investors. Issue is whether they enjoy the same rights as investors of a party to the FTA when they have a substantial presence in one member and invest in the other party's territory through this presence. Implies *de facto* transfer of investment rules to non-party actors.
   a) (Denial of benefits) Only to persons with no substantial business operations in other party?
   b) (Denial of benefits/)Tougher treatment for specific reasons?
      - Examples: denial of benefits in the absence of diplomatic relations between denying party and non-party or adoption/maintenance of measures with that non-party that prohibits transactions with the enterprise
   c) (Denial of benefits/) Tougher treatment for all reasons?

10) Transparency (in any part of the agreement): GATS obligation to publish all relevant laws and to set up inquiry points that companies/governments can use to obtain information about regulations in the sector. Prior comment: parties notify each other with regard to any proposed or actual matter than might be adopted that might affect other party
   a) 'Prior comment'?
   b) Publish (as in GATS)?
   c) National inquiry point (as in GATS)? (may also be 'contact point')

Regionalization in Search of Regionalism:
Multinational Firms Production Networks and Deep Integration Commitments in Asia's Preferential Trade Agreements

Soo eon im

Department of Political Science
National niversity of Singapore
sooyeon kim nus edu sg

orean Society of International Economic Law Conference
Trade and Global Governance:
A Panoramic iew of Free Trade Agreements and WTO
-7 November 201

Context

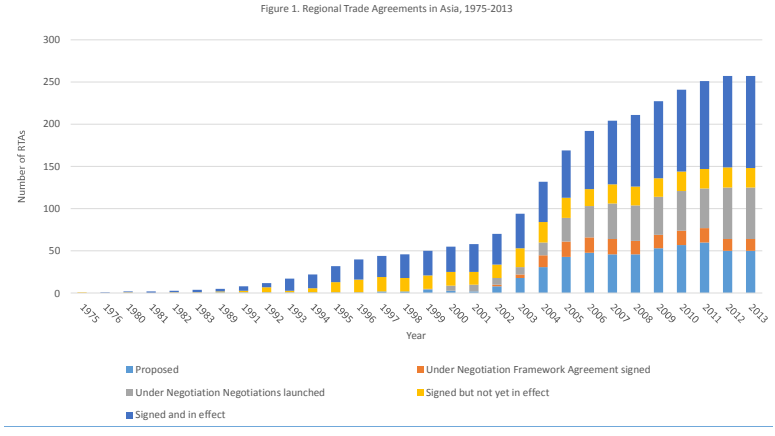
Book pro ect on preferential trade agreements in Asia

1. uestion: how do production networks shape states' commitments in PTAs?
2. Analytical focus: regulatory depth and coherence political influence of MNCs in host as well as home countries
3. Data collection: coding of trade agreement texts: TBTs competition policy provisions investment provisions MNC affiliates data (sales, employment, assets)
4. Today: core argument and presentation of findings for TBT commitments

The Global Pattern of Preferential Trade Agreements

Source: Horstmann, Markusen, and Rutherford (2004)

Preferential Trade Agreements in Asia



Asia is a Late-Comer to the PTA Scene

- Regionalism through PTAs on the rise in the 1990s but Asia was an anomaly (Mansfield and Milner 1999)
- 'ASEAN Way' (Acharya) and a 'market-oriented decentralized Asia-Pacific' (Funabashi 1995): governance provided by private sector-led organizations such as PECC PBEC and the Chinese Diaspora
- Shift in the early 2000s: Asia as an active site of PTA-formation (Fiorentino erde a and To ueboeuf 200)

Motivation: Why PTAs in Asia?

Existing explanations:

- Global diffusion of PTAs

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- Asian Financial Crisis and the consolidation of regionalism in its aftermath
- Negotiations for the ASEAN Free Trade Area began in 1992
- Link between Asian Financial Crisis and subse uent PTA patterns is likely a coincidence (Ravenhill 200)

PTAs in Asia:

From private-sector led regionalization to state-led regionalism

- Regionalization: increasing flows of trade and investment
- Regionalism: states seek active cooperation and coordination in trade-related economic policy (Milner and Mansfield 1999; Fishlow and Haggard 1992)

Argument: Regionalization in Search of Regionalism

Recent PTA activity is a response to the institutional demands of production networks and the current stage of regional economic integration

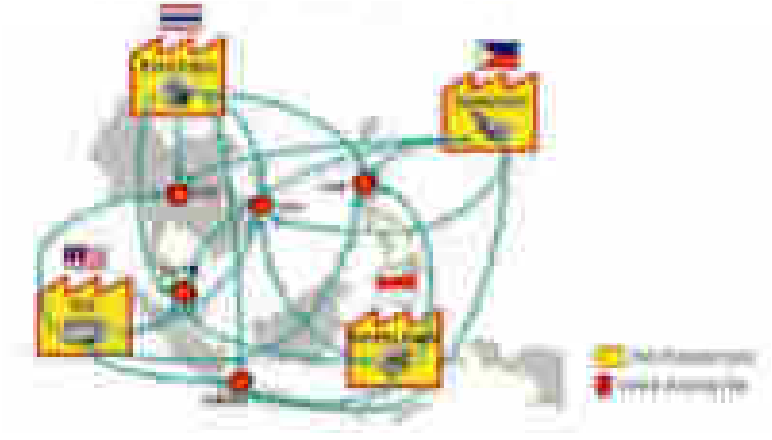
- Private-sector led economic integration has reached its limits
- The increasing intensity and complexity of the region's production networks calls for deep integration and coordination of domestic trade-related rules
- Deep integration re uires coordination by governments
  - Regulatory convergence to facilitate establishment and operations of production networks by multinational firms
  - Deep integration building on existing levels of market access: internal tariffs at zero for 98.6% of 98,176 tariff lines in ASEAN (ASEAN 2013)

Proctor & Gamble in ASEAN

ASEAN Hair Care Supply Chain (AIR 2013)

Toyota's Auto Parts Production and Supply Chains in ASEAN

ASEAN Investment Report (2013)



Local MNCs: Agribusiness Group Wilmar

Integrated ASEAN Business Model (AIR 2013)

- core activities include oil palm cultivation sugar merchandising and refining, specialty fats, oleo-chemicals, biodiesel and fertilizers manufacturing grains processing
- Plantations in Indonesia and Malaysia
- Production and distribution networks extend to Philippines Thailand and ietnam
- R & D in Singapore Malaysia ietnam and Indonesia

Analysis: How Does Global Production Sharing affect PTA Commitments?

Three inter-related themes:

- Regulatory Coherence through PTAs
- Multinational Firms as Political Actors in Host Countries
- Interdependence of PTA Provisions

Regulatory Coherence

Feature of the latest generation PTA

- Deep integration PTA (im 201)
  - Liberalization
  - Protection
  - Harmonization
- Mega-Regional PTAs:
  - Trans-Pacific Partnership (TPP): 'regulatory coherence' as ob ective
  - Transatlantic Trade and Investment Partnership (TTIP): ' harmonize the regulatory systems of the nited States and Europe so that companies can meet a single standard '
  - ASEAN Economic Community: 'regulatory convergence' to construct 'a single production base'

Multinational Firms and the Politics of PTAs

Beyond trade in parts and components

- NYTimes: "Lobbying Bonanza as Firms Try to Influence European nion

- Clients include: major pharmaceutical firms as well as Microsoft Chevron

Interdependence of PTA Provisions

Sectors and Administrative Provisions

- Correlation of commitments across relevant sectors: TBTs and investment
- Sectoral commitments supported by institutional provisions: transparency and dispute settlement

Regulatory Coherence through Technical Barriers to Trade (TBTs) Provisions in PTAs

- TBTs:
  1. Standards (voluntary)
  2. Technical Regulations (mandatory): Labeling– "flammable"; transfat-free
  3. Conformity Assessment
- Why regulatory coherence?
  - Effective firefighting: Baltimore fire of 1904
  - Information for the consumer
  - More trade

TBTs and Costs for Multinational Firms

- TBTs generate production costs for multinational firms:
  - Cost of compliance with technical regulations: safety standards
  - Cost of conformity assessment: same product, different certification process for each export destination
  - B T: these costs are lower than other trade-related costs (transport costs labor costs etc)
- Multinational firms can be expected to lobby for deep integration in TBT provisions mutual recognition or harmonization

TBTs and Other PTA Provisions

- Trade-investment link in global production sharing
- Support of administrative and institutional provisions for transparency and dispute settlement

Coding TBT Provisions in PTAs

Reference to WTO TBT Agreement

Definitions; "Rights and Obligations"

Integraton Approach

Mutual Recognition and or Harmonization

Transparency and Dispute Settlement

Notification; Contact Point; DS Process; Carve-out

Further Cooperation

Technical Assistance Common Policy Beyond Trade Metrology

Investment Provisions in PTAs

1. Sectoral coverage to include portfolio investment and FDI
2. Investor-state dispute settlement
3. Positive or negative-list bindings in MFN and NT
4. Scope of MFN and NT for stages of investment: establishment ac uisition post-establishment and (re)sale
5. Investment protection covering fair and e uitable treatment repatriation of profits, and expropriation
6. Restrictions on transfers and payments
7. Performance re uirements
8. Restrictions on senior management and board of directors in terms of membership and temporary entry provisions
9. Denial of benefits for third-party investors
10. General transparency provisions: publication of laws and regulations availability of a national in uiry point

Research Design

Sample

PTAs in Factory Asia unit of analysis is the PTA-dyad

Dependent ariable

Average score on 23 TBT provisions

Independent ariables

Parent companies and foreign affiliates linking PTA members; all foreign affiliates; investment commitments in PTA

Controls

FDI inflows; trade openness; regime type; veto players

Findings

Table 1. Production Network Trade and RTA Commitments

Dependent Variable:	Commitments in Technical Barriers to Trade (TBTs)		
Trade in Parts & Components	0.680		
	(0.403)		
FTA-wide MNCs		1.553	
		(0.532)**	
Foreign Affiliates			1.947
			(0.873)*
Investment Commitments	0.328	0.718	0.350
	(0.168)	(0.188)**	(0.167)*
Democracy	0.972	0.716	0.941
	(0.361)**	(0.362)*	(0.350)**
Veto Players	4.864	12.498	9.964
	(11.907)	(11.703)	(11.434)
Trade Openness	-0.017	-0.009	-0.013
	(0.032)	(0.030)	(0.031)
FDI Inflows	1.471	1.180	1.417
	(0.556)**	(0.543)*	(0.560)*
Constant	11.247	12.825	9.835
	(6.811)	(4.205)**	(5.815)
R2	0.29	0.39	0.30
N	165	149	168

Standard errors in parentheses. * p<0.05; ** p<0.01

Findings

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		.....	
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Outlook: MNCs and the Political Economy of Trade Policy

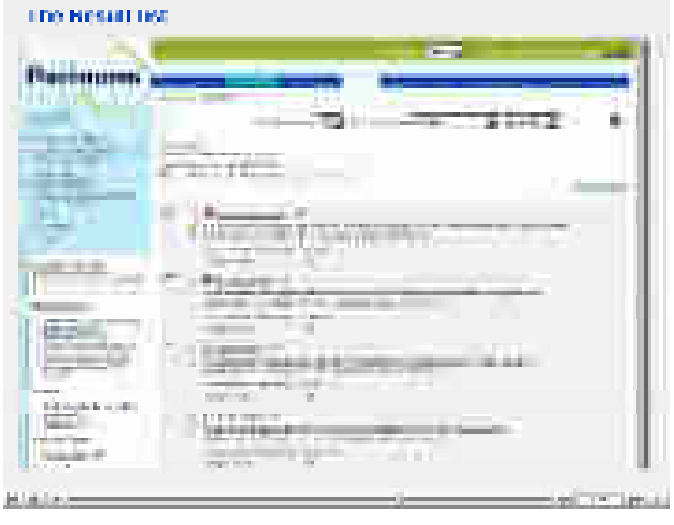
- Sectoral variation in institutional preferences
- How do multinational firms engage the politics of PTAs in host countries?
- How can I best measure the political importance of MNCs in host countries?
- Methodological issues: endogeneity (ODA historical apanese and S investment data)

Conclusions

- PTAs have emerged an important institutional mechanism for managing Asian regional integration)
- Deep integration commitments in PTAs are an integral part of the protection liberalization and harmonization domestic trade-related regulations to facilitate production networks by multinational firms
- Strong presence of MNCs in PTA partner countries associated with depth of commitments in TBTs and investments
- Work under preparation: uantitative text analysis of concordance across texts of PTAs

- Thank you
- sooyeon kim nus edu sg

Standards from the Perinorm Database



The TPP: Areas of Negotiation

The Trans-Pacific Partnership (TPP) Agreement: Areas of Negotiation

Market Access for Goods.
Trade Remedies
Legal Issues/Dispute Settlement.

Cross-Border Services
Financial Services
Telecommunications

Competition Policy
Government Procurement.
Intellectual Property.
Investment
Sanitary and Phytosanitary Standards (SPS)
Technical Barriers to Trade (TBT)
Temporary Entry
Rules of Origin.
Textiles and Apparel/ROOs

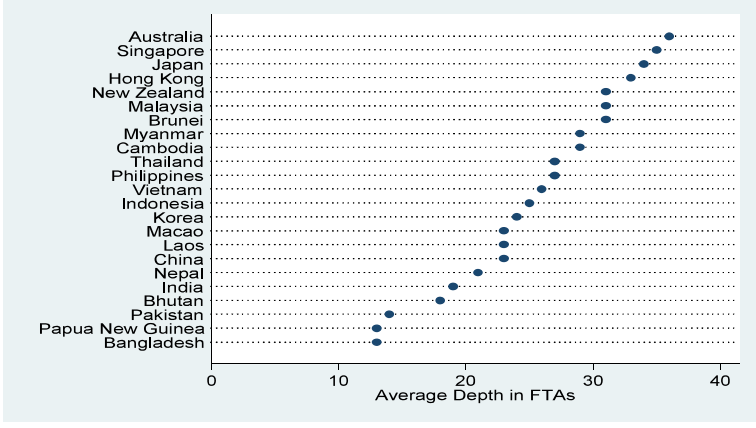
Cooperation and Capacity Building.
Customs
E-Commerce.
Environment
Labor

Depth of Integration in Asia's FTAs

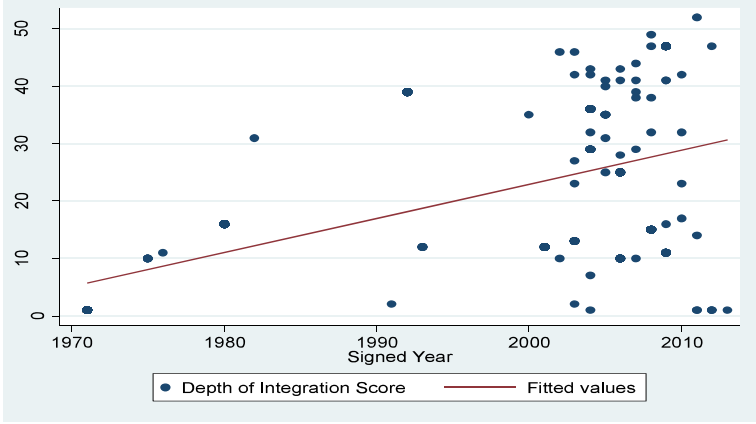
Patterns across Space and Time

- nited Nations Economic and Social Commission for the Asia-Pacific (UNESCAP) compilation of FTA provisions
- Depth of Integration score for FTA: simple sum of number of provisions included in FTA
  - provisions concerning market access for goods investment services trade facilitation rules of origin and an others category that includes issue areas such as competition intellectual property rights labor and environmental standards government procurements dispute settlement and technical cooperation
- Highest scores for WTO-notified recent (2000 and later)FTAs and Economic Integration Agreements (EIAs) that include services commitments
- Lowest scores for earlier agreements not notified to the WTO or notified under Enabling Clause

Depth of Integration Scores by Country



Depth of Integration Scores over Time 1971-2013



Production Networks and FTA Commitments

	Depth of Integration	Investment Commitments
Trade in Parts and Components	1.439	0.398
	(0.279)**	(0.133)**
FDI Inflows	-0.880	0.115
	(0.375)*	(0.186)
Trade Openness	0.107	0.011
	(0.022)**	(0.014)
Economic Asymmetry	2.524	1.020
	(1.026)*	(0.528)
Economic Growth	0.749	-0.108
	(0.485)	(0.233)
Democracy	0.537	0.364
	(0.337)	(0.172)*
Veto Players	-23.560	-4.888
	(9.770)*	(5.005)
Constant	22.513	6.843
	(5.053)**	(2.798)*
R-squared	0.31	0.15
N	208	191

* p<0.10, ** p<0.05. OLS with robust standard errors

Where Are We in the TPP Negotiations?

Deborah Elms
(elms@asiantradecentre.org)

Trade and Global Governance
Seoul, Korea
November 6-7, 2014

Asian Trade Centre

Trans-Pacific Partnership (TPP) Agreement

- Twelve countries, three continents, diverse levels of economic development
  - Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, United States, Vietnam
- "High quality, 21st century" agreement
- Accession clause
  - Canada and Mexico added in Dec 2012
  - Japan in July 2013
- Over two dozen full negotiating rounds held, starting in March 2010

What's Different About the TPP?

- Lots of existing trade deals but the TPP:
- Is broader
  - Covers markets for *all* goods (including agriculture), services, investment, government procurement, e-commerce with meaningful promises for opening
- Is deeper
  - Has new rules for areas like intellectual property, food and food safety (SPS), standards (TBT), environment, labor, competition, customs, etc.
- Shared norms
  - Every member has same commitments (just longer timeframes for some members to implement deal)

Status Update

- Now entering the "home stretch"
- Why? Work backwards from U.S. elections
  - Unfair, but US is biggest player in game
- No one ever won election on trade vote, but can lose elections over trade
- Text cannot be revealed until after Nov. 4
- However, ratification vote needed prior to May/ June 2015 (US Presidential campaigns heat up)
- Means TPP *must* be done now

November is Critical

- November has "decision forcing" events
  - Key dates are APEC Leader's Meeting on Nov 10-11 in Beijing (and EAS Nov 11-12 in Nayphidaw, but not all TPP to attend)
  - Only time currently scheduled for TPP heads of state to convene
  - Photo op for signing best with leaders and not trade ministers or chief negotiators—key govt initiative
- Timeline tricky for signature, but could be done
- TPP is officially one path to FTAAP in APEC

What if November Window is Missed?

- If hoping to catch lame duck Congress for ratification, whole deal must be finished by Nov 12
  - Including legal scrub, translations, etc.
  - Very unlikely—more promising: "substantial conclusion"
- If hoping for spring, still need to get moving
- But if deal not finished and not submitted in US fast enough, Congress unlikely to vote before Obama leaves office on Jan 19, 2017
- So, then what? Need reason for delay
  - Invite South Korea to be 13th member of TPP

Obstacles to Finishing Now

- Officials negotiating furiously still but…
- Nearly all remaining issues need political decisions
  - Cannot be done at negotiator level
  - Matter of which trade-offs each government is willing to accept in various areas—no one gets all they want
- Timing problem—some governments holding back on commitments pending better deal for themselves in rush to finish
  - But could literally run out of time
  - Highly risky strategy, as other parties may stick

Shaving of Quality at Last Minute?

- Hope was that deal would stay 100% high quality to bitter end—but politics always intrudes
- Final deal more likely to be 99 or 98%
- Problem, of course, is that every corner cut encourages others to pull items out of final basket
- Balance of interests between need to get agreement done and ratified with need to keep quality
- Nearly every problem could have been predicted at outset of negotiations

Sticking Points

- Mostly 20th century problems with organized interest group complaints:
  - Japanese "sacred" agricultural items, Canadian dai ry, American sugar
  - Little bit still on textiles (but mostly resolved)
  - Autos
- Scheduling—non-tariff measures and SOEs
- Intellectual property depth in last few areas
- Reach of dispute settlement
- E-Commerce, data and implementation

Trade Promotion Authority (TPA)

- Normally, before the US negotiates, it gets authority to negotiate from Congress (TPA, formerly known as fast track) since 1970s
- For TPP, USTR acted "as if" it had TPA
- Now, TPA not happening until deal is done
- Would have been nice to have—should prevent Congress from amending whole agreement
- But too late to get for TPP—delay is very risky
- Basically, TPP parties jumped off cliff already —no going back now—time for hope and pray er

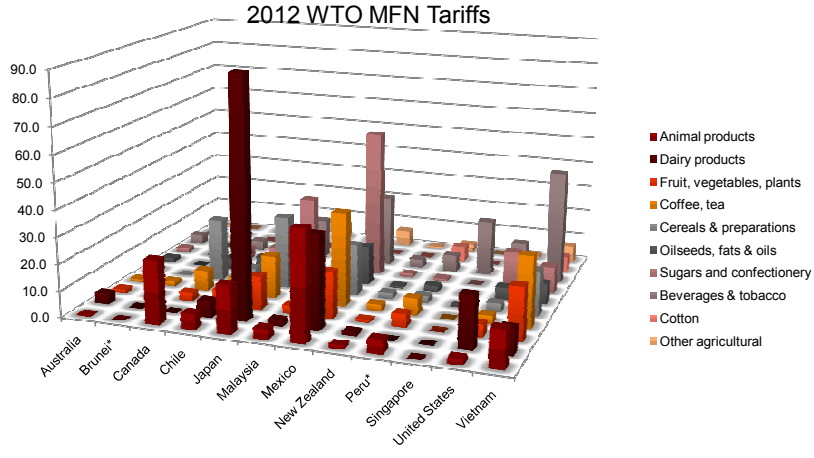
TPP Timelines???

- Assume agreement substantially done by APEC, finished within 2 months?
- Agreement ready for ratification early 2015
- Implementation: July 2016? Jan 2017?
- Next batch of new members to start negotiating
  January 1, 2018?
- TPP with up to 19 members begins 2019 for entry into force by 2020:
  - Addition of South Korea, China, Taiwan, Hong Kong, Columbia, Costa Rica, Philippines

When the TPP Goes "Live" in 2016 (or early 2017)…

- Tariffs will drop to 0 on 90% of all goods trade
  between the TPP members
- Remaining tariffs will also go to 0 over next 7–10 years (mostly)
  - Removal of tariff peaks
  - Removal of tariff escalation (especially key for raw materials exporters and agricultural goods to unlock
    higher value processing)
- Rules of origin not good, but probably manageable (for most firms)
- Trade facilitation improved for members

Zooming in on Agricultural Tariffs
(Minus Canadian and Malaysian Dairy Peaks)+…



Asian Trade Centre

+Canada at 228 and Malaysia at 125%

*Brunei and Peru 2011 data, drawn from WTO tariff database

Not Only Better Goods Trade

- Services trade opened up in meaningful sectors (not just football-chess camps)
- Investment opened and comes with much better protections for TPP partner firms
- Government procurement opened (at federal level above threshold) for competition
- New rules for e-commerce
- New intellectual property protections
- Robust dispute settlement procedures designed to be used by TPP members

New Issues

- Specific areas included to help supply chains
  - In addition to changes in goods, services and investment with one eye to supply chain improvements
  - For example, new logistics and express delivery service rules
- Regulatory coherence now and into the future
  - Attempt to coordinate standards, including for food and safety
- Some development and capacity building built into agreement

TPP Adds Up To Potential for Serious Trade and Investment Diversion

- Some non-TPP members will face significant trade diversion—especially those active in global supply chains with links in TPP countries
  - Biggest losers likely to be Taiwan and Thailand
  - Domestic market not attractive enough alone
  - Other TPP members can offer similar package—but with TPP benefits on top
- Firms are mobile and will move to where benefits are best
- But some benefits will spillover to non-partners

Do Free Trade Agreements Increase Economic Growth of the Member Countries?

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Abstract

This paper assesses whether a bilateral FTA raises the growth rates of the two countries engaging in the FTA. A nonparametric matching approach, which imposes no specific functional forms and can be applied to a broad range of data structures, is employed to estimate the FTA effect on the growth. We find that FTAs exert insignificant effects on aggregated growth from one to ten years period after launch, but detect a significant upward trend in the gap between the growth rates of per capita GDP within a bilateral FTA. This implies uneven FTA effects across countries within an FTA.

Keywords – convergence, divergence, free trade agreement, growth, matching, treatment effect

1. INTRODUCTION

The number of bilateral Free Trade Agreements (FTA hereafter) has risen rapidly since the early 1990s, as is shown in Figure 1.[1] There could be many reasons why countries enter into such agreements, but one of them must be increases in economic growth as the result of trade promotions from the FTAs since policy makers and economists regard FTAs as important policy tools for economic development. International trade theories, from Ricardo's comparative advantage model through the two-country endogenous growth models developed by Grossman and Helpman (1991) and Feenstra (1996), can be considered rationales for the formation of FTAs.

[INSERT FIGURE 1 HERE]

However, although most international trade theories compare economic agents' welfare prior to and after the free trade agreement via two-country models, the mutual effect of free trade on two countries engaged in a bilateral FTA has yet to be empirically investigated with sufficient rigor. Existing empirical studies have generally examined the correlation between an individual country's growth and the degree of openness of that country, whereas the effect of FTA can be examined by investigating whether both countries will be better/worse off once they have removed all their trade barriers and implemented a free trade system than they would be without the free trade system. In addition to the absence of studies on the FTA effect on two countries' growth performance, no consensus has yet been reached regarding the effects of free trade or openness on one country's economic growth among empirical studies. Whereas Dollar (1992), Sachs and Warner (1995), Edwards (1998), Frankel and Romer (1999), and Dollar and Kraay (2004) reported supportive evidence for a positive impact of free trade on economic growth by using a variety of

measures of openness, Harrison (1996), Rodriguez and Rodrik (2000), Rodrik *et al*. (2004), and Wacziarg and Welch (2008) found that free trade had a negative or insignificant effect on economic growth. Recent contributions to the literature on empirical growth provide some examples of non-linear specifications. The studies of Freund and Bolaky (2008) and Chang *et al*. (2009) show that the growth effect of trade openness is significantly positive only if certain complementary domestic reforms are undertaken, including deregulations of business, financial developments, better education or rule of law, labor market flexibility, etc. Otherwise, trade is not associated with long-run growth in such economies.

In this paper, we also attempt to characterize empirically the effects of free trade on economic growth; however, our approach differs from those applied in previous studies in two important ways. First, the existing empirical literature relates an individual country's growth to the degree of openness of that country, and trade openness is frequently constructed as an index reflective of the trade liberalization regimes or policies of *that individual* country. However, the concept of openness is rather difficult to define, and the indices are generally highly correlated with other economic variables of that country, which makes it difficult to interpret results on the basis of trade theories (see Rodriguez and Rodrik (2000)). In addition to these issues, countries with the same levels of openness may experience different effects of that openness in terms of their economic growth, depending on the level of openness of their respective principal trade partners. In our paper, we focus on bilateral FTA systems among a variety of relevant trade policies to reduce mutual trade barriers and stimulate trade volume (e.g. Baier and Bergstrand, 2007). Because a bilateral FTA is formed by a pair of countries, it can be considered an indicator of "mutual openness" for the countries specifically involved in the agreement. The bilateral effects of free trade can be identified more directly in the context of mutual openness rather than from the perspective of individual country's trade openness. In analyzing these effects, we utilize a binary dummy variable to indicate whether or not a

country couple has an FTA, and then consider the growth rates of both economies engaged in the FTA.[2] Although we do not deny the utility of the unilateral trade openness measures utilized in the existing literature and think that non-tariff barriers could still exist within an FTA couple, we believe that the exercise to examine the FTA effect on two countries' growth performance is worthwhile in the face of the rising trend of FTAs.[3]

Second, we consider engagement in an FTA as a "treatment" in the terminology of matching literature, and propose a nonparametric matching approach to evaluate the effects of FTAs on growth. The question addressed by the nonparametric matching approach is what would be the difference in the economic growth of a country couple when this couple has an FTA, as compared with the case in which this couple does not have an FTA. We believe that this question is more relevant in evaluating the effect of FTA than a simple comparison of the growth rates between countries with FTAs and countries without FTA, which is the question most often addressed by regression analyses. In fact, the majority of empirical studies, including the aforementioned ones, have adopted a parametric linear model using either cross-sectional or panel data. However, this linear regression approach not only has a conceptual problem in assessing the effects of free trade on the basis of trade models, but is also subject to econometric issues. We demonstrate herein that the linear regression approach is subject to misspecification problems due to potential nonlinear relations among variables, as well as the non-random selection problem. However, the nonparametric matching approach imposes no parametric restrictions, and has been demonstrated to perform well even in the face of the non-random selection problem. Although this approach is popular in the field of labor economics, economists in the trade literature have recently begun to use this econometric approach. Relevant examples include Chang and Lee (2007) and Baier and Bergstrand (2009). To the best of our knowledge, however, this approach has never been utilized in the literature on trade and growth.[4]

Our paper is organized as follows. In Section 2, we provide a brief description of the dataset used in this study. After demonstrating that an FTA exerts a significantly positive effect on economic growth under the usual linear regression, we present evidence suggesting that this linear regression model suffers from non-random selection and misspecification problems. Section 3 briefly discusses the econometric methodology used in this study—namely, the nonparametric matching approach. In Section 4, our main findings are presented via nonparametric matching analysis. While we find that FTAs exert no statistically significant effects on aggregated economic growth from one to 10 years period after launch, we report an upward trend in the gap between the growth rates in per capita GDP among countries participating in an FTA. This finding implies that some countries may enjoy a positive FTA effect on economic growth, while their counterparts in the FTA experience a negative FTA effect on economic growth. This finding may explain, in part, the observed insignificant or mixed effects of trade openness on economic growth of countries. Section 5 presents our concluding remarks.

2. DATA AND THE LINEAR REGRESSION APPROACH

We describe the dataset in this section and provide evidence of econometric problems occurring in linear regressions even if the trade openness index is replaced with the FTA dummy variable.

(a) DEPENDENT VARIABLE OR RESPONSE VARIABLE

In order to estimate the effects of FTAs on the growth performance of a country couple engaging in an FTA, we utilize the growth rate of the real gross domestic product (GDP) per

person of a country couple for the dependent variable in the regression analysis, or for the response variable in the matching analysis. The per capita GDP for a couple composed of Country A and Country B is constructed as follows:

$$\frac{GDP_A + GDP_B}{Population_A + Population_B} = w_A \frac{GDP_A}{Population_A} + w_B \frac{GDP_B}{Population_B}$$

where $w_A = \frac{Population_A}{Population_A + Population_B}$ and $w_B = \frac{Population_B}{Population_A + Population_B}$.

Assuming that this variable is a proxy measure of a representative agent's welfare in two countries engaged in an FTA, we compare the growth rates of this variable[5] before and after FTAs, as theories in international trade usually compare a representative agent's welfare before and after free trade via a two-country setting.

(b) CONTROL VARIABLES OR COVARIATES

As we wished to estimate the treatment effect of a bilateral FTA via the nonparametric matching approach, we required covariates that render a treated couple (countries engaged in a bilateral FTA) and an untreated couple comparable in terms of their potential growth performance and the likelihood of their forming a bilateral FTA. Similarly, we also required variables to control factors that may affect the growth performance and the possibility of forming a bilateral FTA in the regression analysis. Among many variables that have been reported in previous empirical studies to be strongly correlated with growth, we utilized 18 variables that were significantly and robustly correlated with growth in the study of Sala-i-Martin, Dopplehofer, and Miller (2004). In addition to these 18 variables, we included 7 variables demonstrated by Baier and Bergstrand (2004) and Egger and Larch (2008) to affect the possibility of forming a bilateral FTA.[6] The list of these variables, their brief descriptions, and the data sources are provided in Table 1. These 25 variables were available for 88

countries, and these countries are listed in Table 2. In addition to these variables, year dummies for t = 1971,…, 2003 are also included in the analysis.

[INSERT TABLE 1 HERE]

We attempted to construct a panel dataset of these variables for individual countries from 1971 to 2003 with an annual frequency. Variables that can be considered constant over time, such as the East Asia dummy, fraction of tropical area, sub-Saharan African dummy, Latin American dummy, Spanish colony dummy, and ethno-linguistic fractionalization are taken directly from the work of Sala-i-Martin, Dopplehofer, and Miller (2004).[8] However, variables such as the population density in coastal areas, prevalence of malaria, fraction of Confucians, fraction of Muslims, and fraction of Buddhists could all vary over time, but are not available in the annual frequency dataset. We thus assumed steady trends in these variables, and interpolated and extrapolated those variables using their values at two time points – one in the 1960s and the other in the 1990s – after obtaining the data for these variables from the sources described in Table 1. All other variables were taken with annual frequency from the data sources provided in Table 1.

[INSERT TABLE 2 HERE]

After obtaining the panel dataset for 88 countries, we re-constructed these covariates for all 3828 (=(88×87)/2) couples over the sample period. For the majority of variables with continuous values, the newly rebuilt covariates for a couple of countries were the weighted averages of the counterparts in that couple, like the above combined per capita GDP. For example, the primary schooling variable for a couple is constructed as the population-weighted average of the annual enrollment rates in primary school for two countries in the couple. For the binary dummy variables, the values of the dummy variables for individual countries were added for a couple. Thus, in cases in which both countries (one country) in a couple are (is) located in Latin America, then the Latin American dummy variable for this

couple (country) is two (one). If neither country in a given couple is located in Latin America, then the dummy variable for that couple is set to zero. Finally, the FTA dummy variable for a pair of countries was collected and re-arranged, on the basis of the WTO's report of *Regional Trade Agreements Notified to the GATT/WTO by Date of Entry into Force* for the 1958-2003 period. In Table 2, we provide the list of Regional Trade Agreements (RTAs) that we utilized for the bilateral FTA dummy variable. The RTAs we used in the analysis were only free trade agreements and customs unions that are notified under Article 24 of the WTO.[9] As one may know, FTAs and CUs are the two forms of preferential free trade agreements allowed under Article 24 of WTO, where three main conditions should be met: (i) Trade barriers facing non-members must not 'on the whole' be higher than those previously in effect. (ii) Trade barriers must be eliminated on 'substantially all' trade among members. (iii) Interim arrangements to permit scheduling the customs union or free trade area must be completed over a reasonable period of time. Thus, the definition of "free trade agreements" we used in our paper only considered fully integrated preferential free trade systems. So, we excluded service agreements (to avoid a double counting) and partial preferential agreements under Enabling Clause (to avoid incomplete forms of free trade systems). We also excluded RTAs for the countries that are not in the country list in the second panel of Table 2. Hence, among the 88 countries on the list of FTA, the number of countries belonging to at least one free trade system is 50.[10]

(c) MISSPECIFICATION TEST OF THE LINEAR REGRESSION

In this sub-section, we regress the growth rate of a country couple on the above-mentioned covariates and FTA, similarly to existing studies. In order to determine the effects of free trade, the majority of existing studies focus on whether or not the coefficient of FTA (or other

openness variables) in the regression is significant. However, the coefficient of the FTA dummy variable shows the overall average difference in growth rates between country couples with FTA and without FTA, whereas the FTA effect on growth can be estimated properly by comparing the growth rates of a country couple when this couple has an FTA with the growth rates when this same couple does not have an FTA. This subtle difference arises from whether or not country couples which have no FTA but extremely different characteristics are included in the comparison. In order to remain faithful to the FTA effect on growth that compares the growth rate of a country couple with an FTA with the growth rate of the same country couple if this couple does not have an FTA, it seems more plausible to include country couples with FTAs and country couples which have no FTAs but very similar characteristics to those with FTAs in the analysis. However, the linear regression utilizes all the observations regardless of their characteristics, which implies a distortion in estimating the FTA effect.

This conceptual problem is related closely with the non-random selection problem in the field of econometrics. It has been established that linear regressions may suffer from a non-random selection problem, in which the covariates are correlated systematically with the FTA (the treatment variable). Two primary sources can induce this non-random selection problem. First, the treatment variable, FTA, may exert a more profound effect under certain covariate values. For example, two countries that were previously colonized by the Spanish may see a larger effect from FTAs because the similar legal system, common language, and cultural characteristics between these countries can be expected to amplify the effects of FTAs on growth. Second, the treatment variable may pick up omitted non-linear relations between the dependent variable (the growth rate of combined GDP) and the covariates. Regardless of the source of this non-random selection problem, the existence of this problem also induces a bias in the estimates acquired from the linear regressions.

[INSERT TABLE 3 HERE]

Table 3 shows a list of variables for which the null hypotheses that the means of covariates across two groups (one which has an FTA and the other one which has no FTA) are equal have been rejected at the 5% significance level. As is shown in Table 3, country couples with FTA systems report significantly higher primary school enrollment rates, higher per capita GDP, smaller tropical area, lower prevalence of malaria, longer life expectancy, and lower weight of the mining industry in GDP. They are also less likely to be located in sub-Saharan Africa or Latin America, have higher openness measures, and also evidence less profound ethno-linguistic fractionalization. The results shown in Table 3 indicate that country couples with FTA evidence characteristics very different from those of country couples without FTA, and that we need to extract country couples with no FTA but very close characteristics to those with FTA, in order to estimate correctly the effects of FTA on economic growth.

In addition to this problem, we also demonstrate that the linear regression approach is subject to the econometric misspecification problem. Since the FTA effect may not be observed clearly in the short-run, we re-construct a new dataset from the above-mentioned annual panel dataset for couples. This new dataset consists of the five-year cumulative growth rates of treated couples since the start of FTAs, the five-year cumulative growth rates of control couples, and all covariates at the beginning of a five-year period. In this dataset, control couples do not have a FTA during a five-year period.[11]

[INSERT TABLE 4 HERE]

First, we evaluate the fixed effect model and summarize the results in Table 4 using this new dataset. Country couple dummies to control for factors specific to each couple and common to all the years and year dummies to capture shock specific to year *t* but common to all couples (e.g. global business cycle or changes in oil prices) are included in the fixed effect

model.[12] As shown, the estimated coefficient of the FTA variable under the fixed effect model is significantly positive, which implies that FTA raises the five-year growth rate of the combined per capita GDP by 5% on average after controlling for important factors that may affect growth and FTA formation. However, this regression suffers from some potential econometric problems, as the relation between the growth rate and the FTA membership may not be linear.[13] The regression equation specification error test of Ramsey (1969) is employed to determine whether nonlinear transformations of the control variables have any explanatory power in regard to the dependent variable. The square of the fitted value of the dependent variable is added to the original regression, and a significant coefficient for this newly added variable can be interpreted as indicative of the potential misspecification problem of the original linear regression. As can be seen in the second column of Table 4, the estimated coefficient of this new variable differs significantly from zero, thus suggesting that the original linear regression has evidence for misspecification at a conventional level of significance. We also re-run the model with interaction terms between the FTA variable and other control variables. We show in the third column of Table 4 that the effect of the FTA is insignificant and some interaction terms with the FTA are significant; this can be considered another piece of evidence that supports the misspecification of the original linear regression in the first column.

Second, although the fixed effect model has been shown to provide more consistent estimates in the presence of omitted couple-specific factors, we should exclude time-invariant variables (e.g. East Asia dummy, sub-Saharan Africa dummy, etc.) from this analysis. Considering this problem, we also evaluate the potential presence of non-linearity in the random effect model with the time-invariant variables and year dummies. The random effect model is expected to control for unobservable characteristics of each couple, and the results are shown in the fourth column of Table 4. As is the case in the fixed effect model, we find a

significantly positive FTA effect on growth in the original random effect model. However, the Ramsey test again points to a possible nonlinearity problem in the original regression, when the square of the fitted value of the dependent variable is added. The inclusion of the interaction terms between the FTA variable and the other control variables are also suggestive of a potential non-linearity problem in the original regression, as we were able to find several significant interaction terms.

In summary, the econometric problems arising from non-random selection and nonlinearity appear to warrant serious consideration. Previous studies regarding the relationship between trade and growth may not have been able to reach a consensus because the linear regression approach remains susceptible to these problems. As a result, we employ the nonparametric matching approach in subsequent sections to estimate the treatment effect of bilateral FTAs. The nonparametric matching approach is conceptually close to the comparative static analyses conducted in many theoretical models to derive the effects of free trade. It has been shown to perform better in the presence of the non-random selection problem, as it compares observations with similar characteristics. It is also free from the potential nonlinear problem, as it imposes no specific functional forms between variables.

3. ECONOMETRIC METHODOLOGY

Suppose that there are N countries in the dataset and those countries are indexed by i = 1, 2, …, N. Y_{ijt} denotes the combined per capita GDP for countries i and j in year t, which is the population-size weighted average of per capita real GDP between the two countries. The growth rate of Y_{ijt} is $y_{ijt} = \ln(Y_{ijt}) - \ln(Y_{ijt-1})$, and y_{ijt} is the response variable in the terminology of the matching literature. For the n-year cumulative growth comparison, the response variable is $y_{ij\,(t,t+n)} = y_{ijt} + \cdots y_{ijt+n-1}$. A vector of covariates containing information

regarding the characteristics of a country couple (i, j) is denoted as x_{ijt}. The FTA dummy variable d_{ijt} is one in cases in which a country couple (i, j) has a bilateral FTA at time t, and is zero in all other cases. Hence, observations with $d_{ijt} = 1$ belong to the treatment group, whereas observations with $d_{ijt} = 0$ belong to the control group. Each observation in our dataset can be written as the triple ($y_{ij\ (t,t+n-1)}$, x_{ijt}, d_{ijt}) for $i = 1,\ldots, N$, $j = i+1,\ldots, N$, and $t = 1,\ldots, T$.

Suppose that a country couple (i, j) has formed a bilateral FTA. Then, the bilateral FTA effect on the growth of the per capita GDP for the couple (i, j) is defined as the difference in the growth rates when the couple forms the bilateral FTA, and when the couple does not form the bilateral FTA.[14] Hence, assuming that the potential untreated response is independent of the treatment, the average FTA effect can be written as follows:

$$E(y|d=1) - E(y|d=0) = E(y^1|d=1) - E(y^0|d=0)$$

$$= E(y^1|d=1) - E(y^0|d=1) = E(y^1 - y^0|d=1)$$

where $E(\cdot)$ is the expectation operator, $d = 1$ is a treatment indicator, $d = 0$ is a non-treatment indicator, y^1 denotes the potential treated response, and y^0 is the potential untreated response. However, as we are unable to observe $E(y^0|d=1)$, we need a counterfactual potential untreated response of the treated couple. The counterfactual potential untreated response of the treated couple is acquired via matching methodology. In other words, a couple from the control group, which is the closest to the couple of the treatment group in terms of the function of the vector of covariates (x), is selected as the counterfactual potential untreated response of the treated, under the assumption that the potential untreated response occurs independently of the treatment conditional on the covariates. This assumption implies that a treated couple and an untreated couple are comparable in terms of their potential untreated growth performance and the probability of their forming bilateral FTA if they exhibit the same covariates.

When we select a couple $(y_{i'j'(t',t'+n-1)}, x_{i'j't'}, d_{i'j't'})$ from the control group as the counterfactual for a given couple $(y_{ij(t,t+n-1)}, x_{ijt}, d_{ijt})$ from the treatment group, we employ two functions of covariates as criteria. The first function of covariates is the Mahalanobis metric, which is defined as $(x_{ijt} - x_{i'j't'})' X_N^{-1} (x_{ijt} - x_{i'j't'})$ where X_N^{-1} is the sample variance matrix of covariates in the pooled sample. The Mahalanobis metric is a scale-normalized distance between x_{ijt} and $x_{i'j't'}$, and the couple $(y_{i'j'(t',t'+n-1)}, x_{i'j't'}, d_{i'j't'})$ from the control group which minimizes this scale-normalized distance is selected as the counterfactual potential untreated response of the treated couple (*i*, *j*). The second function is the propensity score function, which can be interpreted as the estimated probability of FTA formation as a function of the covariates of a country couple. The probit model is utilized to estimate the propensity score. For each treated couple (*i*, *j*), only one untreated couple with the closest estimated propensity score is selected as the counterfactual. While searching for the most appropriate untreated couple for each treated couple, we use some control couples more than once in matching.[15]

Note that for the both functions, the matching was conducted based on the covariates in the initial period of the n-year to make a comparison of the n-year cumulative growth rates. Also, when the response variable is the n-year cumulative growth rates, the control groups are those without FTA during an n-year period. They are not restricted to those without FTA during the same n-year period depending on treated couples. Finally, since year dummies are used as part of matching covariates, treated observation's matched control could come from the FTA-treated couple's past observations prior to the launch of FTA.[16]

Once each treated couple is matched with its corresponding untreated couple by either of these functions, the average effect on the treated is estimated nonparametrically. That is, without assuming any particular functional form, the estimated average effect of the

FTA is computed as the average difference of the response variable (the growth rate of combined GDP per capita) across matched pairs. We select an untreated couple that minimizes the scale-normalized distance or has the nearest propensity score to a given treated couple as a matching partner; however, the minimized distance or the nearest propensity score can in certain cases prove to be rather large, which means that there might be no good matches for a certain treated couple. In an effort to avoid such cases, we can discard the matched pairs that fall within the worst $\delta\%$ of all matched pairs.[17] In order to determine whether the estimated average effect on the treated is statistically significant, appropriate standard errors must be computed. Although there are no well-established variance estimators in the matching literature, we calculate the approximate standard errors for the treatment effects under the assumptions of independent observations, fixed weights, homoskedasticity of the response variable within the treated and within the control groups. As a result, the standard errors can be written as:

$$\hat{\sigma} = \sqrt{\frac{1}{N_1} Var\left(y_{ij\ (t,t+n-1)}\right) + \frac{\sum w_{i'j't'}^2}{N_1^2} Var\left(y_{i'j'(t',t'+n-1)}\right)}$$

where N_1 is the number of matched treated, $y_{ij\ (t,t+n-1)}$ is the response variable from the treated group, $y_{i'j'(t',t'+n-1)}$ is the response variable from the control group, $w_{i'j't'}$ is the the frequency with which control couple (i', j') at time t' is used as a match (see Leuven and Sianesi (2003)).

This setup in the nonparametric matching analysis seems consistent with the theoretical models wherein the effect of free trade is shown as the difference in economic growth rates when a country couple has an FTA and when the same country couple does not have an FTA. Unlike the linear regression approach which uses all the observations, the nonparametric matching analysis does not use observations of country couples which have no FTA and different characteristics in terms of the Mahalanobis metric or the propensity score;

this is because those cannot be regarded as a counterfactual of a country couple with an FTA.

4. EMPIRICAL RESULTS

(a) FTA EFFECT ON ECONOMIC GROWTH

This section provides empirical results regarding the effects of FTA on the growth of the per capita GDP of treated couples using the matching method. For each treated couple (a country couple that has an FTA), one country couple from the control group (country couples which have no FTA) is matched. The matching criterion involves the selection of the one with the minimum Mahalanobis metric or the nearest propensity score among couples in the control group. Using these matched pairs, we then estimate the effects of FTA on the growth of the treated couples. Since it would take some time for an FTA to exert its full impact, we use the same dataset in Table 4.

[INSERT TABLE 5 HERE]

Table 5 shows the results with regard to the effects of FTA on the five-year cumulative growth rates of treated country couples. Results based on both the Mahalanobis metric and the propensity scores are provided. As is shown in Table 5, we estimate the effect with two caliper choices: 100% and 80%. A caliper choice of 100% means that we have utilized all matched pairs to estimate the effect, whereas a caliper choice of 80% means that we estimate the effect after discarding the worst 20% of matched pairs in terms of the Mahalanobis metric or the propensity score. The total number of matched pairs for the 100% caliper choice is 205. The results shown in Table 5 differ markedly from those generated by the linear panel regression shown in Section II. The results based on the Mahalanobis metric state that the estimated effect of FTA on the growth of treated couples is insignificantly

positive, regardless of the caliper choice. The results based on the propensity score are also insignificant at the 5% level.

Although the results in Table 5 demonstrate the average difference in the five-year cumulative growth rate of per capita GDP between country couples with and without an FTA, the short-run FTA effect might differ substantially from the long-run effect. For example, it may take a relatively long time for some industries to realize the benefit of an FTA, whereas it may take a relatively short time for other industries to be negatively affected by the FTA. Hence, the effect of the FTA in the short-run tends to be negative or insignificant. However, as workers and resources gradually migrate to industries that have been positively affected by the FTA, the FTA effect may, in the long-run, become more positive. In order to understand better the dynamics of the FTA effect over time, we assess the cumulative growth rates of matched pairs, since the time at which the treated couple in a given pair formed their FTA. Treated couples are matched with non-FTA couples based on all covariates at the beginning of a five-year period. The number of matched pairs varies from 326 (the number of matched pairs one year after the launch of FTA) to 122 (the number of matched pairs 10 years after the launch of the FTA) when the caliper choice is 100%.

[INSERT FIGURE 2 HERE]

Figure 2 shows the average difference in the cumulative growth rates of matched pairs since the time at which the treated couple in a given pair forms an FTA. Although the caliper choice in Figure 2 is 80%,[18] the results are quite similar to the other caliper value choice (100%).[19] Figure 2 shows the 95% confidence interval for the FTA effect. As is shown in the left panel of Figure 2, the FTA effect on cumulative growth rates is positive in most years, from one to 10 years period after the beginning of the FTA on the basis of the Mahalanobis metric, but is consistently insignificant. Furthermore, no upward sloping trend whatsoever was noted with the progression of the time horizon. The results based on the

propensity score are generally consistent with those based on the Mahalanobis metric, except that the estimated effect fluctuates more profoundly and this effect becomes marginally and briefly significant at the nine-year horizon. In summary, the results in Figure 2 show that the formation of an FTA does not significantly stimulate the growth performance of the involved countries, at least up to a 10-year horizon.

(b) FTA EFFECT ON GROWTH RATE COVERGENCE

Although many countries have recently formed FTAs or have begun to consider forming FTAs, the results shown in Table 5 and Figure 2 imply that the average effect of FTA on the growth rate of per capita GDP for country couples with FTAs is insignificant. In this sub-section, we attempt to determine whether this insignificant effect is the consequence of the convergence of the per capita GDP growth rates of individual countries in a treated couple, or of the divergence of per capita GDP growth rates of individual countries in a treated couple. Put another way, we attempt to determine whether the gap in the per capita GDP growth rates of two countries with an FTA has grown or shrunk since the inception of the FTA. This exercise could answer whether an FTA benefits no country at all or only one country in a treated couple.

While some previous studies—most notably those of Sachs and Warner (1995) and Ben-David (1996)—have reported that growth convergence is currently observed only among open countries engaging in international trade, others like Slaughter (2001) reported the opposite result—namely, that trade liberalization induced income divergence among open countries. Our investigation in this sub-section is also anticipated to make a contribution to this debate over the relationship between free trade and growth convergence via the nonparametric matching approach and the notion of FTAs used in the current paper.

[INSERT FIGURE 3 HERE]

The nonparametric matching approach is used to compare differences in the growth rates between country couples with and without an FTA, after switching the response variable from the growth rate of combined per capita GDP to the difference in per capita GDP growth rates across two countries within a couple. That is, the response variable in Figure 3 is as follows.

$$\Delta\ln\left(\frac{GDP_{A,t}}{Population_{A,t}}\right)-\Delta\ln\left(\frac{GDP_{B,t}}{Population_{B,t}}\right)$$

The results are shown in Figure 3. As is shown in Figure 3, the gap of the growth rates between members of a country couple with an FTA is initially lower (on average) than that between members of a country couple without an FTA immediately following the launch of the FTA by both matching methods. That is, an FTA seeks to reduce the gap in the growth rates between member countries in a couple engaging in an FTA, as compared with that between member countries in a couple without the FTA, and this effect is shown to be significant according to the propensity score criterion. As time elapses, however, the gap in the growth rates between member countries in a couple rises relatively more rapidly since these two countries have formed an FTA. The gap between countries with an FTA becomes significantly larger than that between countries without an FTA beginning five years (nine years) after the launch of the FTA, on the basis of the Mahalanobis metric (the propensity score). The vivid upward trend and significantly positive gap shown in Figure 3 suggest that the effects of FTAs on economic growth may not prove symmetrical between two within-FTA country members. Some countries appear to enjoy a positive FTA effect on economic growth, whereas their FTA partners appear to experience a negative FTA effect on economic growth.

[INSERT TABLE 6 HERE]

In order to figure out an underlying cause for the insignificant FTA impact and the

significant divergence, we compare the cumulative growth of the smaller country within an FTA couple with the counterpart within a non-FTA couple. Past studies on welfare effects (for example, see Chong and Hur, 2008 or Kiyota, 2006 for recent ones) have implied that when large and small countries form a bilateral FTA, the small countries tend to see most of the benefit from the arrangement. The larger benefits could be due to the greater market access and gains through specialization. This possibility might explain our finding because the impact of FTAs on the combined economic growth was masked by the weighted measure of economic growth and the larger benefit of FTAs on the small country is reflected as the divergence. Hence, we compare the five-year (or ten-year) cumulative growth of smaller country's per capita GDP between country couples with and without an FTA, after switching the response variable to the cumulative growth of smaller country's per capita GDP within a couple. The results are reported in Table 6. As shown in Table 6, the cumulative growth rate of the smaller country's per capita GDP from a couple with an FTA is (on average) significantly lower than that from a couple without an FTA, after five or ten years from the launch of an FTA. Although the caliper choice in Table 6 is 80%, the results are robust with the 100% caliper choice. This evidence implies that the above conjecture, that most bilateral FTA benefits are captured by the smaller country within a couple, is not the answer for our findings. Instead, our findings appear more consistent with the implication of Feenstra (1996). In the model of Feenstra (1996), trade liberalization lowers the growth of a smaller country but has no significant impact on a larger country when technology spillover does not occur, which may explain our findings in this paper. [20]

(c) THE BEHAVIOR OF GROWTH RATES BEFORE FTAS

One may surmise that we found an insignificant FTA effect on the combined growth rate of

GDP because the GDP growth rates for couples from the treatment group were lower than the matched couples from the control group prior to the inception of the FTAs. In other words, when we match a couple from the treatment group with a couple from the control group on the basis of the Mahalanobis metric or the propensity score, we implicitly assume similar growth behaviors between the matched couples before the inception of the FTAs; this assumption may, however, not prove to be true. To evaluate this possibility, we attempt to determine whether any significant difference exists in the behavior of combined GDP growth rates between matched couples during the period prior to FTA formation.

[INSERT TABLE 7 HERE]

As approximately one or two years are generally required for countries to complete their FTA negotiations and to put their FTA into effect, we compare three- to five-year cumulative growth rates prior to the launch of FTAs for matched couples in order to assess whether those growth rates were comparable before the FTAs were formed. The T-statistics of the difference in the cumulative growth rates of combined GDP are shown in Table 7 and the caliper choice in Table 7 is 80%. As shown in Table 7, the differences in the cumulative growth rates of combined GDP between matched couples are insignificant in all cases, except that the difference in the five-year cumulative growth rates is significant at the 5% level when the propensity score is employed as the matching criterion. These results indicate that the insignificant effect of the FTA on combined growth rates does not appear to be attributable to any systematic difference in the combined growth rates between matched couples prior to the inception of FTAs.

5. CONCLUDING REMARKS

In this paper, we utilize an alternative trade openness measure, which implies ‘mutual’ trade

liberalization, and the nonparametric matching approach, in order to determine whether an FTA exerts an effect on the growth of the two countries involved in the FTA. Whereas linear regressions, which are common in both the growth literature and the FTA literature, are found to be vulnerable to econometric problems including misspecification and non-random selection, the nonparametric matching method imposes no specific functional form in the relation, and can thus be applied to a broad range of data structures.

The principal finding of this paper is that FTAs appear to exert an insignificant effect on growth performance from the nonparametric matching approach. An FTA has an insignificant effect in the one-to-ten-year period after the launch of the FTA. However, more importantly we have found an upward trend in the gap between the growth rates of per capita GDP among countries within an FTA. This implies that uneven FTA effects exist across countries within an FTA. Some countries within FTA systems appear to enjoy positive FTA effects on economic growth, whereas their FTA partners might experience negative FTA effects on their economic growth rates. This result shows that trade policy makers should not consider FTAs as a strategy that guarantees rapid economic growth. Thus, caution should be exercised in the design of FTAs in order to ensure the FTA's positive effects.

Although our findings certainly appear remarkable in relation to the conventional view regarding the effects of free trade, our results can be considered consistent with some endogenous growth models that emphasize the relationship between trade and growth. For example, Grossman and Helpman (1991) and Feenstra (1996) have predicted that if a free trade system is formed under conditions in which technology transfer occurs between the involved economies, production efficiency can be improved, and free trade can therefore ultimately induce economic growth among FTA signatory countries. More specifically, Feenstra (1996) has demonstrated that the free trade system does not increase the growth rate of large countries, and can even retard the growth of small countries in the long run if

technology transfer does not occur. These theoretical propositions imply an insignificant FTA effect on combined growth rates and an uneven FTA effect between the countries engaging in an FTA when technology transfer does not occur between FTA signatory countries; this is consistent with the empirical findings of this paper.

Another explanation of our findings is that, according to Viner (1950), FTAs are basically preferential free trade agreements among member countries, and this preferential arrangement can exert a trade diversion effect against non-FTA member countries outside the FTA blocs in some product markets. At the same time, it can benefit the member countries with trade creation effect in other markets. If the trade diversion effect—which reduces the welfare of FTA member countries—is relatively more dominant, then the effects of FTAs on growth rates might prove insignificant. This may explain why we detected an insignificant FTA effect. Hence, an interesting future research topic would be to investigate which explanation would answer our findings using an appropriate measure of technology transfer or trade diversion.

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NOTES

[1] Many economists have begun to pay attention to this new phenomenon, and have conducted research into a variety of FTA-associated issues. For example, Baier and Bergstrand (2004, 2007) evaluated the effects of FTAs on international trade flow, using a binary FTA dummy variable in the so-called "gravity models". Sohn and Lee (2006) evaluated the effects of an FTA on convergence in a simple neoclassical growth model.

[2] In this paper, the word 'couple' refers to an observation unit that consists of two countries in which the response variable and covariates are combined. The word 'pair' means two observation units (couples) that are conditionally matched on the covariates.

[3] It is rare to find out in the literature where the impact of regional integration on the members' economic growth is discussed. An exception is Walz (1997) which shows that there is a theoretical possibility of a positive growth effect of FTAs from the trade creation in intermediate inputs sectors.

[4] Imbens (2004) provides an excellent survey of the nonparametric matching approach.

[5] One may think that in case of a large country forming an FTA with a small country, the effects of economic growth of the variable may be reduced because the large country with negative growth is more weighted even if the small country benefits from the agreement. We check this possibility in Section 4 (c) and found that the cumulative growth rate of smaller country's per capita GDP from a couple with an FTA is significantly lower than that from a couple without an FTA, after 5 or 10 years from the launch of an FTA. See Section 4 (c) for more details.

[6] Due to the large number of countries employed in our analysis, we could not use the same definition of the variables as was used by Baier and Bergstrand (2004). Rather, we decided to borrow the similar, but more relaxed, definitions utilized by Egger and Larch (2008). This

enabled us to increase the number of countries to be analyzed to 88.

[7] The variable used by Sala-i-Martin, Dopplehofer and Miller (2004) is the number of years the economy has been open between 1950 and 1994. Since we need a variable with annual frequency for individual countries, we use the openness variable in the Penn World Table.

[8] http://www.econ.cam.ac.uk/faculty/doppelhofer/research/bace.htm is the web address from which the data were obtained.

[9] FTAs or CUs formed under Enabling Clause are partial free trade systems across a subset of goods and we excluded them in our dataset of "free trade agreements in goods"

[10] This does not necessarily imply that the remaining 38 countries do not have any type of regional agreements. It simply means that the countries do not have "free trade agreements in goods under Article 24 of WTO". Also note that as of 2008 the following 5 countries used in our analysis are not the members of WTO yet, but observer governments: Algeria, Ethiopia, Liberia, Syria and Sudan. According to a rule of WTO, observers must start accession negotiation within five years of becoming observers. They would become WTO member countries soon.

[11] The seven variables which are reported to affect the possibility of forming an FTA in Baier and Bergstrand (2004) and Egger and Larch (2008) are excluded in the regression of growth rates on the control variables, because these variables might not have direct explanatory power for growth and the FTA dummy variable is included in the regression.

[12] See Baldwin and Taglioni (2006) and Carrere (2006) for more discussion of various dummy variables in fixed effect models.

[13] Freund and Bolaky (2008) and Chang *et al*. (2009) showed a non-linear relationship between growth rates and trade openness. The source of this non-linearity varies due to the effects of business regulations, financial developments, education, or rule of law on labor market flexibility.

[14] In terms of the terminology of the matching literature, we are interested in estimating 'the effect on the treated'. The method in this paper can also be applied straightforwardly to estimate 'the effect of the untreated'.

[15] We use the 'psmatch2' command developed by Leuven and Sianesi (2003).

[16] When we have examined the matched pairs in our analysis, we have found that most of the matched pairs are between couples rather than within couples.

[17] The cost of discarding the matched pairs whose distance falls within the worst δ% of all matched pairs is the reduction in the number of observations. However, the results reported in subsequent sections are robust when we utilize all matched pairs and when we further restrict the sample by discarding the worst 20% of all matched pairs in terms of the distance or propensity score.

[18] When the caliper choice is 80%, the number of matched pairs for one year (ten years) old FTA is 261 (98).

[19] The results with the 100% caliper value are available upon request.

[20] Using an appropriate measure for the technology transfer, a rigorous investigation of the Feenstra model would be an interesting topic for future research.

Table 1. Data Descriptions and Sources

Variable	Description	Source
East Asian dummy	Dummy for East Asian Countries	Sala-i-Martin, Dopplehofer and Miller (2004)
Primary schooling	Annual enrollment rate in primary school	World Development Indicator
Investment price	Annual investment price	Penn World Table 6.2
Real GDP pc	Real GDP per capita	Penn World Table 6.2
Fraction of tropical area	Proportion of country's land area within tropics	Sala-i-Martin, Dopplehofer and Miller (2004)
Population density in coastal area	Coastal population per coastal area (interpolated)	Gallup et al. (2001)
Malaria prevalence	Index of Malaria prevalence (interpolated)	Gallup et al. (2001)
Life expectancy	Annual life expectancy	World Development Indicator
Confucian	Fraction of Confucian Population (interpolated)	Barro
African dummy	Dummy for sub-Saharan African countries	Sala-i-Martin, Dopplehofer and Miller (2004)
Latin American dummy	Dummy for Latin American countries	Sala-i-Martin, Dopplehofer and Miller (2004)
Fraction of GDP in mining	Fraction of GDP in mining	Sala-i-Martin, Dopplehofer and Miller (2004)
Spanish colony	Dummy for former Spanish colonies	Sala-i-Martin, Dopplehofer and Miller (2004)
Openness[7]	Openness variable	Penn World Table 6.2
Fraction of Muslim	Fraction of Muslim population (interpolated)	Barro
Fraction of Buddhist	Fraction of Buddhist population (interpolated)	Barro
Ethonoliguistic fractionalization	Average of five difference indices of ethnolinguistic fractionalization	Sala-i-Martin, Dopplehofer and Miller (2004)
Government consumption share	Annual share of government consumption to GDP	Penn World Table 6.2
Natural	Inverse of Distance	CIA World Fact Book
Remoteness	Remoteness of coupled countries from the rest of the world	CIA World Fact Book
GDP sum	$\log (GDP_i + GDP_j)$	Penn World Table 6.2
GDP sim	$\lvert \log(GDP_i) - \log (GDP_j)\rvert$	Penn World Table 6.2
DKL	$\lvert \log (GDP_i/Pop_i) - \log (GDP_j/Pop_j)\rvert$	Penn World Table 6.2
SQDKL	DKL^2	Penn World Table 6.2
DROWKL	$0.5\{\lvert A - \log (GDP_j/Pop_j)\rvert + \lvert A - \log (GDP_j/Pop_j)\rvert\}$ where $A = \log (\frac{\sum_{k\neq i} GDP_k}{\sum_{k\neq i} Pop_k})$	Penn World Table 6.2

Note: The web address for the data source indicated as Sala-i-Martin, Dopplehofer and Miller (2004) is http://www.econ.cam.ac.uk/faculty/doppelhofer/research/bace.htm. The web address for the data source indicated as Gallup et al. (2001) is http://www.cid.harvard.edu/ciddata/ciddata.html. 'Penn World Table 6.2' can be found at http://pwt.econ.upenn.edu/php_site/pwt_index.php. The data for religion is taken from Robert Barro's web site (http://www.economic.harvard/faculty/barro/data_sets_barro). 'World Development Indicator' can be found at the World Bank website (http://www.worldbank.org/).

Table 2. List of Regional Trade Agreements and Countries Used In the Analysis

Regional Trade Agreements (FTA and Customs Union Only)*	
1958	European Community (EC)
1960	European Free Trade Association (EFTA)
1961	Central American Common Market (CACM)
1973	EC-Switzerland and Liechtenstein; EC accession of Denmark, Ireland and United Kingdom; EC-Norway; Caribbean Community and Common Market (CARICOM)
1976	EC-Algeria
1977	EC-Syria
1981	EC accession of Greece
1983	Closer Trade Relations Trade Agreement (CER)
1985	United States-Israel
1986	EC Accession of Portugal and Spain
1991	Southern Common Market (MERCOSUR)
1992	EFTA-Turkey
1993	EFTA-Israel
1994	North American Free Trade Agreement (NAFTA)
1995	EC accession of Austria, Finland and Sweden
1996	EC-Turkey;
1997	Canada-Israel; Turkey-Israel; Canada-Chile;
1998	EC-Tunisia; Mexico-Nicaragua
1999	Chile-Mexico; EFTA-Morocco
2000	EC-South Africa; EC-Morocco; EC-Israel; Israel-Mexico; EC-Mexico; Southern African Development Community (SADC)
2001	EFTA-Mexico; India-Sri Lanka; United States-Jordan
2002	EFTA-Jordan; EC-Jordan; Chile-El Salvador
2003	EC-Chile; Panama-El Salvador

88 Countries
Algeria, Argentina, Australia, Austria, Belgium, Benin, Bolivia, Botswana, Brazil, Burkina Faso, Burundi, Canada, Chile, Colombia, Congo, Cote d'Ivoire, Denmark, Dominican Republic, Ecuador, Egypt, El Salvador, Ethiopia, Finland, France, Gabon, Gambia, Germany, Ghana, Greece, Guatemala, Guinea, Guinea-Bissau, Honduras, Hungary, India, Indonesia, Ireland, Israel, Italy, Jamaica, Japan, Jordan, Kenya, Korea, Lesotho, Liberia, Madagascar, Malawi, Malaysia, Mali, Mauritania, Mexico, Morocco, Mozambique, Nepal, Netherland, New Zealand, Nicaragua, Niger, Nigeria, Norway, Pakistan, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Rwanda, Senegal, South Africa, Spain, Sri Lanka, Sudan, Sweden, Switzerland, Syria, Tanzania, Togo, Trinidad & Tobago, Tunisia, Turkey, United Kingdom, United States, Uruguay, Venezuela, Zambia, Zimbabwe

Note: *We obtain the list from the WTO's report of *Regional Trade Agreements Notified to the GATT/WTO by Date of Entry into Force* for the period of 1958-2003. The RTAs that we used in the analysis are only the free trade agreements and customs unions notified under Article 24 of the WTO. We exclude service agreements (to avoid double counting) and preferential partial agreements (to avoid incomplete form of free trade systems). We also exclude RTAs for the countries that are not in the country list.

Table 3. Distribution of Covariates

Variable	Non FTA couples			FTA couples		
	Obs	Mean	Std. Dev	Obs	Mean	Std. Dev
Primary Schooling	122211	75.23	23.73	4113	92.61	10.59
Investment Price	122211	86.17	39.38	4113	90.99	20.07
Real GDP pc	122211	7585.06	6342.57	4113	16423.44	6765.24
Fraction of tropical area	122211	0.5541	0.3798	4113	0.1088	0.2743
Malaria Prevalence	122211	0.6754	0.5917	4113	0.0427	0.2205
Life expectancy	122211	63.02	9.38	4113	73.46	7.09
African dummy	122211	0.7025	0.6649	4113	0.0681	0.3434
Latin American dummy	122211	0.4402	0.5775	4113	0.1821	0.5524
Fraction of GDP in mining	122211	0.0429	0.0483	4113	0.0239	0.0353
Spanish colony	122211	0.3471	0.5284	4113	0.1575	0.5048
Openness	122211	56.14	26.82	4113	65.79	24.11
Fraction of Muslim	122211	0.2171	0.2761	4113	0.1379	0.2429
Fraction of Buddhist	122211	0.0271	0.1032	4113	0.0017	0.0020
Ethonoliguistic fractionalization	122211	0.3496	0.2501	4113	0.1592	0.1428
Natural	122211	-8.67	0.7202	4113	-7.32	0.8007
Remoteness	122211	2.16	3.77	4113	6.25	3.95
GDP sum	122211	18.94	1.54	4113	20.13	1.19
GDP sim	122211	2.21	1.61	4113	1.40	1.06
DKL	122211	1.36	0.9456	4113	0.6500	0.6825
SQDKL	122211	2.75	3.22	4113	0.8877	1.57
DROWKL	122211	1.11	0.5122	4113	0.8641	0.2651

Note: The null hypothesis is that the means of covariates across two groups (one with an FTA and the other one without an FTA) are equal. With an assumption of unequal variances between the two groups, we rejected the null hypothesis at a significance level of 5% for all covariates used in the analysis.

Table 4. Linear Panel Regression Models - Fixed Effect and Random Effect

	Fixed Effect Model	With Fitted Value term	With Interaction terms	Random Effect model	With Fitted Value term	With Interaction terms
East Asian dummy	(dropped)	(dropped)	(dropped)	.025(7.30)	.034(9.64)	.025(7.26)
Primary schooling	-.000(-1.21)	-.000(-1.07)	-.000(-1.19)	.000(4.38)	.000(5.41)	.000(4.38)
Investment price	-.000(-12.52)	-.000(-13.20)	-.000(-12.52)	-.000(-18.22)	-.000(-17.99)	-.000(-18.28)
Real GDP pc	-.000(-16.39)	-.000(-16.17)	-.000(-16.36)	-.000(-10.02)	-.000(-13.52)	-.000(-9.95)
Fraction of tropical area	(dropped)	(dropped)	(dropped)	-.048(-17.19)	-.062(-21.29)	-.047(-17.09)
Population density in coastal area	.000(2.05)	.000(1.78)	.000(2.06)	.000(3.51)	.000(3.77)	.000(3.67)
Malaria prevalence	.019(1.83)	.020(1.88)	.019(1.82)	.012(4.03)	.016(5.02)	.012(3.99)
Life expectancy	-.001(-3.79)	-.002(-4.18)	-.001(-3.76)	-.000(-.50)	.000(.11)	-.000(-.46)
Confucian	1.467(7.10)	1.869(8.62)	1.468(7.11)	.219(18.33)	.420(28.85)	.219(18.30)
African dummy	(dropped)	(dropped)	(dropped)	-.024(-8.92)	-.032(-11.24)	-.024(-8.93)
Latin American dummy	(dropped)	(dropped)	(dropped)	-.005(-1.73)	-.007(-2.28)	-.005(-1.73)
Fraction of GDP in Mining	-.508(-3.92)	-.527(-4.07)	-.509(-3.92)	-.112(-4.80)	-.141(-6.01)	-.111(-4.74)
Spanish colony	(dropped)	(dropped)	(dropped)	-.014(-5.00)	-.018(-6.37)	-.014(-5.04)
Openness	.001(16.87	.001(17.20)	.001(16.86)	.001(19.16)	.001(23.54)	.001(19.13)
Fraction of Muslim	.053(1.21)	.059(1.35)	.056(1.26)	.007(1.73)	.005(1.29)	.007(1.80)
Fraction of Buddhist	.225(3.67)	.215(3.42)	.224(3.66)	.072(9.94)	.104(14.52)	.071(9.80)
Ethonoliguistic fractionalization	.295(4.91)	.293(4.87)	.295(4.90)	-.021(-4.23)	-.024(-4.76)	-.021(-4.27)
Government consumption share	-.001(-4.91)	-.001(-4.99)	-.001(-4.89)	-.001(-4.30)	-.001(-5.05)	-.001(-4.31)
FTA	.050(9.41)	.048(9.27)	.039(.18)	.018(3.84)	.027(5.92)	-.679(-3.87)
(Fitted drgdp5)^2		-.158(-4.36)			-1.954(-17.82)	
FTA ×						
East Asian dummy			(dropped)			(dropped)
Primay Schooling			.001(1.03)			.000(.63)
Investment price			.000(.42)			.000(.93)
Real GDP pc			-.000(-.91)			-.000(-2.42)
Fraction of tropical Area			-.241(-1.75)			.089(1.06)
Population density in coastal area			-.000(-.99)			-.000(-2.59)
Malaria prevalence			-.148(-.42)			-.278(-1.58)
Life expectancy			-.001(-.28)			.009(3.32)
Confucian			(dropped)			(dropped)
African dummy			(dropped)			(dropped)
Latin American dummy			.035(.36)			-.116(-2.66)

Fraction of GDP in Mining			.934(3.55)			.337(1.45)
Spanish colony			-.010(-.12)			.136(4.55)
Openness			-.000(-.42)			-.001(-1.01)
Fraction of Muslim			-.116(-2.94)			-.027(-1.14)
Fraction of Buddhist			-2.877(-1.01)			3.598(1.24)
Ethonoliquistic Fractionalization			.041(.72)			.051(1.08)
Government consumption share			.002(.88)			.003(1.66)
obs	107,242	107,242	107,242	107,242	107,242	107,242
R^2	0.1760	0.1764	0.1762	0.2552	0.2577	0.2558

Note: Dependent variable is the cumulative sum of real GDP growth rates of a pair of countries for five years from year t. Estimates for constant and year effects are not reported. Robust t statistics are in parentheses. Standard errors are adjusted for country-pair clusters.

Table 5. Effect of FTA on the five-year Growth of per capita GDP

Mahalanobis Metric					
Caliper	Effect	Standard Errors	T-statistic	No. Treated	No. Control
100%	0.0059	0.0067	0.87	205	107,037
80%	0.0041	0.0072	0.56	164	107,037
Propensity Score					
Caliper	Effect	Standard Errors	T-statistic	No. Treated	No. Control
100%	0.0090	0.0066	1.36	205	20,748
80%	0.0126	0.0068	1.85	164	20,748

Note: This table shows the estimated FTA effect on five-year growth rates for country couples with an FTA by the nonparametric matching approach. No. Treated and No. Control show the number of treated couples and the number of untreated couples which have common support. A caliper choice of 100% means that we have utilized all matched pairs to estimate the effect, whereas a caliper choice of 80% means that we estimate the effect after discarding the worst 20% of matched pairs in terms of the Mahalanobis metric or the propensity score.

Table 6. Difference in the Growth Rates of the Smaller Country within a Couple

	T-statistics: Mahalanobis Metric	
Caliper	5 year	10 year
80%	-13.23	-9.04
	T-statistics: Propensity Score	
Caliper	5 year	10 year
80%	-8.89	-9.04

Note: This table shows T-statistics of the difference in the cumulative growth rates of the smaller country within an FTA couple with that within a non-FTA couple after five years (or ten years) since the start of FTAs.

Table 7. Difference in the Growth Rates before the Formation of FTAs

	T-statistics: Mahalanobis Metric		
Caliper	-3 year	-4 year	-5 year
80%	0.04	0.23	-0.02
	T-statistics: Propensity Score		
Caliper	-3 year	-4 year	-5 year
80%	-1.67	-0.85	-2.55

Note: This table shows T-statistics of the difference in the cumulative growth rates between country couples with an FTA and couples without an FTA before the start of FTAs.

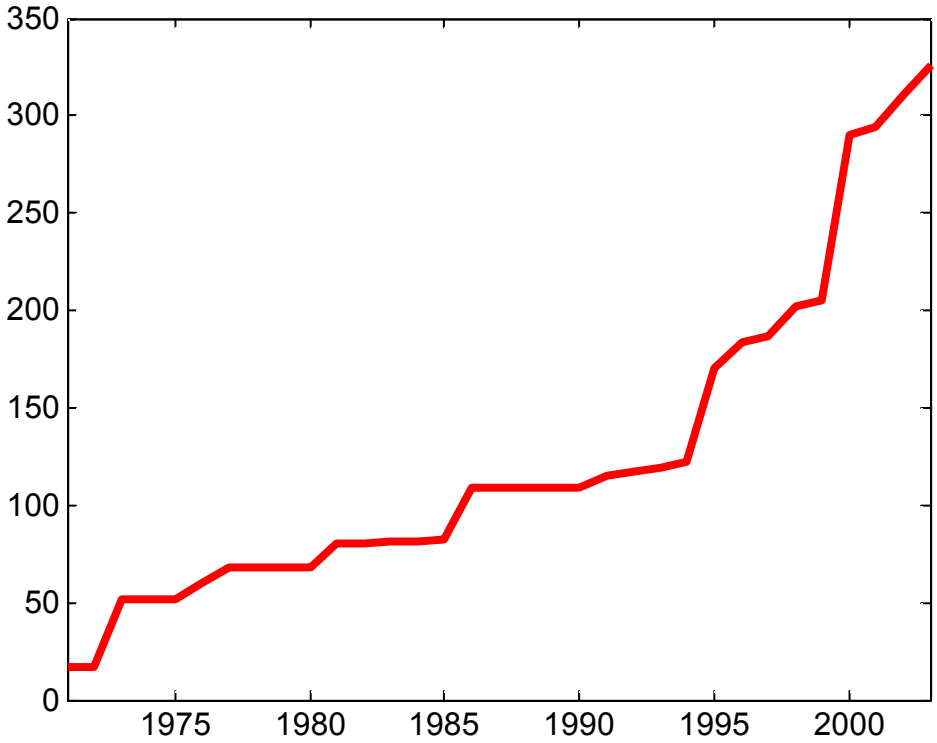


Figure 1. *Cumulative Number of FTAs. Notes: The data source is WTO's report of Regional Trade Agreements Notified to the GATT/WTO by Date of Entry into Force for the 1958-2003 period. This figure shows the cumulative number of a bilateral FTA, which is counted as one if a couple of countries engages in a free trade system such as a free trade agreement or customs union.*

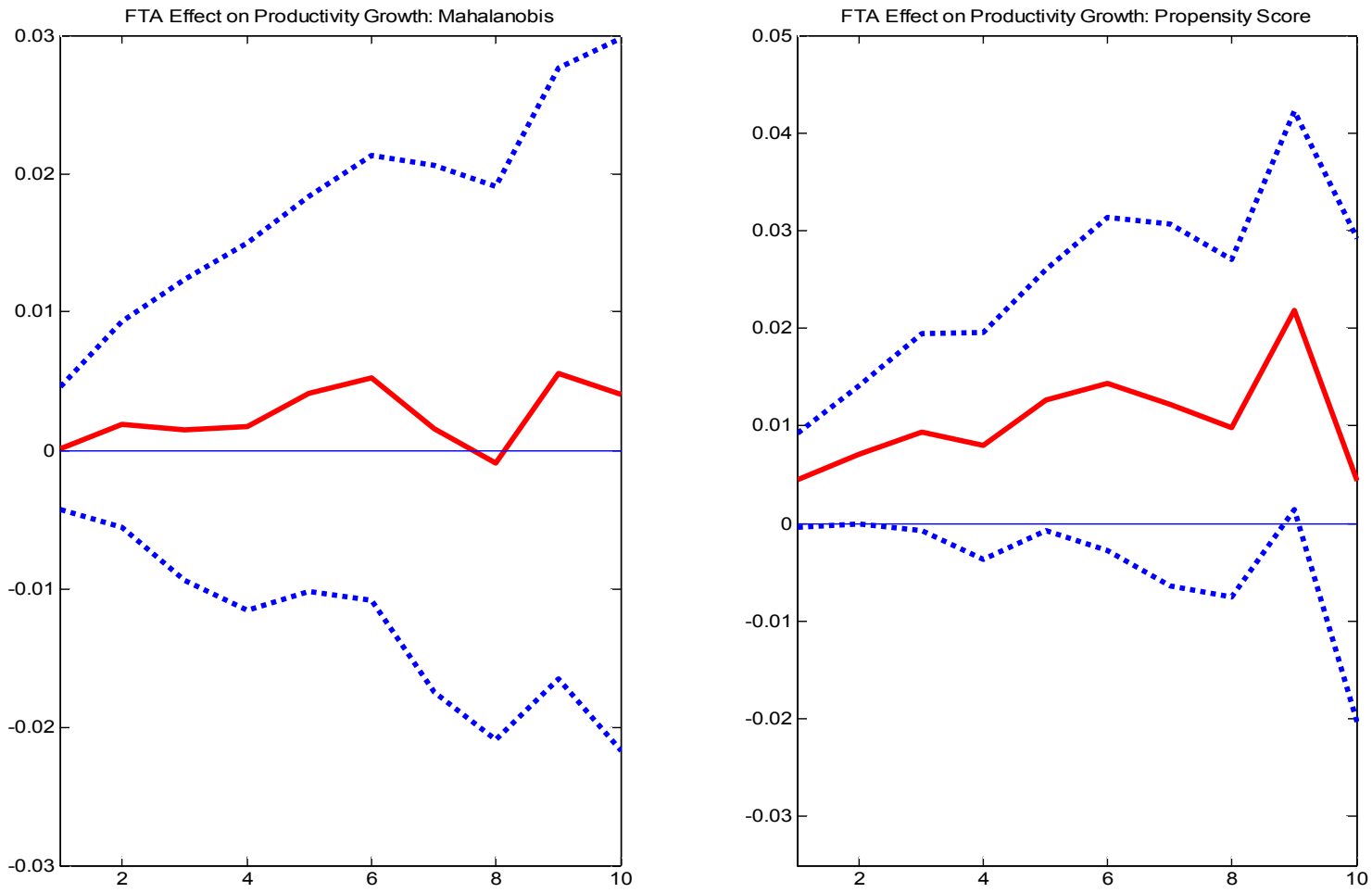


Figure 2. *FTA Effect on Economic Growth over Time. Note: The solid lines show the estimated average FTA effect on the growth performance and the dotted lines show the 95% confidence interval of the effect.*

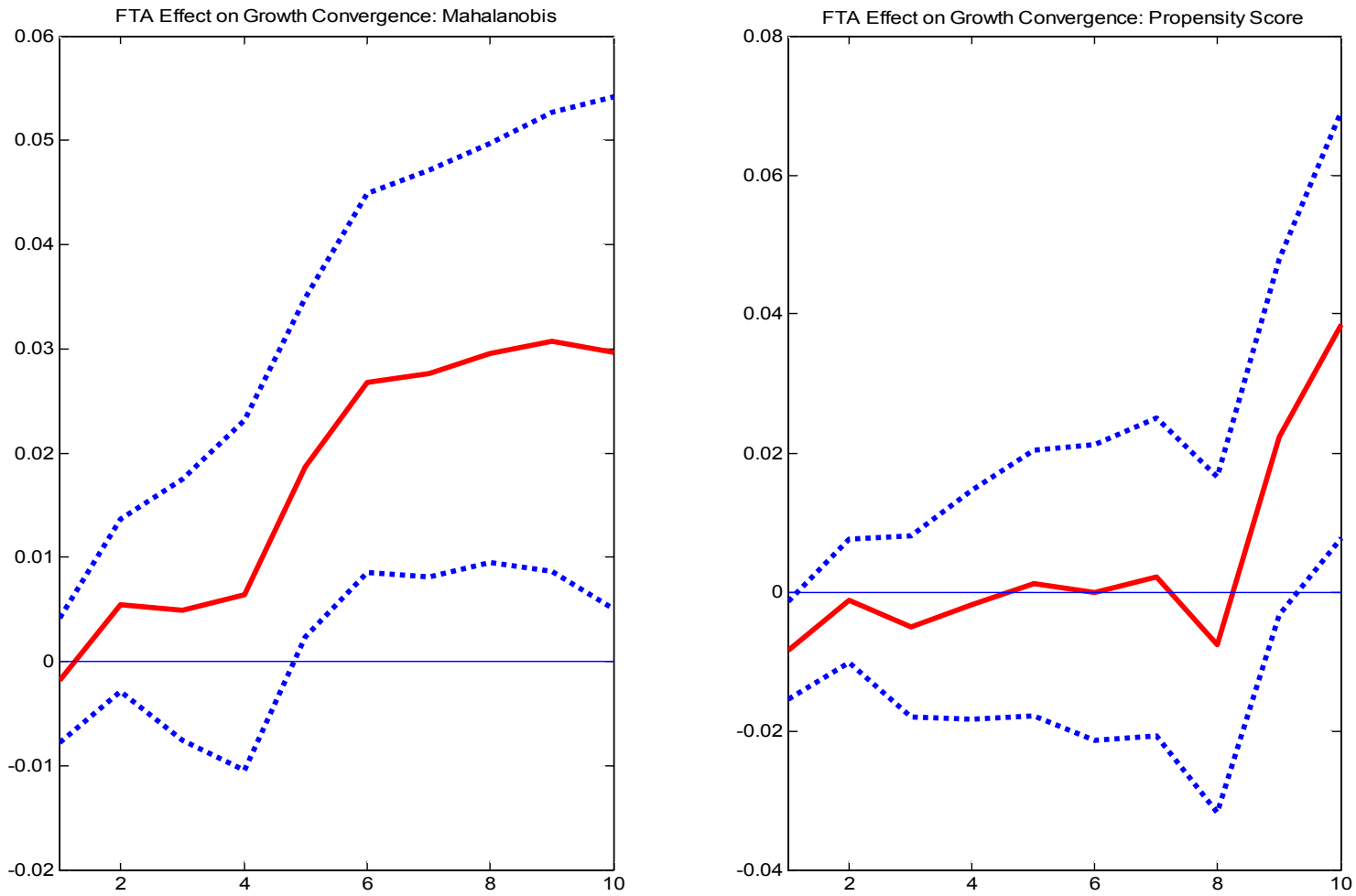


Figure 3. *FTA Effect on Convergence over Time. Note: The solid lines show the estimated average FTA effect on the growth performance and the dotted lines show the 95% confidence interval of the effect.*

Comments on

"Do Free Trade Agreements Increase Economic Growth of the Member Countries?"

Jeongmeen SUH

Department of Global Commerce
Soongsil University

I. Summary and Contributions

1. Using a Novel Approach

An alternative to address self-selection problem in FTA formation
(**Trade Treaty Conclusion Procedure Act of 2011** in Korea)

Evaluate the effects of FTA on the growth

2. Providing Interesting Results

FTA has
(1) an insignificant effect on the **Sum** of growths b/w partners
(2) a significant effect on the **Difference** in growths b/w partners

I. Summary and Contributions (2)

3. Presenting Interesting implications

FTA does not guarantee the growth. It may even make it worse.

Why? a Conjecture
: whether a FTA induce technology spillover or not

☛ **In FTA strategies,**
'How' is crucial, not **'Whether or not'**
in terms of the economic growth

Comments (1): Another evidence of uneven benefits from trade liberalization?

A puzzle raised by Rose (AER 2004)

- "Do we really know that the WTO increases trade?"
  : Insignificant effect of MTA accession

An answer by Subramanian and Wei (JIE 2007)

- "The WTO promotes trade, strongly but unevenly"
  : Significantly positive impact on Developed countries' trade
  : Little impact on Developing countries' trade

COMMENTS (1): ANOTHER EVIDENCE OF UNEVEN BENEFITS FROM TRADE LIBERALIZATION?

(Their lesson) Be More Liberalized and Reciprocal?

- b/w developed countries, among industrial products

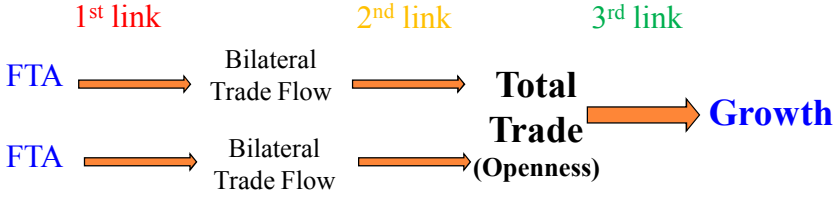
(Suggestion) Who was the winner or loser in FTA?

- Small vs. Large Countries (GDP)
- Developed vs. Developing Countries (GDP per capita)
- Depending on one's behaviors

(need to look up the contents of FTA, beyond FTA dummy)

A Rationale for SDT Clauses

COMMENTS (2): FINDING THE MISSING LINK(S)



1st Link: (+) Baier and Bergstrand (2009)

2nd Link: maybe (+) Trade Creation/Diversion argument

3rd Link: conditional Technology Spillover argument ?

Or, a Fallacy of Composition?

THANK YOU !!!

Session 2 Issues of FTA

Room: Champagne A Hall

CHAIR: SUNG Jae-Ho (Sungkyunkwan University)

Presenters

4. BI Ying (Zhejiang University): Could Predatory Pricing Rules substitute Antidumping Laws in the Proposed China-Japan-Korea Free Trade Agreement?
5. HSIEH Pasha (Singapore Management University): Examining the Liberalization of ASEAN's Legal Services Market - Challenges and Reforms –
6. LEE Ki-Pyeong (Korea Legislation Research Institute): Recent Trends of Investment Chapters in FTAs – Centering around Investor-State Dispute Mechanism-
7. YOO Joon-Koo (Korea National Diplomatic Academy): The Third Wave of International Intellectual Property Legal System - Focusing on the TPP IPR Charter-

Discussants

CHO Young-Jeen (Ewha Womans University)

CHOI Ji-Yeon (Korea Legislation Research Institute)

LEE Ji-Soo (Soongsil University)

Junior Discussants

HAN Xue-Hua (Ewha Womans University)

LEE Seu-Yeun (Yonsei University)

Kang Moon-Kyung (Chonbuk National University)

Could Predatory Pricing Rules substitute Antidumping Laws in the Proposed China-Japan-Korea Free Trade Agreement?

BI Ying[1]

[Abstract] The proliferation of trade agreements heightens the interest in predatory pricing rules, because of their possibility to replace antidumping laws. Successful practices have already been achieved in several regional trade agreements. The current paper focuses on the proposed China-Japan-Korea Free Trade Agreement (CJK FTA) and argues that substitution may be complicated by the presence of two different forms of predatory pricing: dominance orientated predatory pricing and unfair predatory pricing. Reviewing the rules of the former fortifies the evidence that specific rules of competition law can substitute antidumping law. However, by exploring the rules of the latter, this conclusion is troubled. Unfair predatory pricing rules, as they exist in China, Japan and Korea, are prone to protectionist abuse. Hence, efforts to harmonize predatory pricing rules so as to abolish antidumping laws would confront more difficulties in the proposed CJK FTA.

Introduction

With the proliferation of antidumping legislation and the consequently increasing antidumping actions, there has been a wide critique to the potential of protectionist abuse of this law (Lindsey and Ikenson 2003). Various proposals have suggested reforming the antidumping system (Gingerich 1998; Laroski 1999; King 2002; Gunn 2005). Recently, an increasing number of scholars have started to rethink the fundamentals of the whole antidumping system. They are arguing that further fine-tuning and refinement of the antidumping policy is not the answer to prevent abuse. Rather, they claim that the antidote is to be found in competition law and policy. Efforts should be directed at substituting the trade rules of antidumping by the competition rules of predatory pricing. This is the well-known substitution debate (Waller 2000; Taylor 2006; Knorr 2004; Finger and Zlate 2005; Wooton and Zanardi 2002; Niels 2002; Barfield 2004).

This paper supports substituting antidumping laws by predatory pricing rules (Bi 2013: 29-51). The current impasse in the reform of the World Trade Organization (WTO) makes it unlikely that such a change to the antidumping laws will be implemented at this level. Therefore, the idea of

[1] This draft of paper is co-written with VAN UYTSEL Steven. It has been submitted to the journal *SSJJ* (Social Science Japan Journal) and is currently subject to "Immediate Minor Revision".

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gradually incorporating predatory pricing rules in bilateral and regional trade agreements (RTAs) seems to be more feasible and realistic. In fact, the substitution of the antidumping laws by predatory pricing rules has been done in a small number of regional trade agreements, showing the potential of success. For instance, the European Union (EU), the European Free Trade Association (EFTA), and the European Economic Area (EEA) have all decided to abandon antidumping laws and adopted a unified regional competition law to be applied to all its members. Within the Australia New Zealand Closer Economic Relations Trade Agreement (ANZCERTA), the plan to harmonize the domestic competition laws in order to eliminate antidumping laws has also taken shape (Taylor 2006; Hoekman 1998). Similar practices of replacement have been achieved in both the EFTA-Singapore Free Trade Agreement (FTA) (2003) and the EFTA-Chile FTA (2004) (Voon 2010; Emerson 2008; Teh and Prusa *at el.*2007). Some RTAs, such as Mercado Común del Sur (MERCOSUR) (Guasch and Rajapatirana 1998), the Latin American and Caribbean System (SELA) (UNCTAD 2011), have been conducting various reforms with the intention to harmonize competition rules in the future.

What has been achieved in the above-mentioned RTAs, is also the ideal in the ongoing negotiation of China-Japan-Korea Free Trade Agreement (CJK FTA). In the joint-study report for the CJK FTA among China, Japan and Korea in the end of 2011, all of the three countries recognize that competition law is one of the key elements to be included for the establishment of an environment for fair market competition. To achieve this, all three countries agreed to promote and further enhance trilateral cooperation on competition policy in various aspects (Joint Study Report 2011). It is well known that all of the three countries have faced the most antidumping measures in the world. Furthermore, both Japan and Korea have for long held that the objective of antidumping law should be limited to punishing monopolizing dumping (Communication from Japan 1998; Communication from the Republic of Korea 1998). Taken the above facts into consideration, it seems that one of the aims of this cooperation would be the harmonization of the competition laws in order to have an alternative for the antidumping laws in the respective countries.

In order to assess the substitution feasibility in the CJK FTA, Section II will give a brief description of the substitution debate, and set out the focus of the whole paper on one of the main arguments for substitution, i.e. predatory pricing rules would prevent protectionist abuse that often occurs in the application of antidumping laws. In the following Sections, the predatory pricing rules will be highlighted. Section III will discuss Chinese predatory pricing rules, Section IV will address Japanese predatory pricing rules and Section V will examine predatory pricing rules in Korea. The detailed analysis of predatory pricing is necessary in order for Section VI to investigate whether in the three countries an argument can be made for substituting antidumping laws by predatory pricing rules based upon the criteria of less protectionist abuse. In conclusion, we will state that efforts to harmonize predatory pricing rules to abolish antidumping laws will be subject to more difficulties in the CJK FTA than in other RTAs.

II. Antidumping versus Competition: the Substitution Debate

1. The Fundamentals of the Antidumping System

The substitution debate touches upon the fundamentals of the whole antidumping system. The harmful effect from dumping has been for a long time presumed, making an investigation into the real effect of dumping redundant. However, whether dumping has a harmful effect or not is actually a controversial and unclear issue (Sykes 1998). There are three different viewpoints on the justification of antidumping law. The first viewpoint argues that the objective is to eliminate predatory dumping intended to monopolize the market, and could be related to predatory pricing under competition rules (Bi 2013). The second viewpoint alleges that antidumping law aims at protecting against unfair trade resulting from various market-distortive government industrial policies (Bi 2013). The third viewpoint considers that the distinction between fair and unfair trade has become increasingly blurred, with as a consequence that what seems unfair to members of one society may seem perfectly fair to those of another society (Jackson 1997). Therefore, based on the interface theory (Marceau 1994), it views antidumping as a quasi-safeguard measure, so as to mitigate the effects of different economic structures (Bi 2013). It is clear that the second and third viewpoint have little connection with competition law rules.

A comprehensive investigation into the economic theories of dumping as well as the evolution of antidumping law, as has been already conducted in previous scholarship (Bi 2011*a*; Bi 2013), suggests that the core idea of the antidumping system is built on predatory dumping. Dumping should neither be viewed as dealing with unfair trade nor be regarded as a quasi-safeguard measure. Viner and Willig have been influential in relation to the economic theories of dumping. The traditional dumping theory by Viner (1923) and the modern dumping theory by Willig (1998) have brought economists to consider dumping as a kind of price discrimination that can be classified into several types according to its motives (Kennedy 2001; Trebilcock and Howse 1999). Subjecting each type to an efficiency approach, it is generally acknowledged that predatory pricing is the only legitimate economic rationale for prohibiting dumping (Kennedy 2001; Trebilcock and Howse 1999). An historical perspective to antidumping law, of which the U.S. Wilson Act of 1894 is a good example, learns that antidumping law was originally part of competition law aiming at curbing import price discrimination. To deal with this kind of foreign conduct more efficiently, antidumping laws gradually changed and became distinct from competition rules (Bi 2011*a*; Bi 2013). Many countries have ever since adopted antidumping laws without much attention to the premises underlying them (Sykes 1998). At the international level, the idea behind the creation of the international antidumping agreement in the WTO was simply to unify domestic rules. Most countries subsequently adopted antidumping laws merely because they had to follow the requirements of the WTO. None of the changes were aimed at condemning dumping for reasons other than the original ones, i.e. to avoid predatory dumping (Bi 2011*a*; Bi 2013).

The antidumping system was never designed to deal with a tremendously broad notion of fairness (Barfield 2004). However, the U.S., as one of the biggest proponents of antidumping law, has started to push for a new goal of antidumping: dealing with unfair trade. In this respect, a number of market-distortive government industrial policies were listed as should be corrected by antidumping law (Communication from the U.S. 1998). With such a broad notion, almost every industrial policy can be the cause of an antidumping action (Barfield 2004), despite the fact that none of them have any direct relation at all with the conduct of low-price selling (Barfield 2004).

Even if these industrial policies are injurious and condemnable, the correct way to deal with them should be to target each of those unfair government policies directly, rather than counting on investigating price differences (Bi 2013). Therefore, national legislators of antidumping laws and the architects of the General Agreement on Tariffs and Trade (GATT)/WTO who described unfair trade as one of the objectives of antidumping system have been criticized of merely intending to disguise the use of dumping as protectionism (Lloyd 2005; Finger 1991; Sykes 1998; Taylor: 2006).

Apart from the concern with unfair trade, another more persuasive justification of antidumping law is to consider it as a quasi-safeguard measure. This approach asserts that the antidumping system is supposed to protect domestic competitors by means of neutralizing the inequities arising from differences in national economic system (Communication from the U.S. 1998). In the modern multilateral free trade system, it is understandable that countries need a mechanism protecting the domestic competitors against harm. However, such mechanism has no direct relationship with the conduct of low-price selling (Bi 2013). Moreover, there are better mechanisms than antidumping laws, i.e. safeguard measures, to provide temporary protection to inefficient industries (Araujo Jr. 2001; Barfield 2004; Marceau 1994; Finger *et al.* 2000). Even if we could keep two or more different protective mechanisms as the pressure valve to maintain an open trade policy, antidumping has fundamental weaknesses (Bi 2013). The only possible reason why governments prefer the use of antidumping laws is not because it is a better protective policy, but because it is easier to apply (Araujo Jr. 2001). The proliferation of antidumping cases has reinforced the conclusion that it is not a controllable protective mechanism in the free trade system. On the contrary, antidumping has been largely abused for protectionist purposes and it is actually against the basic spirit of modern free trade (Bi 2013).

In conclusion, it is considered that the only rationale of antidumping law is to deal with international predatory dumping, which could also be regulated under competition law, more specifically the rules of predatory pricing. Given that antidumping law and competition law target the same conduct, the question arises whether dumping would be more appropriately regulated by competition law. In other words, we need to ascertain whether regulating dumping through competition law would lead to less protectionist abuse. Prior to a comparison, a thorough review of predatory pricing in modern economic theories and competition law is indispensible.

2. The Fundamentals of Predatory Pricing

Predatory pricing is usually described as an issue related to price discrimination. In order to differentiate whether the predatory pricing is anticompetitive or procompetitive, two levels of competition should be distinguished: the primary-line competition and the secondary-line competition. The former refers to competition between the discriminating monopolist and his rivals in the same line of business whereas the latter concerns competition between the discriminating monopolist's customers and their business rivals (Dale 1980). Antidumping law, which mainly concerns about trade of foreign firms on a market in which domestic competitors are operating, links with competition law in the primary-line competition. Concerning the primary-line competition, modern economic theories consider that price discrimination can only be considered as anti-competitive in extreme cases and this is when there is a predatory pricing (Dale 1980). In general, predatory pricing constitutes a type of behavior where prices are too low

to the extent that the competitive process itself is damaged. A dominant firm, called the predator, incurs short-term losses in a particular market in order to induce the exit or deter the entry of a rival firm, called the prey, so that super-normal profits can be earned in the future, either in the same market or in other markets (Bergh and Camesasca 2001).

In order to establish an optimal and effective approach to identify between a very competitive price and predatory pricing, economists have discussed various tests. Many economists suggest an approach which uses the relationship of the dominant firm's prices to its costs as the primary tool to identify predatory pricing. The representative test was short-run cost-based rules brought forward by the Harvard law professors Areeda and Turner (1974: 697-733). Later on, Posner proposed long-term cost-based rules (1976). Other similar tests, such as the output expansion by Williamson (1977: 284-340), or rules governing price rises by Baumol (1979: 1-26), attempted to address the long-term evaluation in different ways by observing the predators' performance after the exit of a rival from the relevant market. All of the aforementioned tests were criticized as achieving rough justice by relying mainly on cost-price relations and not taking into account the broader economic and strategic aspects (Hovenkamp 2001: 257-337). Consequently, much broader tests, such as the rule of reason test and the structural test, were proposed. The rule of reason tests, put forward by Scherer, proposed a wide inquiry into many factors surrounding the predator's conduct including the alleged predator's intent and the actual consequences of low-priced sales (Scherer 1976: 869-899). Such a broad test, taking every piece of evidence available into consideration, may turn out not be very practical for competition authorities and therefore result in legal uncertainty (Martinez 1993: 95-128). The structural test conducts first an analysis of the relevant market (first screen) and then looks at the price-cost correlation (second screen). The structural test, a two-tier test proposed by Joskow and Klevorick, consequently limits the investigation into the low pricing to markets where favorable conditions for a successful predatory campaign exist. It does so in order to minimize the costs of enforcement errors (Joskow and Klevorick: 213-270).

At current, there do not exist international predatory pricing rules (Niels 2002; Niels and Kate 2000; Kennedy 2001). Predatory pricing is still a national issue. In the U.S., the relevant federal provisions on predatory pricing are found in the following three statutes: the Sherman Act[2] (general approach), the Clayton Act[3] (a more specific approach), and the Robinson-Patman Act[4] (an amendment). In the EU, predatory pricing is prohibited by Article 102 of the Treaty on the Functioning of the European Union.[5] Even though these legislations differ, there is almost a common understanding that predatory pricing requires market power, a requisite intent, below cost pricing and injury to competition (Marceau 1994). Nevertheless, competition authorities

[2] *See* 15 U.S.C. §§ 1-7.
[3] *See* 15 U.S.C. §§ 12-27.
[4] *See* 15 U.S.C. § 13.
[5] It provides that: 'Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market insofar as it may affect trade between Member States. Such abuse may, in particular, consist in: (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; (b) limiting production, markets or technical development to the prejudice of consumers; (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.'

may choose to emphasize different elements in different time periods. For instances, the US courts emphasized the below cost pricing in early cases but shifted to an analysis of the possibility to recoup losses. Thus, the analysis is focusing now on harm to competition (Bi 2011*a*). In the EU, much attention is still paid to cost calculation (Bi 2011*a*).

3. Antidumping laws, Predatory Pricing Rules and Substitution

Having reviewed predatory pricing in modern economic theories and competition law, the next step is to conduct a careful comparison of antidumping laws and predatory pricing rules. In this respect, scholars have concluded that the latter are more meticulous than the former in dealing with low-price selling and hence less prone to protectionist abuse (Bi 2009). To be more concrete, with regards to the objectives, modern competition policy is concerned with protecting the competitive process rather than individual competitors. It aims at promoting economic efficiency and consumer welfare, and takes the overall welfare of the country into consideration. To the contrary, antidumping policy is heavily biased towards achieving distributional fairness and the protection of the welfare of producers (Kennedy 2001; Mendes 1991; Taylor 2006). On the substantive level, predatory pricing rules are more selective in their application and more effective at distinguishing between fair and unfair trade practices. Since low-price selling may have either a pro-competitive or an anti-competitive effect, competition rules are much more careful and sophisticated in distinguishing between healthy competition and harmful predatory conducts (Bi 2009). From the perspective of basic procedural regulations, antidumping laws allow for broad discretion and therefore offer numerous possibilities for protecting domestic vested interests (Bi 2009). Competition investigations, to the contrary, are comparatively fair and equal, giving foreign competitors better due process guarantees (Bi 2009; Kennedy 2001). Lastly, with respect to remedies, the imposition of antidumping duties, price undertaking and so on under antidumping law can only raise the price of the dumped goods for the duration of the action in order to compensate the victims, but cannot prohibit the behavior from reoccurring (Bi 2009; Lloyd 2005). In practice, considering the difficulty in distinguishing between predatory behavior and fierce competition, the courts are usually reluctant to conclude the occurrence of predatory pricing (Taylor 2006). Hence, successful predatory pricing actions are extremely rare in competition law, whereas no such difficulties arise in antidumping actions (Taylor 2006). A series of empirical studies on what would happen if competition standards were applied to antidumping cases also confirm that only very few antidumping cases are candidates for closer examination on predation grounds (Bi 2011*b*).

In light of the above, this paper supports the idea that antidumping laws should be substituted by competition rules. Unfortunately, the political reality is that antidumping is not likely to be abolished soon (Wooton and Zanardi 2002). At the international level, the WTO practice shows that it was really hard to progress on negotiating stricter rules on antidumping measures. Still, antidumping reform is not visible in the WTO (Bi 2013). Therefore, the idea of gradually incorporating predatory pricing rules into antidumping investigations in bilateral and regional trade zones seems more feasible and realistic (Bi 2013).

As already mentioned in the introduction part, there have already been successful practices of substitution in a small number of RTAs. For instance, the EU, the EFTA, and the EEA have all

decided to abandon antidumping investigations among its member states and adopted a unified regional competition law. ANZCERTA has also completed the plan to harmonize domestic competition law to eliminate antidumping law. Similar practices of replacement have been achieved in both the EFTA-Singapore FTA (2003) and the EFTA-Chile FTA (2004). Some RTAs, such as MERCOSUR and the SELA, have conducting various reforms and intend to harmonize rules in the future. Efforts devoted to the aim of dealing with dumping through a harmonized competition law will most likely be expanded to more RTAs, especially among countries or areas that are like-minded on the issue of antidumping. In those RTAs relating to the Friends of Antidumping Negotiations (FANs) including China, Japan, Korea, Singapore, Chile and EFTA, an array of intra-regional modifications has been endeavored to make both the substantive and the procedural aspects of the WTO Antidumping Agreement (ADA) more stringent.[6]

The focus now turns to the ongoing negotiation of CJK FTA. As earlier mentioned, all three countries, China, Japan and Korea, recognize that competition policy is one of the key elements for the establishment of an environment in which competitive market processes can operate and thus needs to be included in a future CJK FTA. Eliminating domestic antidumping law through harmonizing competition law seems an ideal model to follow for the CJK FTA. This paper will attempt to assess such feasibility in the context of CJK FTA by examining one of the main arguments in the substitution debate, i.e., whether predatory pricing rules in the three countries are better equipped to suppress any kind of protectionist intent that could be incorporated in the implementation of their respective antidumping laws. For that purpose, the predatory pricing rules in China, Japan and Korea respectively, will be carefully studied.

III. Predatory Pricing in China

1. The Basic Structure and Objectives of Chinese Competition Law

Competition law is a relatively new field of law in China. It was not until the 1970s when China decided to transform its planned economy into a market economy that there was a need for competition law to regulate the market. Soon after the reform objective ‘Establishment of Socialist Market Economic System’ was determined in the 14th National Congress of Communist Party of China in October, 1992, the Standing Committee of the National People’s Congress passed the Law of the People’s Republic of China against Unfair Competition (CUCL) in September, 1993, which is the first Chinese competition law.[7] This law is mainly concerned with unfair competitive conduct in the market, such as unfairly counterfeiting a registered trademark, infringing upon trade secrets, or fabricating or spreading false information. This kind of conduct was easier to regulate, because the companies committing the infringements were not the

[6] WTO ADA substantive rules-plus modification including: Increasing the threshold for determining negligible imports from two per cent to five per cent; Increasing the standards for *de minimis* dumping margins in investigations from two per cent to five per cent; Eliminating the practice of ‘zeroing’ in calculating dumping margins; Use of the ‘lesser duty’ rule; An agreement to eliminate the application of any third country dumping provisions as otherwise permitted by Article 14 of the AD Agreement; Recognition of the ‘public interest’ in making AD determinations. WTO ADA procedural rules-plus modification including: the referral of any antidumping dispute to a ‘joint committee’; A pre-initiation consultation between the governments before initiating an antidumping proceeding. *See* Emerson 2008.

[7] The CUCL was adopted at the third meeting of the Standing Committee of the Eighth National People's Congress on September 2, 1993 and promulgated by Order No.10 of the President of the People's Republic of China on September 2, 1993.

state-controlled big companies but the small and medium-sized companies (Huang 2007). This does not take away that certain restraints, such as predatory pricing, monopoly abuse by public utility enterprises or governments, were also set forth in the CUCL. This was done because the legislator was of the opinion that such conduct needed to be regulated, even in the absence of what is formally known as a competition law (An 2007).

The second legislation dealing with competition is the Antimonopoly Law of the People's Republic of China (CAML), published in 2007.[8] The drafting of this law started actually at the same time as the CUCL, but due to the immature market conditions in China, the drafting process took much more time. Similar to other countries, the CAML covers three key areas of restrictive competition conducts, i.e., monopoly agreements (horizontal and vertical restraints), abuse of a dominant market position, and concentration of undertakings. Besides, due to the peculiar circumstances in China, abuse of administrative power to eliminate or restrict competition has been added as a separate category of forbidden conduct.[9] In this law, predatory pricing is included in the section of the abuse of a dominant market position.

Regarding the objectives of these Chinese competition laws, the first article of each law defines the respective aim. The CUCL is adopted with a view to safeguarding the healthy development of socialist market economy, encouraging and protecting fair competition, repressing unfair competition acts, and protecting the lawful rights and interests of business operators and consumers.[10] The CAML is enacted for the purpose of preventing and restraining monopolistic conducts, protecting fair competition in the market, enhancing economic efficiency, safeguarding the interests of consumers and social public interest, promoting the healthy development of the socialist market economy.[11] It can be said that, even though both laws promote the healthy development of a socialist market economy by advocating the same fundamental objective of fair competition, these laws do so by addressing different conduct. The CUCL is more concerned with unfair competition and protecting defined competitors, whereas the CAML cares more about restrictive competition and protecting competitive process (An 2007). It can be noted that free competition is not part of either law.

It is also worth to mention that the healthy development of a socialist market economy is also advocated by several other laws, of which the Price Law of the People's Republic of China 1997 (CPL) is worth to mention in this context. The CPL has been used to deal with conduct that in other countries would have fallen under competition law.

2. Predatory Pricing Rules in China

In China, the terms international dumping and domestic dumping are frequently used by scholars to differentiate the conduct of low-price selling in antidumping law and in competition law respectively (Li 2006). Predatory pricing, often called domestic dumping, is currently subjected to both the CUCL and the CAML. According to Article 11 of Chapter Two CUCL, the chapter on Acts

[8] The CAML was adopted at the 29th session of the Tenth National People's Congress on August 30, 2007, and will be taken in effect on August 1, 2008.

[9] *See* the CAML, Chapter V.

[10] *See* the CUCL, Article 1.

[11] *See* the CAML, Article 1.

of Unfair Competition, an act of unfair competition exists in cases where a business operator sells its commodities at a price lower than the cost and that with a purpose of eliminating its competitors, rather than with the intent of selling perishables or live commodities, disposing of commodities near expiration of their validity duration or those kept too long in stock, seasonal sales, selling commodities at a reduced price for the purpose of clearing off debts, change of business or suspension of operation.[12]

Article 17 (2) of Chapter Three CAML, the chapter on Abuse of a Dominant Market Position, regulates predatory pricing and stipulates: 'Undertakings holding dominant market positions are prohibited from doing the following by abusing their dominant market positions: … ;(2) without justifiable reasons, selling commodities at prices below cost;…'[13]

Moreover, as a price related conduct, predatory pricing is also regulated in the CPL. According to the Article 14 (2) of Chapter Two CPL, the chapter on Price Acts of the Operators, no manager may not commit any of the following illegitimate acts in pricing: '…; (2) besides disposing of perishable, seasonal and overstocked commodities at reduced prices according to law, dumping commodities at prices lower than production cost in order to drive out rivals or monopolize the market, thus disrupting normal production and operational order and impairing the interests of the State or the lawful rights and interests of other managers; …'[14] Such rules are further specified in two provisions to the CPL, i.e., the Provisions on Preventing the Conduct of Low-Price Dumping 1999 (Provisions 1999),[15] and the Interim Provisions on Preventing the Acts of Price Monopoly 2003 (Interim Provisions 2003).[16] It should be noted that, predatory pricing rules in the CPL and the relevant provisions do not merely reiterate what had already been regulated in the CULC and CAML. They had rather supplementary role and, where possible, an interpretative one.[17] In other words, the CPL and its provisions elaborated the rules on predatory pricing for the early-enacted CUCL, and filled the gap by regulating conduct that should be covered by the CAML. After the CAML came into force, the Provisions on Anti-pricing Monopoly 2011 (Provisions 2011)[18] replaced the Interim Provisions 2003, pursuing more an interpretive role for conduct the CPL used to exclusively regulate.

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[12] 'A business operator shall not, for the purpose of pushing out their competitors, sell their commodities at prices lower than costs. Any of the following shall not be deemed as an unfair competition act: (1) Selling perishables or live commodities; (2) Disposing of commodities near expiration of their validity duration or those kept too long in stock; (3) Seasonal sales; or (4) Selling commodities at a reduced price for the purpose of clearing off debts, change of business or suspension of operation.' Official translated version is available at: http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383803.htm (last visited July 29, 2014).

[13] Official translated version is available at: http://www.npc.gov.cn/englishnpc/Law/2009-02/20/content_1471587.htm (last visited July 29, 2014).

[14] Official translated version is available at: http://www.npc.gov.cn/englishnpc/Law/2007-12/11/content_1383577.htm(last visited July 29, 2014).

[15] Order of the National Development and Reform Commission (No. 2) issued in August 3, 1999.

[16] Order of the National Development and Reform Commission (No. 3) issued in June 18, 2003.

[17] Basically speaking, similar as most of the other countries, the purpose of the price law in China is to standardize the price acts from a macro perspective, including giving play to the role of price in the rational allocation of resources, stabilizing the overall price level of the market, and promoting the sound development of the socialist market economy. While the difference is that, the price law of China also needs to protect the lawful rights and interests of the consumers and operators from a micro perspective, that is, to regulate the actual unfair price conducts and predatory dumping is one of them.

[18] Order of the National Development and Reform Commission (No. 7) issued in December 29, 2010.

Criterion I: Predatory Pricing in the CUCL

Predatory pricing is regulated in Article 11 CUCL. The CPL and the Provisions 1999 further specify the content of this article. In order to speak of predatory pricing, three main conditions have to be fulfilled. The first one is selling at a price below cost. The Provisions 1999 specifies how to calculate the cost. Article 4 Provisions 1999 defines two different kinds of cost, i.e., the cost of production and the cost of operation. The cost of production refers to manufacturing costs plus period expenses (consisting of management expenses, finance expense as well as sale expense). The cost of operation includes merchandise procurement costs and circulation expenses (consisting of operation expenses, management expenses, and financing expenses). Regarding below cost pricing, Article 5 of the Provisions 1999 stipulates that it means the operator sales the commodities below a reasonable individual cost. In cases where such individual cost cannot be identified, the average cost of the whole industry of the commodities in certain floating scope shall be applied by the relevant authority. Article 7 Provisions 1999 exemplifies eight typical instances of below-cost selling, including: (1)the price at which the manufacturer sells the commodities is lower than the cost of production, or the price at which the operator sells the commodities is lower than the cost of merchandise procurement cost; (2) to make the price below the relevant cost by the means of substituting high-quality, high-level commodities for low-quality, low-level ones; (3) to make the price below the relevant cost by the means of discount, subsidy, and so on; (4) to make the price below the relevant cost by the means of unequal exchange of materials; (5) to make the price below the relevant cost by the means of paying-a-debt-in-kind Assets; (6) to make the price below the relevant cost by the means of more sales, but less or no invoices; (7) to make the price below the relevant cost by the means of larger quantities, quantity sales and so on; (8) to make the price below the relevant cost by the means of lowering the bidding price in a bid.[19]

The second condition to speak of predatory pricing under the CUCL, is the purpose of squeezing out other competitors and so obtain the sole occupancy in the market. For instance, in order to open the local market for its newly established branch, by the means of lowering the price at large scale, the operator tries to squeeze out the other competitors and then monopolize this local market. Even though there do exist the case of which the purpose is obvious or comparatively easy to prove, It is without doubt that the examination of the subjective purpose is very hard and involving much discretion.[20] Therefore, some exemptions of purposes, such as the disposal of fresh and living commodities, seasonal commodities and overstocked commodities at reduced prices in accordance with law, have been provided as defense. Article 6 Provisions 1999 also specifies such stipulation to include five circumstances: (1) selling those commodities which are kept too long in stock; (2) disposing of commodities out of or near the expiration of the season; (3) disposing of commodities near the expiration of their guarantee period or validity

[19] The Provisions 1999 here and below is translated by the authors.

[20] In practice, it is quite hard to directly confirm the predatory purpose, only in very few circumstances. For example, one of the 5 Typical Illegal-Price-Conduct Cases is about one company trying to dump beers in the market of Shangdong Province, 2007. The relevant administrative authority in charge of the investigation has confirmed the purpose of ‘sole occupancy of the market’, mainly based on the statements of the company staff, which pointed out that the company has set ‘occupying the market through low price’ strategy as early as the setup period. *See* The National Development and Reform Commission 2007.

duration; (4) perishables or live commodities near the expiration of their guarantee period; (5) selling commodities at a reduced price for the purpose of clearing off debts, bankruptcy, change of business or suspension of operation .

The third condition is the injury, which means evaluating whether the low-price selling has disrupted the normal production and management order to the detriment of national interests or the lawful rights and interests of other operators. Such as incurring the malignant low-price competition, hindering or threatening the establishment, existence or development of the other competitors, or bringing about the loss of tax revenue and so on. Compared with the cost calculation, this condition of proving the injury is much easier. In practice, as long as the above two conditions are satisfied, the injury is deemed to exist. [21]

Criterion II: Predatory Pricing in the CAML

For predatory pricing in the CAML, stipulated in Article 17(2), four conditions need to be fulfilled (An 2007): (1) the existence of a dominant market position; (2) pricing below costs; (3) the intent to reinforce the dominant position; and (4) competition restraining effect. Each of these issues will be discussed below.

Prior to investigating whether the price is below cost, a dominant position should be ascertained first. The CAML provides two approaches. One is regulated in the Article 18 CAML, which refers to all relevant factors including market share, competition situation, ability to control the sales markets or the raw material purchasing markets, financial status and technical conditions, the degree of dependence, entry to relevant market and so on, to determine the dominant market position.[22] Apart from that, in order to save enforcement costs and conduct an efficient supervision, the CAML, referring to the experiences of Germany and Korea, provides a way to presume a dominant market position via calculating the relevant market share (An 2007). Article 19 CAML states that a dominant market position can be presupposed if one of the following three conditions is fulfilled:(1) the market share of one undertaking accounts for half of the total in a relevant market; (2) the joint market share of two undertakings accounts for two-thirds of the total, in a relevant market; or (3) the joint market share of three undertakings accounts for three-fourths of the total in a relevant market.[23] It can be seen that Article 19 CAML offers an

[21] This can be indicated from the Answers to Some Questions of Judging Unfair Competition Cases, the High Court of Beijing (Interim). The 14th question is 'whether the conduct of unfair competition must result in injury', while the court is of the opinion that the conduct of unfair competition is such conduct as disrupting the normal social economic order, and injuring the lawful rights and interests of the other operators to trade and compete under equal conditions. Therefore, generally speaking, as long as the conduct of unfair competition can be proved, it can be taken as violation. *See Beijing Shi Gaoji Renmin Fayuan《Guanyu Shenli Fan Buzhengdang Jingzheng Anjian Jige Wenti De Jieda (Shixing)》* (The High Court of Beijing <The Answers to Some Questions of Judging Unfair Competition Cases (Interim)>)(No.73 1998).

[22] According to Article 18 CAML, a dominant market position of an undertaking shall be determined on the basis of the following factors: (1) its share on a relevant market and the competitiveness on the market; (2) its ability to control the sales market or the purchasing marker for raw and semi-finished materials; (3) its financial strength and technical conditions; (4) the extent to which other business mangers depend on it in transactions; (5) the difficulty that other undertakings find in entering a relevant market; and (6) other factors related to the determination of the dominant market position held by an undertaking. Official translated version is available at: http://www.npc.gov.cn/englishnpc/Law/2009-02/20/content_1471587.htm (last visited July 29, 2014).

[23] Article 19 CAML stipulates that, an undertaking holds a dominant market position may be deduced from any

efficient way to presume a dominant market position, whereas Article 18 CAML is a comprehensive way to determine a dominant market position (Jiang 2007). It goes without saying the outcome of the former may be often disputed.

In relation to the cost calculation, the CAML does not mention more than below cost pricing in Article 17(2). Therefore, similar to Criterion I, the CPL and the Provisions 1999 are referred to in order to determine when there is a price below cost or not.

To constitute predatory pricing, the firm needs to engage in below cost pricing with the intent of maintaining or reinforcing the dominant position. The intent can be deducted from the fact that the dominant company continuously sells commodities at a price below cost in order to repeal the competitors out of the market, prohibits the new entry of companies, and successfully monopolizes the market. Although the cost of this predatory behavior is very high, the dominant company can anticipate that the future profit exceeds the current lost (An 2007). The below-cost selling is not deemed to be predatory pricing on the condition that there are legitimate reasons, which are specified in the Article 12 of the Provisions 2011. These reasons include selling live commodities, seasonal sales, disposing of commodities near expiration of their validity duration or those kept too long in stock, or selling goods at discount with the aim to pay off debts, shift to other industries or ceasing production, or selling for promotion of new products.[24]

It is also required to examine the competition restraining effect of the selling below the price. This condition is not applied very strictly, as it already is visible under the investigation of the third condition (An 2007).

Criterion I versus Criterion II

Comparing Criterion I and II, it is obvious that the main idea of these criteria is similar. In order to speak of predatory pricing, the criteria require selling at a price below cost and the intent to exclude other competitors to monopolize the market, and this in the absence of any reasonable exemptions. There exist, however, two differences. Firstly, Criterion I does not require dominant market position whereas Criterion II does. Consequently, under Criterion I, predatory pricing cases can arise in China that could never arise in the U.S. or the E.U., where only firms with market power are deemed to be able to conduct predatory pricing. Secondly, taking the differences in the basic objectives of the CUCL and the CAML into consideration, Criterion I is more concerned with unfair competition and the negative effects to competitors, while Criterion II cares about restrictive competition and the negative effects to competition process.

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one of the following circumstances: (1) the market share of one undertaking accounts for half of the total in a relevant market; (2) the joint market share of two undertakings accounts for two-thirds of the total, in a relevant market; or (3) the joint market share of three undertakings accounts for three-fourths of the total in a relevant market. Under the circumstance specified in Subparagraph (2) or (3) of the preceding paragraph, if the market share of one of the undertakings is less than one-tenths of the total, the undertakings shall not be considered to have a dominant market position. Where an undertaking that is considered to hold a dominant market position has evidence to the contrary, he shall not be considered to hold a dominant market position. Official translated version is available at: http://www.npc.gov.cn/englishnpc/Law/2009-02/20/content_1471587.htm (last visited July 29, 2014).

[24] Order of the National Development and Reform Commission (No. 7) issued in December 29, 2010.

Since Criterion II came only recently into existence, the relationship between the application of Criterion I and Criterion II to practical predatory pricing cases is still unclear. This issue has been raised in a recent case, the *Beijing Republic Book Co. Ltd versus Beijing Century Joyo Information Technology Co. Ltd* case of 2009. In this case, the court rejected without reasoning the defendant's request to apply the CAML instead of the CUCL.[25] The case concerns two book companies, the Beijing Gonghe Liandong Books Company (Liandong) and the Beijing Shiji Zhuoyue Xinxi Jishu Company (Zhuoyue). The former sued the latter twice in the Court of Chaoyang District, claiming that Zhuoyue has been engaged in selling two books at a price below cost and that this constituted an act of unfair competition. In both cases, Zhuoyue attempted to defend itself by arguing that the applicable law in this case should be the CAML and not the CUCL. Relying on CAML, Zhuoyue could argue that their low-price selling benefited the consumers and that it thus did not constitute an illegal conduct. The court rejected such defense for both suits by simply stating that Liandong and Zhuoyue are competitors. Therefore, this case concerns unfair competition instead of monopolization.

It is worth recalling that, as analyzed above, in China certain restraints of competition that should be governed under the CAML were also covered in the CUCL. This requires a harmonization of the two legislations and this has started. According to some officers, the basic principle of such an exercise is to delete all the overlapping provisions in the CUCL. However, as to the issue of predatory pricing, there is still disagreement.[26] One group of scholars is of the view that predatory pricing can be taken as either an unfair competition conduct or a restraint of competition and should thus be regulated in both laws (Wang 2010). The other group argues that with the enactment of the CAML, all conducts, including administrative monopoly, predatory pricing and so on, should be dealt with exclusively under the CAML (Shao and Fang 2012; Huang 2007). The latest draft of an amendment to the CUCL, dating from 2010, shows no change to the current predatory pricing rules. Therefore, it is safe to suggest that two sets of criteria concerning predatory pricing remain applicable in China.

IV. Predatory Pricing in Japan

1. The Act on Prohibition of Private Monopolization and Maintenance of Fair Trade

The Japanese competition law, the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade often referred to as the Japanese Antimonopoly Law (JAMA), came into effect in April 14, 1947. Several amendments have been made thereafter, with the latest one taking force in June 27, 2012. The JAMA consists of 118 articles, divided into twelve chapters. The substantive content includes private monopolization, unreasonable restraint of trade, and unfair trade practices.

According to Article 1 JAMA, the purpose of this Act is ‘to promote fair and free competition, to stimulate the creative initiative of firms, to encourage business activities, to heighten the level of employment and actual national income, and thereby to promote the democratic and

[25] The Court of Chaoyang District, awarded No.00016 and No.00026.

[26] *See* Email from Ma Zhengping, Office Worker, *The Commission for Legal Affairs under the Standing Committee of the National People's Congress*, to Bi Ying, *Zhejiang University* (Apr. 24, 2008) (on file with the authors).

wholesome development of the national economy as well as to assure the interests of general consumers.'[27] It has been argued that the last part, promoting the democratic and wholesome development of the national economy, is the ultimate objective of the JAMA. To achieve this objective, promoting fair and free competition has been identified as the most effective way (Matsushita 2006).

2. Predatory Pricing Rules in Japan

Following the revision of the JAMA in 2009, predatory pricing has been defined and specified in a much more clear way in the text of the law. Basically speaking, there are two provisions in the JAMA concerned with predatory pricing: (1) as an unfair trade practice defined in Article 19 JAMA, which is further explained in Article 2(9) JAMA and (2) as private monopolization inscribed in Article 3 JAMA.

Criterion I: Predatory Pricing as A kind of Unfair Trade Practices

Below cost pricing can be viewed as a kind of unfair trade practices. This is stipulated in Article 2(9) JAMA. This article elaborates on the unfair trade practices that are generally forbidden by Article 19 JAMA. Article 2(9)(iii) JAMA stipulates that one of the unfair trade practice is 'without justifiable grounds, supplying goods or services continuously for a consideration which is excessively below the costs required for the supply.' Further, in elaboration of Article 2(9)(vi) JAMA, the Japan Fair Trade Commission (JFTC) Public Notice No. 15, also called the Designation of Unfair Trade Practices and last revised in 2009,[28] stipulates in Section 6 that an unfair trade practice would also be 'unjustly supplying goods or services for a low consideration' with the effects 'tending to cause difficulties to the business activities of other firms.' The legislative provisions have been further explained by the JFTC's Guidelines concerning Unjust Low Price Sales under the Antimonopoly Act (GULPS), revised in 2009 to offer a more comprehensive description.[29]

According to GULPS, three requirements must be fulfilled to find an illegal unjust low price sales under Article 2(9)(iii) JAMA. The first requirement is the mode of price cutting, i.e., whether or not a consideration is excessively below the costs required for the supply. In practice this should be examined case by case. Normally, a price that is lower than the variable-featured costs, referring to variable expenses, is presumed to be a consideration 'excessively below the costs required for the supply.' Whether a cost is categorized as a variable-featured cost is based on whether the cost increases or decreases depending on the supply quantity of the price-cut goods, or whether the cost is closely related to the supply of the price-cut goods. Production costs, purchasing costs, as well as operating costs may be regarded as variable-featured costs. It is noted that, if the price is equal to or higher than the variable-featured cost, such a price is not yet

[27] Official translated version is available at: http://www.jftc.go.jp/en/legislation_gls/amended_ama09/index.html (last visited July 29, 2014).

[28] Official translated version is available at: http://www.jftc.go.jp/en/legislation_gls/unfairtradepractices.files/unfairtradepractices.pdf (last visited July 29, 2014).

[29] The discussion here and below is based on the official translated version of GULPS available at: http://www.jftc.go.jp/en/legislation_gls/imonopoly_guidelines.files/unjustlowprice.pdf(last visited July 29,2014).

regarded as an unjust low price sales. For that, there has to be a continuous low pricing, which means that the conduct of price cutting either occurred repeatedly over a considerable period of time or is objectively predicted for such duration judging from the sales policy. The second requirement is the tendency of causing difficulties to the business activities of other firms. This does not necessarily require the difficulty in actuality but also a concrete possibility, which will judge case by case and comprehensively taking into account the actual status of other firms, the size and type of business, the quantity of goods, the duration, the status of advertising and publicity, the characteristics of the goods and the intent or purpose. The last requirement is the absence of justifiable grounds for the price cutting. This could include, for example, selling perishable goods or seasonable goods.

Even in case where price cutting does not satisfy the above requirements for unjust low price sales under Article 2(9)(iii) JAMA, or in other words, even when a price cutter supplies goods at a price equal to or higher than the variable-featured costs but lower than the total cost of sales, or supplies goods at a price lower than the variable-featured costs one time only, unjust low price sales can still be established under Section 6 of the Designation of Unfair Trade Practices. This Section sets forth that ‘in addition to any act that falls under Article 2, paragraph (9), item (iii) of the Act *[JAMA]*, unjustly supplying goods or services for a low consideration, thereby tending to cause difficulties to the business activities of other firms.’

Criterion II: Predatory Pricing as A kind of Private Monopolization

Below-cost pricing can also be deemed as a private monopolization subject to Article 3 JAMA.[30] Private monopolization is understood, according to Article 2(5) JAMA as ‘such business activities, by which any entrepreneur, individually or by combination or conspiracy with other entrepreneurs, or by any other manner, excludes or controls the business activities of other entrepreneurs, thereby causing, contrary to the public interest, a substantial restraint of competition in any particular field of trade.’ These provisions are further defined and elaborated in the Guidelines for Exclusionary Private Monopolization under the Antimonopoly Act (GEPM) issued by the JFTC in 2009.[31]

According to GEMP, below cost pricing involves an assessment conducted case by case over whether the price is set below the cost which ‘would not be generated unless the product was supplied.’ This is judged based on whether the cost will increase or decrease depending on the supply quantity of the price-cut goods or whether the cost is closely related with the supply of the price-cut goods in a reasonable period. Price-cutting for products, such as perishable food, seasonal good, inferior product and so on, is deemed proper and shall be exempted from the application of Article 3 JAMA.

Another condition that needs to be fulfilled in the assessment of below-cost pricing, is whether it would ‘cause difficulty in the business activities of an equally or more efficient competitor’. This

[30] Official translated version is available at: http://www.jftc.go.jp/en/legislation_gls/amended_ama09/index.html (last visited July 29, 2014).

[31] The discussion here and below is based on the official translated version of GEPM available at: http://www.jftc.go.jp/en/legislation_gls/imonopoly_guidelines.files/guidelines_exclusionary.pdf (last visited July 29, 2014).

requires the JFTC to comprehensively consider various factors, which include:

I. The entire market of the product, such as the characteristics of the product, economies of scale, degree of differentiation of the product, distribution channels, dynamics of the market as well as difficulty of market entry;
II. Positions of the said firm and the competitors in the market, such as the share of the product, its ranking, brand value of the product, excess supply capacity, scale of operation, and proportion of the relevant product in all the businesses of the firm;
III. Period of the conduct and turnover and quantity of the product;
IV. Conditions of the conduct, including the intent, advertising, and publicity associated with the price-cutting.

Criterion I versus Criterion II

Comparing Criterion I with Criterion II, the major difference lies in the requirement of market power. Regarding Criterion II, unlike China, Korea and the other countries, a dominant position is not a prerequisite. However, most of the firms subject to the JFTC's investigation in the past cases concerning exclusionary private monopolization held a large market share within the concerned product market. It is acknowledged that the larger the share is, the more likely the alleged conduct results in a substantial restraint of competition. The GEPM also states that the JFTC will prioritize cases where the share of the product that the said firm supplies exceeds approximately 50% after the commencement of such conduct. Apart from that, the surcharge of the predatory pricing under Criterion I is 6% of the total amount of sales whereas that under Criterion II is 3%.

V. Predatory Pricing in Korea

1. Monopoly Regulation and Fair Trade Act

At the core of Korean competition policy is the Monopoly Regulation and Fair Trade Act (MRFTA), enacted on December 31, 1980. This Act has been thoroughly revised in 1990, and received its current version with the latest amendment was of December 2, 2011. The MRFTA consists of 71 articles divided into fourteen chapters. The substantive content is to be found from Chapter 2 to 5, including: a prohibition on the abuse of market dominance, a prohibition on restrictions on the combination of enterprises and suppression of economic power concentration, a prohibition on restrictions on improper concerted practices, and a prohibition on unfair trade practices.

According to Article 1 MRFTA, the purpose of this Act is to stimulate the creative initiative of enterprisers, to protect consumers, and to strive for the balanced development of the national economy by promoting fair and free competition through the prevention of the abuse of market dominance and excessive concentration of economic power by enterprisers and through regulation of improper concerted practices and unfair trade practices.[32] The MRFTA declares that the promotion of fair and free competition is the overall objective. However, another goal of the MRFTA is 'to strive for balanced development of the national economy by preventing . . . the excessive concentration of economic power.' In this regard, Korean competition law differs from

[32] Official translated version is available at: http://eng.ftc.go.kr/files/static/Legal_Authority/Monopoly%20Regulation%20and%20Fair%20Trade%20Act_mar%2014%202012.pdf (last visited July 29,2014).

U.S. competition law, which arguably purports to maximize economic efficiency and consumer welfare. It should be noted that, the dominance of chaebol over the Korean economy has compelled to implement far more stringent regulations (Yi and Jung 2007).

2. Predatory Pricing Rules in Korea

The MRFTA has two different approaches towards predatory pricing. On one hand, Article 23 MRFTA, a provision on prohibition of unfair business practices, forbids predatory pricing by non-dominant firms. On the other hand, Article 3-2(5) MRFTA, a provision on the prohibition of abuse of a dominant market, regulates predatory pricing by dominant firms.

Criterion I: Predatory Pricing by Non-dominant Firms

Article 23 MRFTA stipulates that no entrepreneur shall commit unfair business practices, and one of them is conduct aiming to unfairly exclude competitors. Further information on these unfair business practices, and thus also the one on unfairly excusing competitors, specified in the Presidential Enforcement Decree of the Monopoly Regulation and Fair Trade Act (EDMRFTA) and the Guidelines for Review of Unfair Trade Practices (GRUTP) of the Korean Fair Trade Commission (KFTC). These instruments to refer to 'the act that could eliminate a competitor of the business in question or its affiliate by going on supplying goods or services at a considerably lower price than the cost of supply without a justifiable reason or supplying goods or services at a lower price unfairly.' [33]

In Korea, predatory pricing by non-dominant firms is called unfair dumping, and can be divided into two kinds: continuous dumping and temporary dumping. Continuous dumping involves the repeated supply of goods or services at a considerably lower price than the supply cost for a considerable period of time. Temporary dumping means supply of goods or services at a considerably low cost once or for a short period of time (within a week). In judging whether the price is below cost, the manufacturing cost (referring to the cost of materials, personnel expenses, other manufacturing expenses, and general operation cost) or purchasing cost (referring to the actual purchase cost) shall be taken into account. In cases where there are special circumstances such as an affiliation or a partnership, the purchasing cost shall be based on the trading cost among general businesses.

Although selling below cost and eliminating the competitor are two essential conditions for both continuous dumping and temporary dumping, the burden of proof is slightly different between these two types of dumping.

Continuous dumping follows a per se principle of illegality. This means that, once selling below cost is established, this type of dumping shall be deemed to have anti-competitive effects. The presumption is rebuttable, but one of the following justifications needs to be put forward by the infringer:

I. The market is characterized by the absence of market barriers, allowing for new firms to

[33] The discussion here and below is based on the official translated version of GRUTP available at: http://eng.ftc.go.kr/files/static/Legal_Authority/Guidelines%20for%20Review%20of%20Unfair%20Trade%20Practices_mar%2014%202012.pdf(last visited July 29,2014).

establish as competitor;

II. The goods concerned are approaching the expiry date, are defective or are seasonal goods, provided they are sold in a limited amount;
III. Dumping is done during a period in which the supply is considerably higher than the demand;
IV. Dumping happens within a restricted period to advertise when making a new entry to the market or opening a new business;
V. Dumping occurs to prevent bankruptcy or dumping carried out by a business that has been declared bankrupt;
VI. There is an enhancement of effectiveness or consumer welfare and this exceeds the anticompetitive effect of the continuous dumping;
VII. Other reasons.

In case of temporary dumping, pricing below cost will be considered illegal if there is a great possibility of excluding competitors. This will be judged based upon the following factors:

I. The purpose of dumping is to eliminate the competitor from the market or to establish a monopolistic position in the market;
II. The competitor has difficulty performing its business activities or it may face a crisis (e.g., bankruptcy due to dumping);
III. The structure of the market is so that, once the competitor is eliminated, only few firms remain and the market concentration becomes high;
IV. There exist entry barrier, such as economy of scale, permits or licenses, making it difficult for new firms to enter or easy or possible for the competitor being eliminated.

Still, even if the examination leads to the conclusion that the competitor affected by temporary dumping could get excluded, such conduct can be considered legal for similar justifications applied to continuous dumping.

Criterion II: Predatory Pricing by Dominate Firms

Article 3-2(5) MRFTA, dealing with the prohibition of abuse of dominant market position, sets forth that no market-dominating enterprise shall commit any of the abusive acts including the act 'unfairly excluding competitive enterprises, or which might considerably harm the interests of consumers.'[34] Categories or standards for such acts are determined by the Presidential Decree EDMRFTA and include the acts where 'there is a possibility of excluding a competitor by supplying goods or services at unreasonably low prices…compared to the normal transaction price.' [35] The Guidelines for Review of the Abuse of Market Dominant Position (GRAMDP), issued by the KFTC, further elaborates the detailed types of and Criteria.[36]

[34] Official translated version is available at: http://eng.ftc.go.kr/files/static/Legal_Authority/Monopoly%20Regulation%20and%20Fair%20Trade%20Act_mar%2014%202012.pdf(last visited July 29, 2014).

[35] Official translated version is available at: http://eng.ftc.go.kr/files/static/Legal_Authority/Enforcement%20Decree%20of%20The%20Monopoly%20Regulation%20and%20Fair%20Trade%20Act_mar%2014%202012.pdf(last visited July 29, 2014).

[36] The discussion here and below is based on the official translated version of GRAMDP available at: http://eng.ftc.go.kr/files/static/Legal_Authority/Guidelines%20for%20Review%20of%20the%20Abuse%20of%20Market%20Dominant%20Position_mar%2014%202012.pdf(last visited July 29, 2014).

There are three conditions for predatory pricing within the abuse of dominance Article. First, the concerned entrepreneur should have a dominant position in the relevant market. Several factors, including market share, entry barriers, relative size of the competitors, possibility of a cartel among competitors, the existence of similar goods and the adjacent markets, are comprehensively considered. In cases where the entrepreneur with the largest market share has more than 50% market share or when the combined market share of the top three entrepreneurs exceeds 75%, excluding an entrepreneur whose annual sales turnover or purchases in a particular business area amount to less than KRW 4 billion, market dominance is presumed under Article 4 MRFTA.

Second, the concerned entrepreneur has supplied goods or services at a price lower than the normal trading price. This is the most essential condition for proving illegal predatory pricing. In order to determine whether this condition is fulfilled, the difference with the normal trading price, the quantity and period of supply or purchase, the nature of the concerned goods or services and the supply and demand situation in the market are comprehensively considered. It should be noted that, different from other countries, here the price has to be below the normal trading price and not below the cost. This means that, even if a dominant entrepreneur sets the price higher than the cost, it can still be considered as predatory. The normal trading price is usually regarded as the price guaranteeing minimal profits in the concerned market (Korea to ICN 2008).

Third, in addition to the fact that the price was set at a level lower than the normal trading price, it has to be proven that such practices should have the potential to exclude competitors. In other words, the anti-competitive effect on the relevant market only exists if there is a threat to other competitors. To determine this potential, the purpose of the conduct, the existence of similar goods or services on the market and the adjacent markets, the concerned entrepreneur's and its competitors' position on the market, and their financial status will be taken into consideration. The firm's intent is an important factor for proving illegality of market dominance abuse. In practice, internal documents showing the intent of excluding competitors are critical evidence. Another factor could be a continued discount. The potential to exclude competitors of such kind of discount is recognized just with the proof of below-cost pricing without the need to prove other factors. Despite an entrepreneur engaging in pricing below the trading standard, this conduct can still be justified if the entrepreneur can prove that price reduction results in an increase in efficiency or consumer welfare that substantially offsets the harm caused by the conduct (Korea to ICN 2008).

Criterion I versus Criterion II

Comparing Criterion I with Criterion II, a great difference can be found between predatory pricing by dominant firms and that by non-dominant firms in term of their conditions. The former requires the entrepreneur to have a dominant position and the price must be lower than the normal trading price, whereas the latter requires, for entrepreneurs without dominance, to investigate the pricing policy and explore whether it has the potential to exclude competitors. The difference can be explained as follows. Regulating predatory pricing by a dominant firm is aims to prevent that this firm can maintain or strengthen its dominance by excluding

competitors, whereas predatory pricing by a non-dominant firm is regulated to prevent a non-dominant firm to gain market dominance by forcing other competitors out of the market (Korea to ICN 2008).

VI. The Substitution Debate—Half Yes, Half No

1. Criterion I Predatory Pricing – A Complicating Factor

After exploring predatory pricing in China, Japan and Korea, respectively three economic strongholds in the East Asian economy, one commonality has been found in the structure to deal with predatory pricing. Each of these countries has two sets of competition rules concerning predatory pricing.

Criterion II on predatory pricing, summarized in the Table 1 below, views low pricing strategies as potentially illegal under the prohibition of abuse of dominant market positions (Article 17 CAML and Article 3-2(5) MRFTA) or under the prohibition on exclusionary private monopolization (Article 3 JAMA). Accordingly, although the specific requirements are slightly different in each of the countries, the proof of dominance or substantial market power is required and therefore has hardly led to any successful cases.

Table 1: Criterion II under Each of the Three Countries

Country / Requirements	China	Japan	Korea
Market Power	Dominant position	A large share of the markets	Dominant position
Intention	Exclusionary	Exclusionary	Exclusionary
Price Calculation	Price below cost	Price below cost ★In practice, the JFTC will substitute the economic test AAC (average avoidable cost) with the cost that would not be generated unless the product was supplied.	Price lower than the normal trading price
Injury to Competition	Restraining competition	Cause difficulty in the business activities of an equally or more efficient competitor.	The potential to exclude competitors, or anti-competitive effect on the relevant market

The substitution debate faces problems with the competition rules explained under Criterion I and summarized in Table 2 below. Criterion I mainly deals with predatory pricing as an unfair competition practice.

Table 2: Criterion I under Each of the Three Countries

Country / Requirements	China	Japan	Korea
Market Power	No	No	No
Intention	Squeezing out other competitors or of sole occupancy of the market.	Exclude other entrepreneurs	Eliminate the competitor
Price Calculation	Price below cost	Price below cost	Price below cost

	★ Normally cost refers to ‘cost of production’ or ‘cost of operation’.	★ The Economic approach of ‘variable-featured costs’ is introduced. The burden of proof is slightly different between ‘unjust low price sales’ and ‘unjustly supplying goods or services for a low consideration under Section Six of the Designation of Unfair Trade Practices’.	★ ‘manufacturing cost’ or ‘purchasing cost’ shall be taken into account. The burden of proof is slightly different in cases of ‘continuous dumping’ and ‘temporary dumping’.
Injury to Competition	Disrupted the normal production and management order to the detriment of national interests or the lawful rights and interests of other operators.	Tend to cause difficulties to the business activities of entrepreneurs that are just as efficient as or more efficient than the price cutter and could harm the fair competition order.	Anti-competitive effects

In order to see whether the arguments of substituting antidumping laws by national competition could apply in the context of East Asian countries, not only Criterion II conditions but also Criterion I conditions should be subject to an examination. Criterion II conditions could fortify the argument that competition law can fulfill the mission of substituting antidumping laws. However, the existence of predatory pricing rules under Criterion I may complicate the substitution story. Several issues can be identified.

First, predatory pricing rules under Criterion I are similar to antidumping laws in terms of their objective. Both Criterion I and antidumping laws set fairness as their essential objective. Accordingly, they are also expected to protect small and weak competitors rather than the competitive process or consumer interests. In other words, the Criterion I provisions are highly susceptible to rent seeking. Predatory pricing rules under Criterion II, which considers predatory pricing as a typical illegal conduct under the prohibition of abuse of dominant market position (monopolization), are disciplined by economic rationality. Underlying this unique dichotomy between Criterion I and Criterion II, which simultaneously applies in these three East Asian countries, is the fundamental understanding that competition policy emphasizes more on fair competition than on free competition. Both Article 1 MRFTA and JAMA state promoting fair and free competition as their general objective. In China, Article 1 CAML even does not mention free competition at all as an objective, but only states that it focuses on protecting fair competition in the market. It can be seen that, initially modeled from the competition rules in western countries, Japan, Korea and China have gradually shaped their own characteristics attaching more importance to fair competition than free competition.

Second, regarding the substantive rules, Criterion I essentially differs from Criterion II in the requirement of market power. Predatory pricing rules under Criterion II would not apply to dumping by a firm without market power, which means such firms could engage in selling below cost without any fear of sanction. Contrary to that, Criterion I does not require market power. Accordingly, predatory pricing can be established easier, which significantly opens the door for more sanctions and blurs its distinction with antidumping laws.

Third, although there is a possibility to narrow the application of predatory pricing rules of Criterion I by using the conditions of intent and pricing below cost, there is no well-founded theoretical basis in cost calculation which simplifies the investigation. As aforementioned, neither China nor Korea introduced an economic approach, such as a price-cost test, a performance test, a rule of reason test or a structural test, to calculate the cost basis. Especially in China, there are many unclear points concerning the cost calculation, which leave much discretion for and result in dissimilarities among the authorities in charge of the enforcement. For instance, there is uncertainty on whether the cost is determined as the cost of operation under Article 4 of the Provisions 1999, or the cost of merchandise procurement under Article 7(1) therein. In practice, the enforcement authority tends to apply the lower of either of these costs, but this is not confirmed by law.[37] When the individual costs of a company cannot be identified, and this may be unique in China, the average cost of the whole industry will be taken. However, as the individual cost of a company is already hard to calculate, it will be equally so for the average cost of the whole industry (Wang 2004). Similar to the price determined by Best Information Available (BIA) rules in antidumping cases, the calculation of average cost of the whole industry can also leave much room for discretion. Besides, it is argued that since the cost of a highly efficient firm is certainly lower than the average cost of the whole industry. The average cost of the whole industry test discourages thus these highly efficient firms to reflect their efficiency in their price setting. This test is thus no good for a healthy competition process (Wang 2004). Taking this into consideration, it is hard to ascertain the argument that subjecting antidumping cases to predatory pricing rules under Criterion I in China could raise less protectionist abuse. Also in Japan, there is a chance that a low threshold is being used for catching predatory pricing. The guidelines provide the JFTC with discretion in relation to the calculation of the variable-featured cost. The JFTC has a possibility to choose between, for example, 'whether the cost increases or decreases depending on the supply quantity of the price-cut goods' and 'whether the cost is closely related to the supply of the price-cut goods.'

Fourth, concerning the harm to competition, predatory pricing rules under Criterion I in Korea require a strict examination of the anti-competitive effects, whereas both China and Japan give preeminence to fair competition, emphasizing on protecting competitors. More concretely, in China, Criterion I evaluates the harm to competition by examining whether it has disrupted the normal production and management process to the detriment of national interests or the lawful rights and interests of other operators. It is worth noting that, national interests could be used as a weapon for certain domestic vested interests when confronted with foreign competition. In Japan, harm to competition requires an inquiry into whether the low pricing tends to cause difficulties to the business activities of entrepreneurs that are just as efficient or more efficient than the price cutter. The focus is thus on a fair competition process. This is only one of the

[37] Article 4 of the Provisions 1999 defines that the cost in 'below the cost' refers to two kinds: cost of production and cost of operation. And Cost of operation includes merchandise procurement cost and circulation expense (consisted by operation expense, management expense as well as finance expense), whereas PROVISIONS ON PREVENTING THE CONDUCT OF LOW-PRICE DUMPING OF 1999, Article 7 defines that regards the operator, below cost selling refers to the situation that price is lower than the cost of merchandise procurement. In practical cases, the governmental authority has applied the lower one, namely the cost of merchandise procurement according to the principle of beneficial to the involved party.

factors broadening the scope of the predatory pricing rules. Another one is that not only to the competitor of the price cutter is taken into consideration but could also be the harm to non-competing companies. Also this could lead to doubt about the advantage of predatory pricing rules under Criterion I over antidumping laws.

2. The Substitution Debate in Numbers

In respect to enforcement, successful predatory pricing cases are very rare when it comes to Criterion II cases. Gathering information on the predatory pricing cases based on Criterion I in each of the three countries leads to the conclusion that the number is astonishingly high, even exceeding the absolute numbers of antidumping cases. Focusing first on China, it should be indicated that the administrative punishment of the CUCL and the CPL, the enforcement structure is rather complicated. Article 3 CUCL 1993 indicates that the administrative departments for industry and commerce of the people's governments at or above the county level shall exercise supervision over and inspection of unfair competition acts. However, since the CPL came into force in 1997, the various competent departments for pricing set forth in the Article 5 CPL have been taking the lead in predatory pricing cases. This is due to the fact that the CUCL 1993 stipulates that in cases where laws or administrative rules and regulations provide that other departments shall exercise the supervision and inspection, those provisions shall apply. There are fewer predatory pricing cases resorting to either civil or criminal litigation.

The number of predatory pricing cases handled between 1998 and 2012 by all of the administrative departments for industry and commerce of the people's governments at or above the county level is, according to statistics in the yearbooks from 1999 to 2013 by the State Administration for Industry and Commerce of the People's Republic of China (SAIC), 457. The total sum of money either by imposing a fine or confiscating illegal gains in all these cases reaches 3,636,100 RMB. The exact breakdown per year is provided in Table 3. With regard to cases dealt with by Competent Departments for Pricing, there are no official data yet, but only a few cases, such as the *White-Cat Case in Shanghai City* (Cheng 1998) and the *Beer Case in Shandong Province* (The National Development and Reform Commission 2007) have been reported. However, taking into the consideration that they have started to play the main role in predatory pricing cases ever since 1997, it can be predicted that there should be even more cases awarded by the various competent departments for pricing. Up till now, none of the above administrative decisions were recorded to be challenged in courts.

Table 3: Predatory Pricing Cases under Criterion I in China (1999-2013)[38]

Year	Cases	imposing a fine(RMB)	confiscating of illegal gains(RMB)
2012	9	70,000	0
2011	12	70,000	0
2010	37	260,000	0
2009	26	170,000	0
2008	11	40,000	10,000
2007[39]	39	310,000	140,000
2006	19	140,000	10,000

[38] The yearbooks can be accessed at: http://lib.cnki.net/cyfd/N2013040091.html (last visited July 29, 2014).

[39] The relevant data of the year 2007 was absent in the Yearbook 2008. The author accessed to such information in the Internal Yearbook 2008 by consulting directly with the officers of SAIC.

2005	25	610,000	0
2004	43	40,000	0
2003	78	680,000	0
2002	43	210,600	26,800
2001	31	216,000	200
2000	39	351,100	11,400
1999	26	270,000	0
1998	19	Lack of Data	
Total	457	3,636,100	

In Japan, administrative sanctions also take up the main part of enforcement. Regarding predatory pricing as a kind of unfair trade practices, there are four kinds of decisions that the JFTC can render, i.e., a caution, a warning, a cease and desist order, or a surcharge. The difference between caution and warning is that, if the JFTC finds a violation, then it issues a warning to violating firms and guides them to take elimination measures. If the JFTC does not find a violation but finds conduct which may lead to violation, then it issues a caution as a preventive measure for it. A caution is more lenient than a warning. Among the above four kinds of decisions, a caution is most frequently applied whereas a warning is listed second to it (Japan to ICN 2008). According to the latest statistics recorded in the annual reports of the JFTC from 1998-2012 as shown in Table 4 below, there are 22,431 cases resulting in caution, 51 in warning and 3 in a cease and desist order. Since surcharge has been newly-applied according to the revision of the JAMA in 2009, no cases have been subject thereto yet.

Table 4: Predatory Pricing Cases under Criterion I in Japan (1998-2012)[40]

Year	Caution	Warning	Cease and Desist Order
2012	1736	4	0
2011	1772	1	0
2010	2700	0	0
2009	3225	7	0
2008	3054	0	0
2007	1679	6	2
2006	1031	1	1
2005	607	2	0
2004	627	8	0
2003	653	3	0
2002	1007	5	0
2001	2624	5	0
2000	1044	8	0
1999	672	1	0
1998	No data concerning predatory pricing in the annual report		
Total	22431	51	3

The predatory pricing cases in Japan occur mainly in three product areas, i.e., alcoholic beverages, petroleum products and electrical home appliances. Of the 20,702 predatory pricing cases resulting in a caution between 2001 and 2011, alcoholic beverage cases took up 53.6%, while electrical home appliances cases 26.6% and petroleum product cases 19.0%. Most of the predatory pricing cases resulting in a warning are related to alcoholic beverages and petroleum products. All of the three predatory pricing cases resulting in a cease and desist order, are

[40] *See* the annual reports of the JFTC available at: http://www.jftc.go.jp/soshiki/nenpou/index.html(last visited July 6, 2014).

attributed to the area of petroleum products. Because of this, three special guidelines were issued by the JFTC concerning the above three categories of products in 2009, two of which were partly revised in 2011.[41]

Table 5 Predatory Pricing Cases based on Sectors in Japan (2001-2012)[42]

Year	alcoholic beverage	petroleum products	home electrical appliance	Others
2012	1123	426	121	66
2011	1138	444	142	48
2010	1028	714	856	102
2009	700	956	1425	144
2008	795	430	2364	65
2007	926	306	427	20
2006	592	259	158	22
2005	397	130	2	78
2004	485	30	1	111
2003	507	75	0	71
2002	904	79	3	21
2001	2494	86	3	41
Total (20702)	11089 (53.6%)	3935(19.0%)	5502(26.6%)	789(3.8%)

In Korea, the KFTC also publishes statistics on unfair business practices in a yearbook. The problem with the statistics on unfair business practices is that the data of unfair pricing below cost is combined with high-price purchasing, another conduct to exclude competition but that rarely happens. The data of the 2013 yearbook, as shown in Table 6 below, reveals that the KFTC received 130 complaints about exclusionary conduct between 1998 and 2013. These complaints have led to 131 cases in which an investigation was conducted, of which 16 cases were rendered with correction.[43] A more direct survey on predatory pricing was provided by the KFTC to the International Competition Network (ICN) in 2008, according to which 139 cases related to unfair business practice based on predatory pricing have been investigated into by the KFTC. Amongst these, 19 cases resulted in violating competition rules, most of which were sanctioned with a warning. Only in five cases, the KFTC demanded remedies. Surcharges were levied in one case. Unfair pricing below costs was typical for the following products or services: propane gas, waterproof sheets and synthetic resins, petroleum supply, and software supply.[44] Moreover, it is noted that there have been neither civil nor criminal litigations concerning predatory pricing, but administrative sanctions dominated the enforcement (Korea to ICN 2008).

Table 6: Predatory Pricing Cases under Criterion I in Korea (1998-2013)[45]

Year	complaints	performance	Correction

[41] Available at: http://www.jftc.go.jp/dk/guideline/index.html(last visited July 29, 2014).
[42] *See* the annual reports of the JFTC aforementioned.
[43] The statistics can be accessed from the Yearbook 2011 by the KFTC, http://www.ftc.go.kr/policy/case/caseStaticList.jsp (last visited December 8,2012).
[44] Decisions issued by the KFTC cover: No.93-117 is an unfair low price case for propane gas; No.94-205 deals with an unfair low price for waterproof sheets and synthetic resins; In No.94-328 and No.94-329, the respondent is a petroleum supplier who bid for a long-term supply contract with a too-low bid price. No.94-328 orders the respondent to advertise this fact while No.94-329 orders it to pay a fine of 20 million Korean won. In No. 95-3, the respondent is advised that it cease to a local bus line for free. No.96-18 is an unfairly low bidding price by a software supplier. Available at: http://www.ftc.go.kr/laws/book/judgeSearch.jsp (last visited December 8,2012).
[45] *See* the Yearbook 2011 by the KFTC aforementioned.

1998	19	16	4
1999	22	24	5
2000	16	17	4
2001	7	10	2
2002	10	5	0
2003	7	12	1
2004	12	11	0
2005	5	4	0
2006	5	7	0
2007	2	2	0
2008	2	3	0
2009	1	0	0
2010	5	2	0
2011	6	8	0
2012	8	9	0
2013	3	1	0
In total	130	131	16

Correspondingly, compared with the extremely rare successful predatory pricing actions under Criterion II, the number of those subject to Criterion I is quite large, especially in Japan and China. Furthermore, it has greatly outnumbered that of antidumping cases in the three countries respectively. As can be seen in Table 7 below, the cases of antidumping initiations (measures) taken by each country from 1998 to 2013 are 211(164) in China, 89(63) in Korea, 7(6) in Japan. Compared with that, as analyzed above, in China, the number of predatory pricing cases handled from 1998 to 2012 by the administrative departments for industry and commerce is at least 457 (the number would be bigger if all cases decided by all the competent departments for pricing would be taken into consideration). In Korea, of the total 130 complaints of exclusion of competition received by the KFTC during 1998 to 2013, 131 of these cases were subject to an investigation, and 16 cases were rendered with correction. In Japan, the annual reports of the JFTC from 1998-2012 state that there are 22,431 cases resulting in caution, 51 in warning and 1 in a cease and desist order. It could be said that, comparing from the absolute numbers between antidumping cases and predatory pricing cases under Criterion I, the latter is more proliferated due to which the impression could be created that they are more susceptible to protectionist abuse.

Table 7: Antidumping initiations and measures by the three countries (1998-2013)[46]

Country / Year	China		Korea		Japan	
	Initiations	Measures	Initiations	Measures	Initiations	Measures
1998	3	3	3	8	0	0
1999	2	2	6	0	0	0
2000	11	5	2	5	0	0
2001	14	0	4	0	2	0
2002	30	5	9	1	0	2
2003	22	33	18	4	0	0
2004	27	14	3	10	0	0
2005	24	16	4	3	0	0

[46] Antidumping Initiations and antidumping measures can be accessed respectively at: http://www.wto.org/english/tratop_e/adp_e/AD_InitiationsByRepMem.pdf;http://www.wto.org/english/tratop_e/adp_e/AD_MeasuresByRepMem.pdf(last visited July 29, 2014).

2006	10	24	7	8	0	0
2007	4	12	15	0	4	0
2008	14	4	5	12	0	4
2009	17	12	0	4	0	0
2010	8	15	3	0	0	0
2011	5	6	0	2	0	0
2012	9	5	2	0	1	0
2013	11	8	8	5	0	0
In total	211	164	89	63	7	6

The immediate counterargument against the difficulty to substitute could be that, unlike antidumping cases in which the usual award is antidumping duties and the like, the administrative sanctions in predatory pricing cases under Criterion I are relatively light. This is especially so for Japan and Korea, where warnings and cautions are vast. However, supposing that antidumping laws were replaced by unfair predatory pricing rules, there is a high chance that the international predatory pricing cases would be ruled in favor of the domestic firms. Indeed, the unfair predatory pricing rules allow for incorporating domestic vested interests or even national interest under the disguise of fairness. Therefore, it can be predicted that not only the number of affirmative cases would increase tremendously, but also the relevant punishment would probably become severer. In a word, similar to antidumping laws, predatory pricing rules under Criterion I are vulnerable to protectionism.

This paper has introduced two different understandings of predatory pricing in China, Japan and Korea, i.e., dominance orientated predatory pricing and unfair predatory pricing. Dominance orientated predatory pricing as described in Criterion II refers to a practice by which a dominant firm or firm with significant market power charges low prices in order to limit or eliminate competition, followed by the predator raising its prices so as to the dominant can be consolidated or the market further monopolized. Unfair predatory pricing detailed under Criterion I, is typical for the three countries investigated. It points to an unfair trade practice by which a non-dominant firm charges prices below cost in order to limit or eliminate competition. In order to test the arguments of substituting antidumping laws by national competition rules in the context of the three East Asian countries, not only the dominance orientated predatory pricing rules but also the unfair predatory pricing rules should be examined. This examination has led to the conclusion regulating dumping through competition law would not necessarily lead to less protectionist abuse, which has been the criteria in our argument to substitute. To some extent, the unfair predatory pricing rules in each of these countries are prone to protectionism. Hence, efforts to harmonize predatory pricing rules so as to abolish antidumping laws will face more difficulties in the CJK FTA than the ANZCERTA and the like.

Moreover, there have been recent signs in China and Japan suggesting that the distinction between the two kinds of predatory pricing remains, or get further strengthened. In China, there has been no attempt to change the regulation of below-cost pricing in the CUCL in 1993 with the adoption of the CAML in 2008, even though regulating pricing below cost was mistakenly borrowed from antimonopoly law by the drafters of the CUCL. So, there is a prevailing opinion that views predatory pricing as both unfair competition and as a conduct restraining competition. Therefore, the latest draft of amendment of the CUCL, the one of 2010, the rules on predatory

pricing remained unchanged. In Japan, one of the significant revisions of the JAMA in 2009 brought about a clear definition of predatory pricing. Below-cost pricing is now explicitly considered as one of the four types of exclusionary conduct under the GEPM. Meanwhile, 'unjust low price sales' is written into the JAMA, with the GULPS issued by the JFTC as supplementary. Prior to 2009, 'unjust low price sales' was generally deemed as a kind of 'unfair trade practices' subject to the previous Article 19 JAMA, and only designated under the previous Designation of Unfair Trade Practices issued by the JFTC. Correspondingly, this paper suggests a thorough joint research should be conducted therein to seriously consider the rationality underlying their unfair predatory pricing rules.

Conclusion

'The main subject for discussion at present should not be the dilemma between protectionism and free trade. Right now, the debate on competition must be framed within the search for a new development model.' (UNCTAD 2009: 2) Among the various issues beneath such a statement is without doubt the challenge antidumping laws pose and the question of whether predatory pricing rules could substitute for the antidumping laws. Underlying such a question is whether such a substitution would lead to less protectionist abuse than that is possible under the antidumping laws.

This paper has found that the substitution debate is more complicated than originally could be presumed. In China, Japan and Korea, there is no single understanding of predatory pricing. Each of these three countries make a distinction between dominance orientated predatory pricing and unfair predatory pricing, with the latter considerably extending the scope of what normally would be caught by pricing below cost conduct. This extended scope makes the outcome for the substitution debate less clear than when only dominance orientated predatory pricing would exist. The reason for this is that unfair predatory pricing rules in the three investigated countries are to some extent prone to protectionism.

Due to the dual conceptualization of predatory pricing, the effort to harmonize predatory pricing rules so as to abolish antidumping laws will be met with difficulties in the CJK FTA than the ANZCERTA and the like. Further research should be conducted regarding the rational underlying the unfair predatory pricing rules to see why they should be maintained and to what extent they can be applied with less danger for protectionist abuse.

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EXAMINING THE LIBERALIZATION OF ASEAN'S LEGAL SERVICES MARKET: CHALLENGES AND REFORMS

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Abstract

The article examines the liberalization of trade in legal services in the Association of the Southeast Asian Nations (ASEAN) and its reform prospects to meet the challenges of multi-jurisdictional practice. It argues that while the ten-country bloc pledges to progressively liberalizethe legal sector, ASEAN commitments under free trade agreements (FTAs) constitute merely "paper commitments." To achieve the goal of the ASEAN Economic Community to form a single market and production base, a feasible, incremental roadmap is imperative to integrate the legal services market. The article first analyzes the economic impact of foreign law firms on ASEAN's legal capacity building and the evolution of emerging ASEAN law. By assessing legal services negotiations under the World Trade Organization, the European Union, and Asia-Pacific FTAs, the article identifies issues of complexity in international arenas. The Singapore experiment further explores the effectiveness of FTAs with Australia and the United States and self-initiated FTA-plus measures such as Joint Law Ventures and Qualifying Foreign Law Practices. These case studies, along with law firms' operations vis-à-vis regulatory changes, demonstratethe best practices. Finally, the article provides reform proposals that will accelerate the integration of ASEAN's legal services market and enhance its competitiveness under the multilateral trading system.

I. Introduction

The globalized marketplace requires transnational lawyers. Legal services contribute tocross-border transactions that underpin today's multilateral business network. From the Uruguay Round to the Doha Round, the liberalization of legal services has been of great interest to international law firms and countries keen on exporting such services.[1] De-regulating trade

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[1] The major exporters of legal services include the European Union (EU), the United States, and the United Kingdom. Alison Hook, Sectoral Study on the Impact of Domestic Regulation on Trade in Legal Services (2007), at 5-10; Massimo GelosoGrosso, *Managing Request-Offer Negotiations under the GATS: The Case of Legal Services*, OECD Trade Policy Papers No. 2 (2004), at 9; Legal Services: Background Note by the Secretariat, S/C/W/318, June 14, 2010 [Legal Services: Background Note by the Secretariat], at 1-4. Australia and the United States have been actively promoting the liberalization of legal services in the World Trade Organization (WTO) and free trade agreements (FTAs). Speech given by John Corcoran, Law: A Global Practice – Perspective on the Internationalisation of Legal Services Market (2009), at 3-8; Laurel S. Terry, *From GATS to APEC: The Impact of Trade Agreements on Legal Services*, 43 AKRON L. REV. 869, 927-34 (2010); Joint Statement on Legal Services,

barriers to legal services is equally critical to a high degree of economic integration that mandates a free flow of professional services in diverse jurisdictions.With the global economic power shifting to Asia, the total revenue of its legal services markethas surpassed $85 billion and the market sizeis expected to double by 2017.[2]The notable 18% growth of US legal services exports to Asia contributed to half of American law firms' overseas expansion in the region.[3]Against this background, the article examines the liberalization of trade in legal services in the Association of Southeast Asian Nations (ASEAN). This ten-country bloc is now Asia's third largest economy, including countries with highinvestment potential such as Indonesia, Myanmar and Singapore.[4]

In this article, I argue that ASEAN countries' legal services commitments under free trade agreements (FTAs) constitute merely "paper commitments" that will hinder the formation of the ASEAN Economic Community (AEC). I further contend that to meet the AEC's goal as a "single market and production base," a feasible, incremental approach is imperative to achieve the intergradation of ASEAN's legal services market.[5]To substantiate my claims and enrich the existing literature, this article provides the most updated and comprehensive analysis of ASEAN's legal services liberalization measures at multilateral and national levels.[6]It also details

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Communication from Australia, Canada, Chile, the European Communities, Japan, Korea, New Zealand, Singapore, Switzerland, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu and the United States, TN/S/W/34; S/CSC/W/46, Feb. 24, 2005 [Joint Statement on Legal Services].

[2] John Grimley, *Asian Legal Market Set to Double by 2017*, ASIA L. PORTAL, Apr. 18, 2013, http://www.asialawportal.com/2013/04/18/asian-legal-market-set-to-double-by-2017/; MarketLine Industry Profile: Legal Services in Asia-Pacific (2012), at 7. From 2007 to 2011, the legal services market in Asia grew by 5.3% annually. *Id*.

[3] Recent Trends in U.S. Services Trade, 2013 Annual Report, at 5-9; *See* 2013 Report on the State of the Legal Market, at 8 (stating that in 2012, 28 of 56 foreign offices opened by US law firms were located in Asia).

[4] The Association of Southeast Asian Nations (ASEAN) includes Indonesia,Malaysia, the Philippines,Singapore, Thailand, Brunei,Cambodia, Laos,Myanmar (Burma) and Vietnam. In terms of Gross Domestic Product (GDP), ASEAN is only after China and Japan in Asia. ASEAN Economic Community Chartbook 2013, at 4.

[5] For the object of the ASEAN Economic Community (AEC), see Roadmap for an ASEAN Community: 2009-2015 (2009), at 21-31.

[6] Most of the existing articles or reports on this matter are either outdated or lack an overall analysis of FTA impact

regulatory changes' impact on the private practice,based oninsights provided by international law firms such as Sidley Austinand Linklaters.[7]To fill the gap between ASEAN governments' urge for the "progressive liberalization of trade in legal services" and the reality on the ground, the article provides reform proposals that incorporate the best practices of ASEAN states and other regional blocs.[8]

This article proceeds in the following manner. Section II analyzes the *de jure* and *de facto* obstacles to the development of intra-ASEAN liberalization of legal services. I will first discuss the architecture of the prospective AEC and the need to cultivate the expertise ofemerging ASEAN law. By challenging the weaknesses of the implementation of ASEAN states' commitments, I will address legal services negotiations in the context of the World Trade Organization (WTO) and FTAs. Section IIIexamines ASEAN states' experimentswith legal services liberalization from a tripartite perspective of the government, law firms and business clients. I will provide an overview of ASEAN's legal profession and focus on Singapore as a key case study. For decades, this city-statehas been the base for multinational law firms that serve the ASEAN market. Its regulatory changesin compliance with FTAs with the United States and Australia, as well as self-initiated FTA-plus liberalization efforts, provide valuable lessons for ASEAN. In particular, I will assess the advantages and potential loopholes of

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and actual operation of ASEAN-based law firms. *See e.g.*, Chew Seng Kok &YeapSuan Hong, *Liberalization of Legal Services – Embracing a World of Opportunities in the ASEAN Region*, 10 US-CHINA L. REV. 141 (2013); Jayanth K. Krishnan, *The Joint Law Venture: A Pilot Study*, 28:2 BERKELEY J. INT'L L. 431 (2012); Trade in Legal Services: Preparing for the Liberalisation of Legal Services, 2011/12 Report, the Malaysian Bar; Indonesia: Legal Services Market Report (2010); Colin Ong, *Cross Border Legal Services within ASEAN under the WTO: the Law and Practice: Brunei Darussalam* (2005).

[7] From June 2013 to May 2014, I interviewed almost 20 ASEAN government officials and managing partners and senior attorneys of law firms based in Germany, Norway, Japan, Korea, the United States, the United Kingdom, Malaysia, Laos and Singapore. Their views, to a large extent, reflect the practice of global law firms and are therefore important to understanding ASEAN states' implementation of legal services liberalization.

[8] Joint Communique of the Eighth ASEAN Law Ministers Meeting (ALAWMM), Nov. 4-5, 2011; *Southeast Asia Discusses Challenges to Liberalising Legal Services Sector*, BRUNEI TIMES, Apr. 14, 2011, http://www.bt.com.bn/news-national/2011/04/14/southeast-asia-discusses-challenges-liberalising-legal-services-sector (last visited May 1, 2014).

Singapore'srevolutionary regimes that have liberalized the legal market. Section IV explores proposals for reforming regulations on legal services in ASEAN. Based on the experiences of ASEAN states, the European Union (EU) and the North American Free Trade Agreement (NAFTA), I will provide pragmatic solutions to ASEAN's legal services liberalization. These reform proposals will expedite the ten-country bloc's seamless multi-jurisdictional practice.

II. Challenges to ASEAN's Legal Services Integration

ASEAN includes a population of 616 million, and its diverse development stages across the regionhave been a prime obstacle to the AEC's objective to promote a "free flow of services."[9]Placing Singapore and Myanmar on the same liberalization agenda can never be easy, as the Gross Domestic Product (GDP) per capita of the former is 61 times of that of the latter.[10]The liberalization of legal services is particularlyformidable because the legal profession is jurisdiction-based and more protectionist than other sectors. One cannot ignore ASEAN's complex legal systems, which include common law, civil law, socialist law and Sharia lawthat have beeninfluenced by the legal traditions of Dutch, France, Spain and the United States.[11]ASEAN states' regulatory intensity towards foreign lawyers varies significantly. While Cambodia implicitly allows foreign consulting firms to offer advice on domestic law, Article XII of the Philippine Constitution explicitlyconfines"[t]he practice of all professions" to citizens.[12]The Supreme Court of the Philippines in *Cayetano v. Monsod* widely interpreted the

[9] ASEAN Statistic Leaflet: Selected Key Indicators 2013; Roadmap for an ASEAN Community: 2009-2015 (2009), at 25-27.
[10] ASEAN Statistic Leaflet: Selected Key Indicators 2013.
[11] COLIN Y.C. ONG, CROSS-BORDER LITIGATION WITHIN ASEAN: THE PROSPECTS FOR HARMONIZATION OF CIVIL AND COMMERCIAL LITIGATION 115-40 (1997); Alphabetical Index of the Political Entities and Corresponding Legal Systems, http://www.juriglobe.ca/eng/sys-juri/index-alpha.php (last visited July 20, 2014). Japanese law also influenced the modern legal systems of Cambodia and Myanmar because the Japanese government provided development aid to legal reform in these countries. Japanese law firms, which focus on the ASEAN market, were often involved in these projects. Interview with a UK lawyer [name withheld], Mar. 6, 2014.
[12] An example is Gordon & Associate, a Phnom Penh-based consulting firm founded by a US lawyer. Interview

"practice of law" to encompass "any" law-related activities, hence banning the practice of foreign lawyers.[13]

A. The AEC as a Single Market and Emerging ASEAN Law

While recognizing these issues above constitute hurdles to ASEAN's multi-jurisdictional practice, ASEAN law ministers have proposed the "progressive liberalization" of the legal sector.[14] In fact, to transform ASEAN into a single market, the AEC envisions the substantial removal of restrictions on the legal services by 2015.[15] I offer three key reasons for liberalizing the legal services market to magnify ASEAN's competitiveness. First, foreign law firms have substantially contributed to ASEAN states' legal capacity in dealing with international litigation and finance. Eversheds' assistance to Cambodia was noteworthy in the PreahVihearTemple dispute against Thailand before the International Court of Justice.[16] Hogan Lovells advised state-owned Vietnam Airlines to secure the Export Credit Agency financing to purchase Airbus aircraft.[17] These cases entailed sophisticated transnational legal skills that most ASEAN-based firms currently do not possess. The liberalization of legal services will galvanize multilateral law firms to be based in the ASEAN region. It willreduce the transaction costs of the firms and clients and enable ASEAN governments and enterprises to have better access to high quality

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with a UK lawyer [name withheld], June 12, 2013. CONST. OF THE PHILIPPINES (1987), art. XII, sec. 14.

[13] The Court held that "practice of law" refers to "any activity, in or out of court, which requires the application of law, legal procedure, knowledge, training and experience." Cayetano v. Monsod, 201 SCRA 210 (1991).

[14] Joint Communique of the Eighth ASEAN Law Ministers Meeting (ALAWMM), Nov. 4-5, 2011.

[15] The AEC's plan for a free flow of services mandates the removal of "substantially all restrictions on trade in services for all other services sectors by 2015." Roadmap for an ASEAN Community: 2009-2015 (2009), at 26.

[16] *Eversheds Advises Government of Cambodia on PreahVihear Dispute*, Nov. 14, 2013, http://www.eversheds.com/global/en/what/publications/shownews.page?News=en/Singapore/advises-Government-Cambodia-Preah-Vihear-dispute. The Cambodia-Thailand dispute concerned the clarification of the 1962 judgment of the International Court of Justice (ICJ) on the territorial scope of sovereignty over the Temple. Another example is the Philippines, which retained US lawyers in dealing with ICJ and WTO disputes. H. Harry Roque Jr., *Globalization of Legal Services: Challenges and Possibilities in the Philippines Setting* (2003), at 61.

[17] *Hogan Lovells Advises Vietnam Airlines on ECA Financing*, Feb. 7, 2013, LAW., http://www.thelawyer.com/firms-and-the-bar/hogan-lovells-advises-vietnam-airlines-on-eca-financing/3000774.article.

legal services. Moreover, the transfer of expertise from international law firms to local lawyers will benefit the AEC's transformation to a knowledge-based economy.

Second, the promotion of trade in legal services will help attract foreign direct investments (FDIs) and benefit the equitable development of ASEAN from various dimensions.[18] Japan's "Big Four" law firms alone have facilitated Japanese companies' investments of over $15 billionin the region.[19] White & Case's operation of an outsourcing center in Manila since 2007 hasalso increasedgeneral employment in the Philippines.[20] Foreign law firms' involvement can be important to mitigate the development gap among ASEAN countries and strengthen the rule of law in the region. Myanmar is a key case. On the advice of JipyongJisung, a Korean law firm, the new Yangon airport will be constructedby the Incheon International Airport Cooperation.[21] A US firm's appointment of U Kyaw Hoe, an ally ofAungSanSuuKyi, as itsYangon-based head of the ligation practice also reflects the emergence of Myanmar's independent legal profession that may prompt further reform.[22]

[18] *See* ASEAN Integration Monitoring Report: A Joint Report by the ASEAN Secretariat and the World Bank (2013) [ASEAN Integration Monitoring Report], at 123 ("Overall, the average ratio of [foreign direct investments (FDIs)] to GDP has been increasing in [ASEAN] to 58 percent in 2010 . . . ."). FDIs are of particular importance to development in Malaysia, Thailand, Vietnam and Cambodia. AxeleGiroud& Hafiz Mirza, *MNE Linkages in ASEAN*, *in*COMPETITIVENESS OF THE ASEAN COUNTRIES: CORPORATE AND REGULATORY DRIVERS 82, 83-89 (Philippe Gugler& Julien Chaisse eds. 2010).

[19] These firms include Nishmura& Asahi, NagashimaOhno&Tsunematsu, Mori Hamada & Matsumoto, and Anderson Mori &Tomotsume. *Tom Brennan, Japanese Firms on Expansion Drive*, May 13, 2013, ASIAN LAW., http://www.americanlawyer.com/asian_lawyer/id=1202599866735/Japanese-Firms-on-Expansion-Drive.

[20] The firm's Manila-based business processing outsourcing unit "carries out business support work such as administrative, technology, marketing and accounting support." *Alex Newman, White & Case Eyes Ireland and Poland for Legal Support Centre*, Nov. 2, 2012, LEGALWEEK, http://www.legalweek.com/legal-week/news/2221736/white-case-eyes-ireland-and-poland-for-legal-support-centre.

[21] Yun Kriegler, *Korean Firm Advises as Myanmar Builds New International Airport*, Aug. 27, 2013, LAW., http://www.thelawyer.com/news/regions/asia-pacific-news/korean-firm-advises-as-myanmar-builds-new-international-airport/3008761.article.

[22] The firm is New York-based Herzfeld Rubin Meyer & Rose. U Kyaw Hoe is a central committee member of Myanmar's opposition party, the National League for Diplomacy. Yun Kriegler, *US Firm Herzfeld Granted Myanmar License*, Oct. 29, 2013, http://www.thelawyer.com/news/regions/asia-pacific-news/us-firm-herzfeld-granted-myanmar-licence/3011604.article.

Third, allowing further liberalization of legal services willgiveASEANmorebargaining power in requesting concessions in tariff reductions on export commodities or on opening domestic markets.[23] This strategymaybenefit ASEAN states' ongoing negotiations in the Trans-Pacific Partnership (TPP) and the Regional Comprehensive Economic Partnership (RCEP).[24] Notably, maintaining protection of more vulnerable sectors such as the agricultural industry will be critical to development in ASEAN's least-developed countries (*i.e.*, Cambodia, Laos, Myanmar and Vietnam, collectively known as CLMV countries).

Finally, easing restrictions on foreign lawyers and law firms will help develop ASEAN-based law firms and cultivate ASEAN law expertise, thus facilitating the AEC's goal of a single market. In addition to large Western firms, certain law firms have become well-known as ASEAN law firms, including Rajah &Tann of Singapore, Zaid Ibrahim & Co (ZICO) of Malaysia, and DFDL of Laos.[25]These firms, which employ primarily ASEAN lawyers, have expanded their regional practice and gradually ascended to compete with international law firms in Southeast Asian transactions. Conferring preferential treatment to ASEAN lawyers and law firms in the region will strengthen their "home advantage" and facilitate cross-border investments in line with the AEC objectives. Facilitating ASEAN law firms in enhancing their ASEAN law expertise will also be significant to the bloc's legal capacity building.

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[23] A comparable experience is Korea's consent to open the legal market to US law firms under the Korea-US Free Trade Agreement "in exchange for tariff reduction of certain commodities such as cars." Kyungho Choi, *Korean Foreign Legal Consultants Act: Legal Profession of American Lawyers in South Korea*, 11:1 ASIAN-PACIFIC L. & POLICY J. 100, 102 (2009).

[24] For a detailed analysis of the Trans-Pacific Partnership (TPP) and the Regional Comprehensive Economic Partnership (RCEP), see Meredith Kolsky Lewis, *The TPP and the RCEP (ASEAN + 6) as Potential Paths toward Deeper Asian Economic Integration*, 8:2 ASIAN J. WTO & INT'L HEALTH L. & POLICY 359 (2013); THE TRANS-PACIFIC PARTNERSHIP: A QUEST FOR A TWENTY-FIRST CENTURY AGREEMENT (C. L. Lim et al. eds. 2012). For information on TPP negotiations and development, see Meredith Kolsky Lewis, *The Trans-Pacific Partnership Agreement and Development*, *in*TRADE LIBERALISATION AND INTERNATIONAL CO-OPERATION: A LEGAL ANALYSIS OF THE TRANS-PACIFIC PARTNERSHIP AGREEMENT, 28, 38-48 (Tania Voon ed. 2013).

[25]Rajah &Tann and Zaid Ibrahim & Co first developed the "ASEAN law firm" concept. These two firms were originally Singaporean and Malaysian branches of Andersen Legal, which dissolved with Arthur Andersen. Interview with a Malaysian lawyer [name withheld], July 10, 2013.

Given the transnational nature of ASEAN's legal practice, limiting the client base and transactions to one jurisdiction cannot be sustained. A typical merger and acquisition (M&A) deal illustrates this point. To reinforce its position in the ASEAN market forhygiene products such as baby diapers, Japan-based Unicharm Corporation acquired a Singapore company that held 88% of Myanmar Care Products Limited (MYCARE).[26]Unicharm then purchased 10% of MYCARE's outstanding shares through its Thai affiliate.[27]Potential restructuring of Unicharm's supply chain following the M&A will also take into consideration preferential treatment under ASEAN FTAs. As this case demonstrates, any law firm that engages in such multi-jurisdictional M&A casesneeds a sophisticated understanding of ASEAN jurisdictions. The existing model of retaining correspondent firms at various levels on an ad hoc basis will not meet the demands of ASEAN-oriented transactions.

It has beencontended that ASEAN law is only a loose political concept because ASEAN's lack of a super-national institution akin to the EU renders it infeasible to make applicable intra-ASEAN law.[28]Thus, ASEAN law means ten sets of domestic legal systems. I disagree with this contention. While ASEAN's legal framework has developed through a soft-law approach, its rapid development has prompted the legalization of the ASEAN market.[29]The 2007 ASEAN Economic Community Blueprint (AEC Blueprint) set 2015 as the goal for forming a single

[26]*Completion of Acquisition of Shares in Myanmar Care Products Ltd. and CFA International Paper Products Pte. Led.*, Aug. 22, 2013, http://www.unicharm.co.jp/english/ir/news/2013/__icsFiles/afieldfile/2013/08/22/130822_2_Press_Release_E.pdf.
[27]*Id*. Japan's Mori Hamada &Matsumo was the lead counsel for Unicharm Cooperation in this case. Interview with a UK lawyer [name withheld], June 12, 2013.
[28]*E.g*., Lin Chung Hung, *ASEAN Charter: Deeper Regional Integration under International Law?*, 9:4 CHINESE J. INT'L L. 821, 835-37 (2010); Lay Hong Tan, *Will ASEAN Economic Integration Progress beyond a Free Trade Area?*, 53 INT'L & COMP. L.Q. 935, 949 (2004).
[29]*See also* Michael Ewing-Chow & Tan Hsien-Li, *The Role of the Rule of Law in ASEAN Integration*, EUI Working Paper RSCAS 2013/16 (2013), at 19-22 (analyzing ASEAN legalization); Diane A. Desierto, *ASEAN's Constitutionalization of International Law: Challenges to Evolution under the New ASEAN Charter*, 49 COLUM. TRANSNAT'L L. 268, 274 (2011) (stating that ASEAN countries are "evolving toward the consolidation of 'ASEAN Law'").

market and production base.[30] The adoption of the ASEAN Charter in 2007 and the agreements that underpin the AEC both transformed ASEAN into an internal-governmental institution and accelerated the emergence of ASEAN law.[31]

ASEAN treaties on trade in goods, services, investments and dispute resolution mechanisms constitute the legal framework of the AEC. The 2009 ASEAN Trade in Goods Agreementincorporatesprior goods-related agreements concluded since the 1992 Agreement on the Common Effective Preferential Tariff Scheme for the ASEAN Free Trade Area.[32]From 1997 to 2010, various rounds of negotiations under the 1995 ASEAN Framework Agreement on Services (AFAS) led to eight packages of commitments including legal services.[33] The liberalization of professional services was also facilitated by eight mutual recognition arrangements (MRAs) and the 2012 ASEAN Agreement on the Movement of Natural Persons (ASEAN Agreement on the MNP).[34] To fortify ASEAN's competitiveness to attract FDIs, the 2009 ASEAN Comprehensive Investment Agreement (ACIA) integratesthe two previous agreements, streamlines the schedule of reservations and confers immediate benefits on ASEAN investors.[35]

More importantly, ASEAN has developed multi-layered dispute settlement mechanisms. Non-economic matters fall within the realm of the 1976 Treaty of Amity and Cooperation (TAC)

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[30] Roadmap for an ASEAN Community: 2009-2015 (2009), at 22.
[31] *See* Charter of the Association of Southeast Asian Nations (2007), art. 3 ("ASEAN, as inter-governmental organisation, is hereby conferred legal personality.").
[32] KanyaSatyaniSasradipoera, *ASEAN Trade in Goods Agreement (ATIGA)*, *in*ASEAN: LIFE AFTER THE CHARTER 89, 90-92 (S. Tiwari ed. 2010).
[33] ASEAN Economic Community Factbook (2011), at 19-20.
[34] The mutual recognition arrangements (MRAs) cover, for instance, engineering, nursing, architectural and accountancy services. ASEAN Integration Monitoring Report, *supra* note 18, at 113.
[35] The ASEAN Comprehensive Investment Agreement integrates the 1987 Agreement for the Promotion and Protection of Investments (1987 Agreement), the 1998 Framework Agreement on the ASEAN Investment Area, and two related protocols. Yap Lai Peng, *The ASEAN Comprehensive Investment Agreement 2009: Its Objectives, Plan and Progress*, *in*ASEAN: LIFE AFTER THE CHARTER 100, 101 (S. Tiwari ed. 2010).

and the ASEAN Charter, whereas trade disputes can be resolved under the 2004 ASEAN Protocol for Enhanced Dispute Settlement Mechanism (EDSM).[36]While the TAC and the EDSM aim at state-to-state disputes, the ACIA accords private investors the right to resort to the investor-state arbitration.[37]Under a previous investment agreement, the 2003 case of *Yaung Chi Oo Trading v. Myanmar* marked the first and only instance where ASEAN dealt with legal disputes.[38] The ACIA, which provides more detailed guidance on dispute procedures, may prompt ASEAN-based investors to utilize the regional mechanism from a cost perspective.

Indonesia's recent Bilateral Investment Treaty (BIT) practice is noteworthy. Its termination of theBIT with the Netherlands in 2014 and its intention to cancel more than 60 BITs may have beenprompted by concern over arbitration panels favoring investors from developed countries.[39] Jakarta's move may also indicate ASEAN countries' preference to shift the investor-state disputes to the ACIA, the RCEP or other ASEAN FTAs.[40] These developments consolidate emerging ASEAN law and reinforce my view that the liberalization of legal services will fortify the legal capacity building of ASEAN lawyers and benefit the AEC'sintegration.

B. The Evolution of Legal Services Negotiations: From the WTO to FTAs

[36] For a detailed analysis of ASEAN dispute settlement mechanisms, see Locknie Hsu, *The ASEAN Dispute Settlement System*, *in*THE ASEAN ECONOMIC COMMUNITY: A WORK IN PROGRESS 380, 383-391 (SanchitaBasu Das et al. eds. 2013); Ewing-Chow & Tan, *supra* note 29, at 23-28.

[37]*E.g.*, The ASEAN Comprehensive Investment Agreement (2009), arts. 32 & 33.

[38] This case concerned the interpretation of the 1987 Agreement and the Tribunal held that it lacked jurisdiction. Yaung Chi Oo Trading Pte Ltd. v. Government of the Union of Myanmar, ASEAN I.D. Case No. ARB/01/1.

[39] Termination Bilateral Investment Treaty, http://indonesia.nlembassy.org/organization/departments/economic-affairs/termination-bilateral-investment-treaty.html (last visited May 1, 2014); *Indonesia to Terminate More Than 60 Bilateral Investment Treaties*, Mar. 26, 2014, FINANCIAL TIMES, http://www.ft.com/intl/cms/s/0/3755c1b2-b4e2-11e3-af92-00144feabdc0.html#axzz31SVQbGe4. Presumably for similar reasons, countries such as South Africa, Venezuela and Australia have also questioned the fairness and benefit of investment arbitration panels. For recent trends and practices of Asian and European investment treaties, see generally Julien Chaisse, *Assessing the Exposure of Asian States to Investment Claims*, 6:2 CONTEMP. ASIA ARB. J. 187 (2013); Julien Chaisse, *Exploring the Confines of International Investment and Domestic Health Protections – Is a General Exceptions Clause a Forced Perspective?* 39 AM. J. L. & MED. 332 (2013).

[40] Edmund Sim, *Indonesia's Shift in Arbitration May Help ACIA, Hurt Non-RCEP Partners*, Mar. 30, 2014, http://aseanec.blogspot.tw/2014/03/indonesias-shift-in-arbitration-may.html.

To recognize the impact of legal services on cross-border transactions, some WTO members have attempted to push for additional liberalization in the legal sector. To assess ASEAN's legal services liberalization, understanding the evolution of multilateral legal services negotiations is essential. Legal services, which include advisory and representation services related to legal proceedings, belong to the sub-sector "professional services" of "business services" in the WTO Services Sectoral Classification List.[41]Legal services generally exclude the administration of justice because it concerns "the excise of governmental authority" as defined by the General Agreement on Trade in Services (GATS).[42]45 members, including four ASEAN countries, made commitments to legal services in the Uruguay Round.[43]Despite these WTO commitments, the obstacles to liberalization often arose in the lack of transparency, as well as nationality, residency, and licensing and qualification requirements.[44] These limitations hinder the effective supply of legal services in four "modes" under the GATS.[45] For example, restrictions on foreign-domestic partnerships or joint ventures largely diminish the market value of"commercial presence" commitments for international law firms.[46]

[41] Services Sectoral Classification List, MTN.GNS/W/120, July 10, 1991; Joint Statement on Legal Services, *supra* note 1, at 2-3; Documents Relevant to Proper Classification of Legal Services in Ongoing GATS Negotiations, http://www.americanbar.org/groups/professional_responsibility/policy/gats_international_agreements/track_one_class.html (last visited July 20, 2014). *Seealso* Legal Services: Background Note by the Secretariat, *supra* note 1, at 8 ("This entry corresponds to the CPC number 861 in the United Nations Provisional Central Product Classification of 1991.").

[42]General Agreement on Trade in Services (GATS), art. 1(3)(a) & (b). *See also*GILLES MULLER, LIBERALIZATION OF TRADE IN LEGAL SERVICES 31 (2013) ("The OECD was the first international organization to discuss the liberalization of legal services in depth and its recommendations have significantly influenced . . . negotiations within the GATS or PTAs.").

[43] Annex III: Legal Services – Specific Commitments, in Legal Services: Background Note by the Secretariat, *supra* note, at 29-30. *See also*Grosso, *supra* note 1, at 14-15 (examining Uruguay Round commitments in legal services).

[44]*Id*., at 8; MULLER, *supra* note 42, at 32-44.

[45] Annex B: Sectoral and Modal Objectives as Identified by Members, in Report by the Chairman to the Trade Negotiations Committee, TN/S/23, Nov. 28, 2005, at 11-12 (describing current obstacles to legal services in Modes 1, 2 and 4).

[46]Grosso, *supra* note 1, at 10; MULLER, *supra* note 42, at 37-39.

To facilitate the negotiations in legal services, Australia suggestedthat the countries adopt the "limited licensing" concept that reflects the operation of international law firms.[47]This concept includes a two-faceted goal. It urges WTO members to devise a less burdensome regulatory approach to allow foreign lawyers and law firms to practice non-domestic law without the requirement to gain a right of audience in local courts.[48] For instance, an Australian law firm in a foreign jurisdiction should be allowed to practice Australian law (home-country law), US law (third-country law) and international law. In addition, Australia's proposal encourages host-states to allow foreign law firms to form partnerships or other forms of voluntary commercial association with other law firms.[49]

To prompt the momentum in legal services negotiations, Australia, the United States and other "Friends of Legal Services" countries issued a collective request in legal services in 2006.[50] This request symbolizes a joint force to ask WTO members to remove existing limitations in four modes and make additional commitments in legal services in Doha Round negotiations.[51]42 WTO members, including five ASEAN states, submitted offers related to legal services.[52] Nevertheless, given the Doha Round impasse, services negotiations have yet to result inanymeaningful outcome.

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[47] Negotiating Proposal for Legal Services Revision, Communication from Australia, S/CSS/W/67/Supp.1/Rev/1, July 10, 2001, at 2.
[48] *Id*. at 2-4.
[49] *Id*. at 4-5.
[50] Collective Request: Legal Services (2006), http://www.iatp.org/files/451_2_78786.pdf; Terry, *supr*a note 1, at 939-40.
[51] *Id*., at paras. 3(a) & (b). For information on legal services negotiations in the Doha Round, see generally Laurel S. Terry, *Lawyers, GATS, and the WTO Accountancy Disciplines: The History of the WTOs Consultation, the IBA GATS Forum and the September 2003 IBA Resolutions*, 22 PENN ST. INT'L L. REV. 695 (2004); Sydney M. Cone III, *Legal Services and the Doha Round Dilemma*, 41:2 J. WORLD TRADE 245 (2007).
[52] WTO Services Negotiations – Derestricted Offers Relating to Legal Services [Doha Round Offers], Aug. 1, 2010, http://www.americanbar.org/content/dam/aba/migrated/cpr/gats/derestricted.authcheckdam.pdf (last visited May 1, 2014); Gross, *supra* note 1, at 15-16.

Notwithstanding the procrastinating developmentsinWTOnegotiations, the liberalization of legal services at the regional and bilateral levels has made progress. These experiences can serve as best practices for ASEAN. The stagnation of the Doha Round prompted key countries in exporting legal services, including Australia and the United States, to shift the discussion arena to the Asia-Pacific Economic Cooperation (APEC).[53]21-member APEC includes seven ASEAN countries and its objective to form a pan-APEC Free Trade Area of the Asia Pacific is pertinent to ongoing RCEP and TPP negotiations.[54] Although APEC is technically not a forum for negotiating agreements, its consensus built the foundation for binding instruments such as the 1996 Information Technology Agreement under the WTO.[55]

Based on Australia's proposal, APEC launched the APEC Legal Services Initiative (APEC LSI).[56] The goal of this initiative was to enhance transparency by facilitating discussions and creating an online inventory that includes domestic regulations governing foreign lawyers.[57]The inventorycovers information on APEC members' regulatory frameworks on Mode 4 temporary practice (known as "fly in, fly out" practice), full and limited licenses to practice law, and rules on law firms' partnerships. This projecthas two weaknesses.[58] APEC's voluntary approach caused the incompleteness of domestic rules, andBrunei and Malaysia's failure to provide full information on legal services rulesconfirmed the problem.[59] Asthe initiative was a one-time

[53] Terry, *supra* note 1, at 887-90 (discussing Asia-Pacific Economic Cooperation (APEC) discussions on legal services).
[54] Seven ASEAN states that are APEC members include Brunei, Indonesia, Malaysia, the Philippines, Singapore, Thailand and Vietnam.
[55] For the outcome of APEC's soft-law approach, see Pasha L. Hsieh, *Reassessing APEC's Role as a Trans-Regional Economic Architecture: Legal and Policy Dimensions*, 16:1 J. INT'L ECO. L. 119, 134-35 (2013).
[56] Completion Report for APEC legal Services Initiative, 2011/SOM1/GOS/006, Mar. 3, 2011, at 2-3.
[57] *Id*.
[58] Inventory, http://www.legalservices.apec.org/inventory/index.html (last visited May 2, 2014).
[59] Sections of Brunei and Malaysia, *id*.

APEC project, the information in the inventory has not been updated since the project was completed in 2010.[60]

Distinguishable from the APEC initiative, NAFTA parties (Canada, the United States and Mexico) placed the liberalization of legal services in the agreement. Article 1210 of NAFTA prohibits "licensing and certification" requirements from being "an unnecessary barrier to trade" and its Annex encourages parties to establish "mutually acceptable standards and criteria for" such requirements.[61]The Annex also obliges parties to develop the mechanism for foreign legal consultants (FLCs) in their jurisdictions.[62] The significance of these provisions is to enable future talks on legal services liberalization and ensures the creation of FLC rules in NAFTA jurisdictions.[63] However, NAFTA rules do not mandate that parties enact licensing and certification requirements in a particular way. The rules simply ban discriminatory measures in violation of national treatment and most-favored-nation treatment.[64] Moreover, negotiations under Article 1210 are complex. While Mexico has a state-regulated legal profession, states and provinces rather than the federal governments are entrusted with the power to enact or change rules on lawyers in the United States and Canada.[65]

In addition to NAFTA, the US-Korea FTA (KORUS FTA) marked a milestone in pushing for liberalizing the legal market through an FTA. The three-stage liberalization under the

[60] The project lasted from 2009 to 2010. Services Action Plan, 2013/SOM2/GOS/003, Apr. 12, 2013, at 7. The APEC Legal Services Initiative inspired the International Bar Association (IBA) project to collect and release information on legal profession rules in selected countries. Laurel S. Terry, *Putting the Legal Profession's Monopoly on the Practice of Law in a Global Context*, 82 FORDHAM L. REV. 2903, 2919-20 (2014).
[61] North American Free Trade Agreement (NAFTA) (1993), art. 1210 & Annex 1210.5, sec. A.
[62] NAFTA, Annex 1210.5, sec. B.
[63] *See* Orlando Flores, *Prospects for Liberalizing the Regulation of Foreign Lawyers under GATS and NAFTA*, 5 MINN. J. GLOBAL TRADE 159, 188 (1996) (discussing NAFTA's impact on legal services); Cone, *supra* note 51, at 256 (explaining that the scope of legal practice of foreign legal consultants is determined by the host jurisdiction).
[64] NAFTA, arts. 1202 & 1203.
[65] Flores, *supra* note 63, at 185.

KORUS FTA enabled Korea to pass the Foreign Legal Consultant Act (FLC Act).[66] The Act first allows FLCs and the establishment of the representative offices of foreign law firms, and it will permit foreign-Korean firms' cooperative agreements and eventually joint ventures.[67]Comparable liberalization of legal services was included in Korea's FTA with the EU.[68]Arguably, the FLC Act provides *de facto* preferential treatment to US firms because it requires the chief representative of a foreign law firm to have a minimum of seven years' experience in the "home country of license."[69]As most Korean lawyers gained their education and qualification in the United States, this requirement poses challenges to UK-based firms such as Allen &Overy and Herbert Smith Freehills.[70] Another asymmetrical requirement is that foreign lawyers in foreign law firms must meet the three-year experience requirement.[71]This rule hinders foreign law firms' development because junior associatescannot be qualified as FLCs. Ironically, the rule does not apply to foreign lawyers in Korean firms. In fact, the number of foreign lawyers working at Kim & Chang alone is larger than the total number of foreign lawyers in Korea-based international law firms combined.[72]The impact of US and EU FTAs on the Korean legal market are important to ASEAN states in legal services negotiations.

The EU, which went further than NAFTA and the KORUS FTA,led to the most integrated legal market that covers diverse jurisdictions. Unlike EU law, ASEAN law has no direct effect in domestic law and hence the integration levels of the two blocs vary to a large extent.

[66]*See* Choi, *supra* note 23, at 101-03 (explaining the background and effect of the Act).
[67] Deadlines for three stages of liberalization are set for 2012, 2014 and 2017, respectively. 2013 National Trade Estimate Report on Foreign Trade Barriers, at 238; Annex II-Korea-45, Free Trade Agreement between the Republic Korea and the United States of America (2007) [Annex II-Korea-45, KORUS FTA].
[68]Yeongkwan Song, *KORUS FTA v. Korea-EU FTA: Why the Differences?*, KEI Academic Paper Series, Vol. 6:1 (2011), at 10 (explaining the legal services commitments under Korea's US and EU FTAs).
[69] Summary of the Foreign Legal Consultant Act [on file with author]; Interview with a US lawyer [name withheld], July 18, 2013.
[70] Interview with a US lawyer [name withheld], July 18, 2013.
[71] Summary of the Foreign Legal Consultant Act, *supra* note 69.
[72] Kim & Chang, the largest Korean law firm, has approximately 150 foreign lawyers. Interview with a US lawyer [name withheld], July 18, 2013.

Nonetheless, the EU experiences can provide guidance for ASEAN. As for the liberalization of legal services, the EU went further than NAFTA. Built on the Treaty of Rome, the Treaty on the Functioning of the European Union (TFEU) mandatesfreedom of movement and establishment within the EU market."[73] To further a knowledge-based economy, the followingdirectives fundamentally changed the landscape of pan-European legal practice. The 1977 Lawyers' Services Directivepermits cross-border temporary practices using the lawyers' home-country professional titles.[74] The 2005 Recognition of Professional Qualifications Directive, which superseded the 1989 Recognition of Diplomas Directives, enables lawyers to have their qualifications recognized in other states.[75] The host jurisdiction retains the authority to impose an aptitude test for such recognition.[76]

The boldest step in liberalizing the EU legal sector was the 1998 Lawyers' Establishment Directive, which allows European lawyers to register as foreign lawyers on a permanent basis in EU member states.[77] The Directive creates a unique European legal consultant system distinguishable from most FLC rules, as a migrant lawyer can practice foreign and local law, albeit subject to certain restrictions.[78]Remarkably, the directive permitsan EU lawyer to gain

[73]Treaty on the Functioning of the European Union, as amended by the Treaty of Lisbon (2007), Title IV.

[74] Council Directive No. 77/249/EEC to Facilitate the Effective Exercise by Lawyers of Freedom to Provide Services, 1977 O.J. K 78/17. To some extent, these directives reflect the European Commission's responses to legal disputes concerning bar regulations. For the pertinent European cases, see Court of Justice of the EU Judgments Concerning the Legal Profession, http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/Court_of_Justice_of_1_1302595800.pdf (last visited July 30, 2014).

[75] Parliament & Council Directive No. 2005/36 on the Recognition of Professional Qualifications, 2005 O.J. L 255/22 replaced Council Directive 89/48, 1989 O.J. (L 19) 16.

[76] *Id*.; *see also* Julian Lonbay, *Assessing the European market for Legal Services: Developments in the Free Movement of Lawyers in the European Union*, 33 FORDHAM INT'L L. J. 1629, 1645 (2010) ("[A]ll European bars, except Denmark's *Advokatsamfundet*, employ an aptitude test to allow transmigration of colleagues from other EU and EEA countries.").

[77] Parliament & Council Directive No. 98/5 to Facilitate Practice of the Profession of Lawyers on a Permanent Basis in a Member State Other than that in which the Qualification Was Obtained, 1998 O.J. L 77/36 [Directive No. 98/5].

[78] An EU lawyer "may, inter alia, give advice on the law of his home Member State, on Community Law, on international law and on the law of the host Member State." *Id*. art. 5(1). The host country can exclude the scope of an EU lawyer's practice areas or require him to work in conjunction with a local lawyer. *Id*. art. 5(2) & (3). For

admission to the local bar without sitting for an aptitude test, so long as he "has effectively and regularly pursued for" three years in the host state in local law.[79]Pursuant to this directive, an English solicitor who has had substantial exposure to German law in Frankfurt-based firm would be entitled to be qualified as a German lawyer (*Rechtsanwalt*). In other words, notwithstanding diverse legal systems and training, the Establishment Directive allows EU lawyers to acquire the same status as local lawyers.

The Establishment Directive accelerated the penetration of "foreign" EU lawyers into financial hubs such as Belgium, Luxemburg and the United Kingdom.[80] In *Luxembourg v. European Parliament*, Luxemburg challenged the legality of the directive, arguing that it led to discrimination against local lawyers and failed to safeguard the interest of the public.[81] The European Court of Justice upheld the directive. The Court explained that the equal protection principle was not violated because the directive did not change national routes for lawyers or abolish the rules on which cases a lawyer can handle.[82] National requirements such as "applicable rules of professional conduct" can prevent an EU lawyer from engaging in domestic law cases about which he possesses limited knowledge.[83] To ensure an EU lawyer is entitled to the freedom of establishment, the directive "simply released him from the obligation to prove

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additional background information, see Gilles Muller, *The Liberalization of Legal Services in the EU Internal Market*, 9:3 GLOBAL TRADE & CUSTOMS J. 123, 135.

[79] Directive No. 98/5, *supra* note 77, art. 10(1). The Directive defines "effective and regular pursuit" as "actual exercise of the activity without any interruption other than that resulting from the events of everyday life." *Id*. The host state will govern this requalification process, including the determination of the "effective and regular nature" of the lawyer's activity. *Id*. art. 10(1)(a) & (b).

[80] *See* Laurel S. Terry, *A Case Study of the Hybrid Model for Facilitating Cross-Border Legal Practice: The Agreement between the American Bar Association and the Brussels Bars*, 21 FORDHAM INT'L L.J 1382,1404-08(1998) (discussing the Brussels Bars' evolving stances on foreign lawyers);Wayne J. Carroll, *Liberalization of National Legal Admissions Requirements in the European Union: Lessons and Implications*, 22 PENN ST. INT'L L. REV. 563, 581-83 (2004) (discussing the percentage of foreign-trained Community lawyers in EU states).

[81] Case C-168/98, Luxembourg v. European Parliament and Council of the European Union, [2000] E.C.R. I-9131.

[82] Luxembourg, [2000] E.C.R. I-9131, 43; Lonbay, *supra* note 76, at 1643.

[83] Luxembourg, [2000] E.C.R. I-9131, 43.

that knowledge in advance."[84]Consequently, these directives and case law laid the foundation for the European legal services market and can serve as guidance for prospective ASEAN's liberalization efforts.

C. Assessing ASEAN's Legal Services Commitments and Enforcement

The experiences of APEC, NAFTA, the KORUS FTA and the EU demonstrate the impact of FTAs on the liberalization of legal services in terms of transparency requirements, FLC rules, and mutual recognition of education and qualifications. They also demonstrate the emerging trend to internationalize the legal profession to strengthen the trade blocs' economic competitiveness. The weaknesses and merits of these examples analyzed above will be important to ASEAN's future reform. Despite the market demand for seamless legal practice, ASEAN states' rules on foreign lawyers often lack transparency. This is particularly true in CLMV countries that are modernizing their legal frameworks. Interestingly, the proposed laws in ASEAN countries to liberalize the legal sector are sometimes perceived as more restrictive than the existing regime, which appears to be "liberalized" due to lack of enforcement. To understand the legal structure of ASEAN's legal services market and how it operates differently from other trade blocs, I provide the following analysis of commitments under the WTO and ASEAN FTAs.

Table 1: Legal Services Commitments in the WTO and ASEAN FTAs[85]

[84] *Id*.

[85] Annex III: Legal Services – Specific Commitments, in Legal Services: Background Note by the Secretariat, *supra* note 1, at 29-30; Schedules of Specific Commitments (For the First Package of Commitments), Annex/SCI, ASEAN-Korea Agreement on Trade in Services (2007); Schedules of Specific Commitments, Annex 3, ASEAN-Australia-New Zealand Free Trade Agreement (2009) [AANZFTA Commitments]; Annex to the Protocol to Implement the Eighth Package of Commitments under the ASEAN Framework Agreement on Services (2010) [AFAS Eighth Package of Commitments]; Doha Round Offers, *supra* note 52; and Schedules of Specific Commitments (For the Second Package of Commitments, 2011), AC-TIS/SC2, ASEAN-China Free Trade Agreement on Trade in Services (2007).

ASEAN Country	WTO: Uruguay Round (1993)	Korea FTA (2007)	Australia-New ZealandFTA (2009)	AFAS (2010)	WTO: Doha Round (2010)	China FTA (2011)
Brunei Darussalam					X	
Cambodia	X	X	X	X		X
Indonesia		X	X	X	X	
Lao PDR						
Malaysia	X	X	X	X	X	X
Myanmar						
Philippines					X	
Singapore						
Thailand	X		X	X	X	X
Vietnam	X	X	X	X		X

Note: "X" indicates a partial or full commitment

At the WTO, four ASEAN states entered into commitments in legal services in the Uruguay Round and five countries made legal services offers in the Doha Round.[86]Cambodia, Malaysia, Thailand and Vietnam agreed to ease restrictions on advisory services concerning foreign law and international law.[87]In particular, Thailand committed to both advisory and representation services in domestic law.[88]Notably, ASEAN's "free flow of services" is distinguished from the EU concept of "freedom of movement" because the AEC confines the liberalization of movement to"skilled labor."[89]Legal professionals thus fall within the scope of liberalization. According to the AEC Blueprint, restrictions on trade in legal services should be substantially removed. By 2015, ASEAN states are obliged to allow no less than 70% of ASEAN equity participation in law firms and tocomplete MRAs on legal services.[90]These MRAs may be comparable to EU directives that facilitate recognition of education and professional

[86] Annex III: Legal Services – Specific Commitments, *in* Legal Services: Background Note by the Secretariat, *supra* note 1, at 29-30; Doha Round Offers, *supra* note 52.
[87] Annex III: Legal Services – Specific Commitments, in Legal Services: Background Note by the Secretariat, *supra* note 1, at 29-30.
[88] *Id*. at 30.
[89] *See* Roadmap for an ASEAN Community: 2009-2015 (2009), at 22 (stating that a core element of an ASEAN single market and production base is "free flow of skilled labour").
[90] *Id*. at 26 (discussing that 70% of foreign (ASEAN) equity participation "for other service sectors" should be allowed and MRAs "for other professional services" should be completed by 2015).

qualifications, although ASEAN MRAs can be binding only after the transformation into domestic law.

In 2010, for the first time, the AFAS eighth package of commitments incorporated legal service commitments and five countries made specific commitments.[91]Compared with ASEAN countries' GATS commitments, this represents an improvement in that five ASEAN states raised their foreign equity limits to 100%.[92] The 2012 ASEAN Agreement on the MNP further facilitatedthe ASEAN lawyers' "temporary entry and temporary stay" in ASEAN states.[93]In addition to the AFAS, ASEAN's external FTAshave influenced the legal sector. Since 2002, ASEAN as a bloc concluded five FTAs with trading partners, including China, Korea, India, Japan, Australia and New Zealand.[94]Several ASEAN FTAs cover legal services commitments. These FTAs include the 2007 ASEAN-Korea Trade in Services Agreement, the 2009 ASEAN-Australia-New Zealand FTA (AANZFTA) and the 2011 second package of commitments under the ASEAN-China Agreement on Trade in Services.[95]

Regardless of these"comprehensive" legal services commitments in the WTO and FTAs, I argue that ASEAN's commitments merely constitute "paper commitments." These commitments, which represent multi-faceted problems, misrepresent the actual level of legal services liberalization. [96] First, I do not challenge the value of commitments that

[91] AFAS Eighth Package of Commitments, *supra* note 85.
[92]*See*SirisenaDahanayake, *Implications of Liberalizing Professional Services: Legal, Accountancy, and Engineering Services in Lap PDR*, Aug. 2012, at 12-13 (analyzing AFAS and GATS commitments on foreign equity limits for joint ventures).
[93]ASEAN Agreement on the Movement of Natural Persons (2012), art. 6.
[94] For information on ASEAN external FTAs, see ASEAN Economic Community: Handbook for Business 2012, at 69-78.
[95]*Id*.; For detailed commitments, see agreements, *supra* note 85. *See also* R.V. Anuradha, *Liberalizing of Trade in Services under RCEP: Mapping the Key Issues*, 8:2 ASIAN J. WTO & INT'L HEALTH L. & POLICY 401, 409-11 (2013) (discussing trade in services in ASEAN+1 FTAs).
[96] For instance, the Services Trade Restrictiveness Index for legal services of Cambodia, Indonesia, Malaysia, the Philippines, and Thailand ranges from 60 to 80, indicating a relatively high restrictive regime. ASEAN Integration

constitutethenegotiating basis forremovingtrade barriers and enhance stability for domestic regulatory regimes.[97] Vietnam is a major market for Australian law firms. The AANZFTA therefore ensuresthat Vietnam will not restrict foreign lawyers or shut down foreign law firms, as it did in the 1990s.[98]Nonetheless, the potential loophole lies in the interpretation of commitments, which are often subject to the state that made thecommitments. For instance, Vietnam excluded "legal documentation" services from its commitments in the WTO, the AFAS and other ASEAN FTAs.[99]While these services can be defined to include drafting of "commercial contracts," it remains unclear whether such contracts can be based on Vietnamese law or should be limited to foreign law.[100]

In 2012, 18 local Vietnamese law firms lobbied the government to expand the definition of legal documentation services, so that foreign law firms would be barred from preparing Vietnamese law contracts.[101] Presumably, due to the lobbying force of foreign law firms such as Baker & McKenzie, Vietnam's National Assembly decided not to include the protectionist provision in the Amended Lawyer Law.[102] Cambodia had a similar controversy of interpretation. In its WTO and FTA commitments, Cambodia allowed foreign and Cambodian law firms to enter a "commercial association," defined as "any commercial arrangement" without requiring "a

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Monitoring Report, *supra* note 18, at 103-04.

[97] *See* MULLER, *supra* note 42, at 99 (explaining the role of specific commitments in the GATS).

[98] International Legal Services Advisory Council, Submission to the Productivity Commission: Review of Bilateral and Regional Trade Agreements (2010), at 7.

[99] *E.g.*, Elizabeth Roomhall, *Foreign Law Firms in Vietnam Face Pushback from Local Practices*, Dec. 7, 2012, LEGALWEEK, http://www.legalweek.com/legal-week/news/2230173/foreign-law-firms-in-vietnam-face-pushback-from-local-practices; Viet Nam – Schedule of Specific Commitments: For the 8th Package of Commitments under ASEAN Framework Agreement on Services (2010); Viet Nam – Schedule of Specific Commitments, *in* Schedules of Specific Commitments, Annex 3, ASEAN-Australia-New Zealand Free Trade Agreement (2009).

[100] The definition of "8613 86130 Legal documentation and certification services" is included in the United Nations Professional Central Product Classification of 1991.

[101] Roomhall, *supra* note 99; Interview with a Vietnamese lawyer [name withheld], Aug. 14, 2013.

[102] Leanne Mezrani, *Globals Flight Protectionist Lawyer Law*, Nov. 28, 2012, LAW. WEEKLY, http://www.lawyersweekly.com.au/news/globals-fight-protectionist-lawyer-law; *see also* Interview with a Vietnamese lawyer [name withheld], Aug. 14, 2013 (stating that foreign law firms communicated their concerns with the Ministry of Law and the Deputy Prime Minister).

specific juridical form."[103]Although Cambodian law firms' proposal to impose restrictions of commercial arrangement and a 49% equity limitation on foreign firms was not approved, it has caused ambiguity and uncertainty in the country's regulatory regime.[104]

Second, although Laos, Myanmar, the Philippines and Singapore made limited legal services commitments in the WTO and under FTAs, they represent significantly differentlevels of liberalization of the legal professions. Laos and Myanmar are "liberal" toward foreign law firmsprimarily because they areat an early stage of developing rules for lawyers.[105] Both Singapore and the Philippines place the legal profession under a highly regulated framework, but they mark the two ends of the spectrum with respect to foreign law firms. Singapore only made legal services commitments under bilateral FTAs, but it has significantly liberalized the legal market in the past decade. The Philippines, along with Indonesia,areASEAN's most restrictive regimes on "commercial presence" (known as Mode 3 under the GATS) of foreign law firms.[106]The Philippines Constitution bestows the exclusive power to regulate "the admission to the practice of law" on the Supreme Court.[107] The Court's 1985 decision that banned Baker & McKenzie from practicing law due to its "alien law firm" status remains good law.[108]On the

[103]*E.g.*, Trade Policy Review, Secretariat Report, Cambodia: Revision, WT/TPR/S/253/Rev.1, Nov. 24, 2011 [Trade Policy Review, Cambodia], at 80; The text and footnote 1, Cambodia – Schedule of Specific Services Commitments, in AANZFTA Commitments, *supra* note 85.

[104] Trade Policy Review, Cambodia, *supra* note 103, at 80.

[105]*See*Dahanayake, *supra* note 92, at 22-23 (explaining Laos' Law on Lawyers (2011)); Brigid O. Gorman, *Firm Opportunities in Myanmar*, May 30, 2013, LAW. WEEKLY, http://www.lawyersweekly.com.au/news/firm-opportunities-in-myanmar (stating that Myanmar's efforts to amend its Bar Council Act).

[106] Interview with a Singapore lawyer [name withheld], June 11, 2013. Foreign law firms usually "bypass" Indonesia's restrictions by entering a strategic alliance with Indonesian firms. For example, Clifford Chance and DLA Piper formed such an alliance with Linda Widyati& Partners and Ivan AlmaidaBaely&Firmansyah, respectively. Kate Beioley, *Clifford Chance Forms Strategic Alliance in Indonesia*, Jan. 10, 2014, LAW., http://www.thelawyer.com/news/regions/asia-pacific-news/clifford-chance-forms-strategic-alliance-in-indonesia/3014725.article.

[107]CONST. OF THE PHILIPPINES (1987), art. VIII, sec. 5.5.

[108] The Court hence enjoined Baker & McKenzie from practicing law under its name. Dacanay v. Baker & McKenzie, Adm. Case No. 2131 (1985). After this case, Baker's Manila office has practiced through a locally incorporated firm and been referred to as "Quisumbing Torres." Interview with a Philippines lawyer [name withheld], Apr. 26, 2014; Roque, *supra* note 16, at 60. Myanmar also has restrictions on the use of foreign law

separation of power basis, the Court even found a treaty with Spain unconstitutional because it allowed Filipino citizens to practice law in the Philippines based on their Spain-issued law licenses.[109] The constitutional complexity will pose challenges to future liberalization.

Third, a comparative analysis of ASEAN states' legal services commitments fortifies my "paper commitments" argument. The legal services commitments under the AFAS and ASEAN's external FTAs are almost identical.[110]In simple words, ASEAN countries just "copied and pasted" their legal services commitments in these FTAs at different times without any actual improvement. Compared with treatment of their Australian or Chinese counterparts under ASEAN's eternal FTAs, ASEAN law firms and lawyers are not even accorded preferential treatment under the AFAS. This hinders the development of ASEAN lawyers and counteracts the goal of the AEC. In fact, certain commitments are rarely utilized. For example, Malaysia's commitments permitted foreign law firms to be established in the Federal Territory of Labuan.[111]However, no foreign law firms set up branches on the island because the goal of promoting Labuan as an offshore banking center largely failed.[112]

Lastly, most ASEAN states have indicated their most conservative stance on the presence of natural persons by entering "unbound" in the Mode 4 section in legal services commitments. Such "fly in, fly out" practice is critical to international law firms, as they can effectively serve their clients' needs without establishing a costly on-the-ground office. Unlike the EU's Services

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firms' names. For example, Singapore-based Rajah &Tann is officially known as NK Legal in Myanmar. Interview with a Singapore lawyer [name withheld], June 11, 2013.

[109]*See* In Re: Garcia, 2 SCRA 985 (1861) ("[T]the Executive Department may not encroach upon the constitutional prerogative of the Supreme Court to promulgate rules for admission to the practice of law in the Philippines . . . .").

[110]*E.g.*, legal services commitments of Cambodia, Malaysia, Thailand under the AFAS and the AANZFTA.

[111]*See* Trade Policy Review, Report by the Secretariat, Malaysia, WT/TPR/S/292, Jan. 27, 2014, at 110 & 122 (introducing Malaysia's Labuan International and Business Centre and legal services). *See also* Trade Policy Review, Report by the Secretariat, Malaysia, WT/TPR/S/225, Dec. 14, 2009, at 68 ("Under exceptional circumstances, a foreign lawyer may apply for a special admission certificate from the Attorney General. . . . No such certificates have been issued.").

[112] Interview with a UK lawyer and a Malaysian lawyer [names withheld], Mar. 6, 2014.

Directive that specifically applies to lawyers, the ASEAN Agreement on the MNP only incorporates the principle allowing the movement of professionals.[113] Although most ASEAN states do not have clear rules that permit the Mode 4 practice of foreign lawyers, such practice has been tolerated in actuality. The anomaly is the Philippines, as its case law indicates that merely advising on foreign or international law could constitute the "practice of law," which is limited to its citizens.[114] Thailand imposes a milder level of restriction. Itstime-consuming application procedure for the business visa for temporary practiceoften delays cross-border legal practice.[115]

Foreign lawyers may run into the danger of committing the unauthorized practice of law pursuant to the government's interpretation of ambiguous rules. Singapore and Malaysia cases illustrate this problem. As Singapore lawyers were concerned about other ASEAN lawyers' cross-border legal services in their country, the Attorney General's Chambers (AGC) internally deliberated to prohibit the Mode 4 practice.[116] The ultimate decision was not to adopt explicit rules because Singapore-based firms would suffer should other ASEAN states adopt the restrictive approach towards Mode 4 practice.[117] It would also undermine Singapore's status as a legal hub.

Malaysia once held a similar protectionist stance. Itsproposed Legal Profession (Amendment) Act 2012 made foreign lawyers' temporary advisory services related to non-Malaysian law

[113]The range of professionals covered in the agreement will be determined by subsequent negotiations. ASEAN Agreement on the Movement of Natural Persons (2012), arts. 3-7.
[114]*See generally*Cayetano v. Monsod, 201 SCRA 210 (1991).
[115]MarialusiaTaddia, *Thailand: Staying Power*, L. SOC'Y GAZETTE, http://www.lawgazette.co.uk/practice/malaysia-open-for-business/practice/thailand-staying-power/5040390.article ("Many international law firms have set up offices in Bangkok, in part because it is time-consuming and bureaucratic to obtain business visas to service clients on a fly-in/fly-out basis.").
[116] Interview with a Singapore lawyer [name withheld], June 11, 2013.
[117]*Id*.

illegal.[118] This proposed rule contravened Malaysia's goal to be an Islamic financial center by attracting multilateral enterprises. Itwould essentially inhibit Malaysia-based companies from receiving regional legal advice. Not even a Singapore-based general counsel could provide legal advice to Malaysian subsidiaries.[119] As the rule caused grave concerns to international firms, the Malaysian Bar Council subsequently decided to amend the Act to allow foreign lawyers' to temporarily practice non-Malaysian law up to 60 days each year.[120]Given the loose immigration enforcement mechanism to police the 60-day rule, the amendment was simply made for "face" issues.

III. Lessons of Liberalizing the Legal Profession and the Impact of FTAs

Despite the weaknesses of enforcement, ASEAN states' legal services commitments under FTAs paved the way formulti-jurisdictional practice. Their commitments reflectofficial recognition of the importance of cross-border legal practice in strengthening the bloc's capacity to attract FDIs. In the long term, the liberalization of legal services will fortify the competitiveness of ASEAN-based firms. Hence, to meet the AEC goal as a single market, ASEAN countries will need to strike a balance between opening the legal market and enabling the local legal profession to adjust to the competition. Since ASEAN states have closely watched the operation of Singapore's legal regime and FTA commitments, I will analyze Singapore as a case study. In particular, I will examine the best practices of Singapore's incremental approach to liberalizing its legal market.

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[118] Legal Profession (Amendment) Act 2012, sec. 37(2A).

[119] After the announcement of the proposed rule, Singapore-based Rajah &Tann only sent Malaysia-qualified lawyers to Malaysia to deal with legal matters. Interview with a Singapore lawyer [name withheld], June 11, 2013.

[120] *Liberalisation of Legal Services*, http://www.malaysianbar.org.my/trade_in_legal_services_formerly_known_as_gats/liberalisation_of_legal_services.html (last visited May 20, 2014).

A. Foreign Law Firms and Lawyers

Singapore has emerged as a legal hub in ASEAN. Since 2008, the value of Singapore's legal industry has increased by 25% and the export of its legal services has grown by 60%.[121]The influx of foreign law firms and foreign lawyers is remarkable. More than 130 international law firms utilize Singapore as a base to handle offshore transactions related to ASEAN and India.[122]Over 1300 foreign lawyers represent one-fifth of Singapore's legal profession.[123]The fact that the number of Singapore International Arbitration Centre (SIAC) cases rose 2.6 times is also evidence of the country's status as a preferred venue to resolve ASEAN-related commercial disputes.[124] Such status will be further enhanced by Singapore's plan to set up the International Commercial Court and the International Mediation Centre.[125] Despite the government's liberalization efforts and keen foreign competition, 17 of the largest 25 firms in Singapore remain local firms, which have become highly competitive in the region.[126]

Singapore-based firms are largely divided into foreign and local firms. Foreign law firms operate under five schemes: Foreign Law Practices (FLPs), Representative Offices (ROs),

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[121] Speech by Minister for Law, K Shanmugam, during the Committee of Supply Debate 2014, Mar. 5, 2014, http://www.mlaw.gov.sg/news/parliamentary-speeches-and-responses/speech-by-minister-during-cos-2014.html [Shanmugam's 2014 Speech].

[122] The list of Singapore-based foreign law firms [List of Foreign Law Firms], see http://www.lawsociety.org.sg/forPublic/FindaLawFirmLawyer/FindaLawFirm.aspx (last visited May 1, 2014). For example, the Singapore office of Gibson, Dunn &Crutcher focuses on matters related to Indonesia, India, Mongolia and Myanmar. Interview with a US lawyer [name withheld], June 6, 2013.

[123] Elizabeth Broomhall, *Open Season – The Influx of Global Firms Making Their Mark in Singapore*, May 24, 2013, LEGALWEEK, http://www.legalweek.com/legal-week/analysis/2269459/open-season-the-influx-of-global-firms-making-their-mark-in-singapore. *See*Opening of the Legal Year 2013 and Welcome References for Chief Justice SundareshMenon, Jan. 4, 2013, para. 12 ("Between 2007 and 2012, . . . the number of local lawyers over this period grew by about 27% whilst that of foreign lawyers by 42%."); *Liberalisation of Singapore's Legal Sector: A Reflection*, 1:2 AL-MIZAN 13, 18 (2013) ("[T]he number of foreign lawyers registered with the Attorney-General's Chambers doubled to 1304 since the Government relaxed the barriers of entry to foreign lawyers.").

[124]Shanmugam's 2014 Speech, *supra* note 121.

[125]*Id*.; for detailed information on the Court, see Report of the Singapore International Commercial Court Committee (2013).

[126] *Singapore's 25 Largest Law Firms 2013*, Mar. 4, 2014, S'PORE BUS. REV., http://sbr.com.sg/professional-serviceslegal/feature/singapores-25-largest-law-firms-2014-0.

Formal Law Alliances (FLAs), Joint Law Ventures (JLVs) and Qualifying Foreign Law Practices (QFLPs). Local firms are officially known as Singapore Law Practices (SLPs). Prior to the amendments to the Legal Profession Act (LPA) in 2000, the LPA only governed SLPs, thus leaving foreign firms out of the regulatory framework.[127]For the first time, the amendments required foreign law firms and lawyers to register and introduced the JLVs and FLAs.[128] The Legal Profession (International Services) Secretariat under the AGC was established as a regulatory agency for registration matters.[129] Further reform that introduced QFLPs under subsequent amendments to the LPA took place in 2008.[130]

Strong government motivations have driven the liberalizationof Singapore's legal sector. From Singapore's viewpoint, fortifying alliances between local and foreign law firms will help transfer legal expertise and enhance the standards of Singapore firms.[131]Localizing international law firms will not only increase employment, but will also rectify the brain drain problem that causeselite Singapore lawyers to move to Hong Kong or London-based firms.[132]In addition, attracting foreign law firms will expand Singapore's GDP growth and transform itinto Asia's"key legal services hub."[133] Foreign law firms are expected to bring in offshore transactions. The value of exporting legal services will hence escalate in tandem with the increasing use of Singapore law in contracts and designation of Singapore as a dispute resolution

[127] Jeffery Chan Wah Teck, *Liberalisation of the Singapore Legal Sector*, para. 11, http://www.aseanlawassociation.org/10GAdocs/Singapore3.pdf (last visited May 2, 2014).
[128]*Id*., paras. 11-12.
[129]*Id*., para. 11.
[130]*Id*., para. 19.
[131] Second Reading Speech on Legal Profession (Amendment) Bill 2008 by Law Minister K Shanmugam, Aug. 26, 2008, http://www.mlaw.gov.sg/news/parliamentary-speeches-and-responses/second-reading-speech-on-legal-profession-amendment-bill-2008-by-law-minister-k-shanmugam.html [Shanmugam's 2008 Speech].
[132] Report of the Committee to Develop the Singapore Legal Sector (2007), at 85; *see also id*., at 36 ("The number of practising layers in Singapore had risen steadily over the last decade or more, until 2001 when the Bar saw its first decline.").
[133]*Id*. at 67.

forum. [134] Importantly, Singapore's policy makers have avoided repeatingthe Hong Kong experience. In Hong Kong, international law firms now dominate almost "every area of law" because they are permitted to practice local law with few restrictions.[135]ASEAN countries should note that Singapore's incremental liberalization approach offers foreign firms a menu of options as to their corporate forms and permits the local law practice with certain conditions.

The legislative changes to liberalize the legal sector have significantly influenced foreign law firms' structural operations and shaped Singapore's legal landscape. Freshfields Bruckhaus Deringer, a British "magic circle" firm, serves as a prime example. In 1980, Freshfields became the first foreign law firm in Singapore.[136] As an experiment to advance the professional standing and improve Singapore's status as a financial hub, the firm was set up with an ad-hoc license that permitted it to practice Singaporean law.[137] As such, Freshfields developed a strong domestic litigation practice and employed a substantial number of Singaporean lawyers.

Because Freshfields' monopoly status as an international law firm withstrong litigation practice created tensions among local lawyers, the authorities requested that the firm phase out its Singapore law practice.[138] To accommodate its Singaporean lawyers, Freshfieldshelped establish a boutique litigation firm, Wong Yoong Tan & Molly Lim (Wong Tan & Molly Lim

[134]Shanmugam's 2008 Speech, *supra* note 131.
[135] Andrea Tan, *Singapore Proposes Opening Law Firms to Foreign Ownership, Profit Sharing*, Feb. 14, 2012, BLOOMBERG, http://www.bloomberg.com/news/2012-02-14/singapore-proposes-opening-law-firms-to-foreign-ownership-profit-sharing.html. *See alsoLiberalisation of Singapore's Legal Sector: A Reflection*, *supra* note 123, at 18 (indicating that a Member of Parliament expressed his "concern that Singapore's legal market would follow the trajectory of Hong Kong").
[136]*Liberalisation of Singapore's Legal Sector: A Reflection*, *supra* note 123, at 14 (explaining that in 1981, to promote the Asian Dollar Market, Singapore "allowed foreign banks in Singapore to bring in solicitors . . . , upon the Attorney-General's informal approval, to provide legal services for Asian dollar bonds . . . . "). Interview with a UK lawyer [name withheld], June 28, 2013.
[137] Interview with a UK lawyer [name withheld], June 28, 2013.
[138]*Id*.

LLC today) in 1987.[139]Freshfields continued to operate as a sole FLP until it formed a JLV with Drew & Napier, aleading Singapore firm, in 2000.[140]Given the Asian financial crisis and the shift of the firm's focus to China and Japan, Freshfields terminated the JLV and exited Singapore in 2007.[141]Subsequently, due to the booming ASEAN market, Freshfields relocated its Hong Kong-based partners and reopenedits Singapore office in 2012 and is now considering applying for a QFLP license to meet the market demand.[142]

The case of Freshfields demonstrates the evolving legal regime vis-à-vis international firms' operations. Like Freshfields, almost 85% of Singapore-based foreign firms are FLPs.[143]What makes FLPs different from FLAs, JLVs or QFLPs is that FLPs are limited to practicing non-Singaporean law.[144]Lawyers working in a FLP, even Singapore-qualified,cannot practice local law. Contrary to conventional understanding, the incentive to practice Singapore law has not prompted most FLPs to change their legal status. The reason is not the complexity of the application procedure, but the cost and need of having in-house Singapore law expertise. For instance, NagashimaOhno&Tsunematsu (NO&T) serves primarily Japanese clients.[145] Instead of developing its own Singaporean lawyers, the firm's strategy is to work closely with local firms such as Allen & Gledhill.[146] To meet the demand from an increasing number of Japanese small

[139]*Id*.
[140]*Id*.
[141] Suzi Ring, *Freshfields to Reopen in Singapore Five Years after 2007 Exit*, Feb. 10, 2012, LEGALWEEK, http://www.legalweek.com/legal-week/news/2145159/freshfields-reopen-singapore-2007-exit.
[142]*Id*.; Elizabeth Broomhall, *Freshfields to Grow Singapore Arbitration with Transfer of Global Practice Head*, Apr. 28, 2014, LEGALWEEK, http://www.legalweek.com/legal-week/news/2341753/freshfields-to-grow-singapore-arbitration-with-transfer-of-global-practice-head.
[143] List of Foreign Law Firms, *supra* note 122.
[144] Legal Profession (International Services) Rules 2008, rule 2(1).
[145] Interview with a Japanese lawyer [name withheld], June 4, 2013. NagashimaOhno&Tsunematsu first established its Singapore presence in 1997, but exited the country due to the Asian financial crisis. The re-opening of the Singapore office in 2013 was because Tokyo-based companies increasingly delegated the decision-making power of regional operations to their Singapore offices. Hence, it has become important for the firm to have Japanese lawyers stationed in Singapore to work with these companies' Singapore-based counsels. *Id*.
[146]*Id*.

and medium-sized enterprises, it is important to cater to these companies' legal budgets by retaining flexibility in choosing Singapore law firm partners.[147]Thus, being an FLA, JLV, or QFLP would not advance NO&T's business.

For foreign law firms thattake a "wait and see" stance on setting up a permanent office, Singapore law offers the possibility to establish anRepresentative Office, a more cost-effective mechanism for boutique firms to assess the market. An RO may subsequently set up an FLP or exit the country. The renewable one-year RO license limits the scope of practice to "liaison or promotional work only."[148] Unlike an FLP, an RO cannot even "practice" foreign law. One should not confuse Singapore's RO concept with ROs in other countries, such as China and Korea, where ROs are comparable to Singapore FLPs. [149] Norway's Arntzen de Bescheexemplifies an RO model in Singapore. The primary task of the one-person RO is to promote the firm and refer potential cases back to theOslo headquarters.[150]The cases may involve Singaporean companies' M&As with Norwegian companies and relevant due diligence matters.[151] In instances where Norwegian enterprises wish to invest in Singapore, the RO often cooperates with local firms and English firms, as the shipping industry often utilizes English law to govern the contract.[152]Because of limited work, Arntzen de Besche decided to close its RO in 2014.[153] The firm's decision indicates that Singapore may not be attractive to foreign firms from certain jurisdictions.

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[147]*Id*.
[148] Legal Profession (International Services) Rules 2008, rule 17; Fees and Payments, https://app.agc.gov.sg/What_We_Do/Legal_Profession_Secretariat/Fees_and_Payments.aspx (last visited May 3, 2014).
[149]*E.g*., Summary of the Foreign Legal Consultant Act, *supra* note 69.
[150] Interview with a Norwegian lawyer [name withheld], June 5, 2013.
[151]*Id*.
[152]*Id*.
[153] Interview with a Norwegian lawyer [name withheld], Mar. 6, 2014.

Other than foreign law firms, Singapore's liberalization measures extend to foreign attorneys. The scope of liberalization is "FTA-plus" becausethe treatment accorded to foreign lawyers exceeds what FTAs require. Singapore did not make legal services commitments in the WTO or in ASEAN FTAs. It only made such commitments under bilateral FTAs with Japan, Australia and the United States.[154] As Singapore merely committed to "consultancy services for Japanese law," the FTA with Japan has a minimal impact on Singapore's legal market.[155]However, the Singapore-Australia FTA (SAFTA) and the US-Singapore FTA (USSFTA), which became effective in 2003 and 2004, haveenergized the change in Singapore's local profession since 2000.[156]

Under the USSFTA, Singapore recognizedJuris Doctor (J.D.) degrees conferred by Harvard, Columbia, Michigan and New York University law schools as"local degrees" for admissionpurposes.[157]The SAFTA obliged Singapore to accord recognition to 10 Australian law schools for the same purposes.[158]Both FTAs apply to Singapore citizens and permanent residents (PRs) who graduated from designated US and Australian schools with a specified standing.[159] While the rationale for selecting the Australian law schools was based on Australia's

[154] Table IV.10, Trade Policy Review, Report by the Secretariat, Singapore, WT/TPR/S/267, June 5, 2012, at 76-77.
[155] Annex 4C, Singapore's Schedule of Specific Commitments, Japan-Singapore Economic Partnership Agreement (2002), at 432.
[156] Table IV.10, Trade Policy Review, Report by the Secretariat, Singapore, *supra* note 154.
[157]*See* George Yeo's Letter to Robert Zoellick, May 6, 2003 [George Yeo's Letter] (stating that two countries "will initiate consultations on the selection of the four [US] law schools prior to the entry force of the Agreement."); EUL-SOO PANG, THE U.S.-SINGAPORE FREE TRADE AGREEMENT: AN AMERICAN PERSPECTIVE ON POWER, TRADE, AND SECURITY IN THE ASIA PACIFIC 85 (2011). *See also*Carsten Fink & Martin Molinuevo, *East Asian Free Trade Agreements in Services: Key Architectural Elements*, 11:2 J. INT'L ECO. L. 263, 305, ft 11 ("This recognition agreement seems less designed to facilitate the movement of legal professionals . . . than to promote the export of higher education services of US law schools."); Laurel S. Terry, *The Future Regulation of the Legal Profession: The Impact of Treating the Legal Profession as "Service Provider,"* 2008 J. PROF. LAW. 189, 197-98 (2008) (discussing side agreements, letters and an Annex on legal services rules of US FTAs with Peru, Columbia, Singapore and Australia).
[158] Annex 4-III(II): Recognition of Law Degrees for Admission as Qualified Lawyers, Singapore-Australia FTA (2003) [Annex 4-III(II), Singapore-Australia FTA].
[159] To meet the FTA requirements, Singapore students should rank in top 30% and 40%, respectively, of designated Australian and US schools. *Id.*; George Yeo's Letter, *supra* note 157.

"geographical representation," it remains unknown how the four US law schools were selected.[160]The SAFTA went further than the USSFTA by allowing Australian nationals who have received law degrees from National University of Singapore (NUS) to be admitted to the Singapore bar.[161]

The recognition of foreign schools under FTAs may change the dynamic of the legal market, which is currently dominated by law graduates from NUS, Singapore Management University (SMU) and UK schools.[162]After the SAFTA and the USSFTA, Singapore initiated FTA-plus measures to liberalize foreign lawyers' practice areas by introducing the Foreign Practitioner Examination (FPE) in 2012.[163]The objective of the FPE is toenable foreign lawyers to practice "commercial areas ofSingapore law."[164] This direction is in line with the liberalization efforts to expand the scope of practice areas for foreign law firms.

Singapore's FPE imposes eligibility requirements. Itis limited to foreign lawyers who have at least threeyearsof relevant work experience and have worked, or will work, in Singapore-based firms.[165]The FPE is also distinctive in test subjects and the permissible scope of practice. For instance, Indonesia introduced thefirst bar examination for foreign attorneys in 2014.[166] The

[160] Milton Churche, Transcript of Evidence, at 19, *cited in* Singapore-Australia Free Trade Agreement, at 25, http://www.aph.gov.au/binaries/house/committee/jsct/march2003/report/chap2.pdf (last visited June 1, 2013); *see also*PANG, *supra* note 157 ("[N]o one seemed to be able to explain how these four had been chosen."). Note that both FTAs allow the list of recognized schools to be expanded under subsequent negotiations.
[161] Annex 4-III(II), Singapore-Australia FTA, *supra* note 158.
[162] As of May 2014, National University of Singapore (NUS) and SMU are the only two local schools that offer law degrees. The two FTAs will also help cultivate more dual-qualified lawyers, as students from designated law schools are eligible to sit for the bar exams in both jurisdictions. Also note that additional "law schools may be accorded recognition for admission to the Singapore Bar under any bilateral, regional or multilateral" FTAs. Factsheet 1, Key Recommendations of the Third Committee on the Supply of Lawyers, http://www.mlaw.gov.sg/content/dam/minlaw/corp/assets/documents/linkclick62ed.pdf (last visited May 3, 2014).
[163] *See* Legal Services, http://www.contactsingapore.sg/key_industries/legal_services/ (last visited May 3, 2014) ("Singapore also launched the Foreign Practitioners Examination (FPE) in January 2012 to meet the growing demand from Singapore's burgeoning commercial and financial sectors.").
[164] *Id*.
[165] Legal Profession (Foreign Practitioner Examinations) Rules 2011, rule 4(3).
[166] *PERADI Organizes Bar Exam for Foreign Lawyers*, Feb. 27, 2014,

examination focuses on the code of ethics and passing the examination is the prerequisite to register as a foreign lawyer to practice non-Indonesian law.[167]Singapore's FPE covers ethics and corporate laws and passing the FPE will enable foreign lawyers to practice Singapore commercial laws.[168]

Another important legislative change was to ease the requirement on ad hoc admission of Queen's Counsels (QCs), who are well-recognized barristers in common law countries. The 2012 LPA amendment, which abrogated the "sufficient difficulty and complexity" thresholdfor cases,accords the Singapore courts greater discretion to decide on the admission of distinguished foreign counsels.[169]The Singapore High Court in *Re Caplan Jonathan Michael QC*stressed that the "special reason" criterion in the LPA still limits the admission of QCs to"exceptional" cases.[170] One significant factor to consider is the availability of Singapore's QC equivalent, Senior Counsels, or other attorneys to handle the case.[171] Notwithstanding the cautious interpretation, the increasing participation of QCs and foreign lawyers who passed the FPE in domestic cases will further internationalize Singapore's legal market.

B. The Misunderstanding of Joint Law Ventures

The overview of Singapore's legal regimes on foreign law firms and lawyers demonstrates the nation's incremental approach to liberalizing the legal sector by providing foreign firms with a list of options to suit their commercial goals. Singapore'slessons also show that while FTAs

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http://en.hukumonline.com/pages/lt530f21a990829/peradi-organizes-bar-exam-for-foreign-lawyers.

[167]*See id*. (stating that Article 23 (2) of the Law No. 18 of 2003 on Advocates "requires foreign lawyers to secure a recommendation letter from [PERADI,] the Indonesian bar association, before they can be employed by an Indonesian law firm.").

[168] Singapore's Foreign Practitioner Examination covers components of Ethics and Social Responsibility, Corporate Practice, Commercial Practice and Corporate Finance. Guide to the 2013 Session of the Foreign Practitioner Examinations (2013), at 9.

[169] Legal Profession (Amendment) Bill, 2012, Amendment of sec. 15:4(a).

[170] Re Caplan Jonathan Michael QC, [2013] SGHC 75, para. 75.

[171]*Id*., paras. 66-70.

may inspire change, self-initiated FTA-plus measures will result in the meaningful liberalization of legal services. I now turn to the structure of joint ventures and examine the common misunderstanding of JLVs. Trade negotiators and lawmakers prefer to create a legal basisthatfacilitates foreign and local firm alliances to energize legal services liberalization. There are diverse designs for such alliances. Cambodia and Vietnam's commitments under the AFAS and the AANZFTA and Malaysia's 2012 statute that introduces "international partnerships" do not mandate particular forms of corporate associations.[172] The KORUS FTA adopted more specific language that allows US law firms to establish "joint venture firms with Korean law firms" by 2017 as the final stage for liberalizing Korea's legal market.[173]

Based onthe Singapore experience, ASEAN states should be cautious in adopting these arrangements due to the high failure rate of JLVs and their inherent structural weaknesses. Singapore introduced FLAs and JLVs under amendments to the PLA in 2000 in order to encourage collaboration between foreign and Singapore law firms and allow the latter to receive world-class expertise from the former.[174] The two schemes enable constituent foreign and local firms to market "as a single service provider" and bill their clients as a single entity.[175]Furthermore, "office premises, profits or client information" of the constituent firms can

[172] Cambodia and Vietnam allow commercial associations and partnerships, respectively between foreign and local law firms. AANZFTA Commitments & AFAS Eighth Package of Commitments, *supra* note 85; Legal Profession (Amendment) Act 2012, art. 40F. Interestingly, Supplement IX to the Mainland and Hong Kong Closer Economic Partnership Agreement (CEPA) allows Hong Kong firms' representative offices "to operate in association with" no more than three Chinese firms. Although Chinese law does not allow joint law ventures (JLV), the CEPA rule prompted Clyde & Co to form a JLV with a Chinese firm via the UK firm's Hong Kong branch. Supplement OX to CEPA (2012); Elizabeth Broomhall, *Clyde & Co Taps South West China through Local Joint Venture*, Oct. 31, 2013, LEGALWEEK, http://www.legalweek.com/legal-week/news/2304046/clyde-co-taps-south-west-china-with-local-joint-venture.

[173] 2013 National Trade Estimate Report on Foreign Trade Barriers, at 238; Annex II-Korea-45, KORUS FTA, *supra* note 67.

[174] Steven Chong, *Liberalisation of Legal Services Freeing the Legal Landscape: Is South-East Asia Ready?*, paper presented at the International Bar Association: 3rd Asia-Pacific Regional Forum Conference (2012), at 4-6.

[175] Legal Profession (International Services) Rules 2008, rules 5(1) & 9(1).

be shared.[176]To form an FLA or a JLV, both constituent firms should possess "relevant legal expertise and experience" in niche areas such as financial, intellectual property, maritime law or arbitration.[177]

Despite sharing the "two-in-one" concept, an FLA is different from a JLV in that an FLA solely fortifies an alliance between a foreign and a Singapore firm without creating a separate corporate entity. In other words, an FLA permits two free-standing firms to collaborate without cross-ownership. Ince& Co, a UK-based international firm, formed an FLA with Incisive Law LLC.[178] The two constituent firms respectively registered as an FLP and anSLP. For branding and client purposes, the FLA creates the image of a single firm that provides English and Singapore law services. Attorneys of the two firms share the same office premises, collaborate and share profits on certain cases, and attend each other's board meetings.[179]Nevertheless, the two legal entities maintain separate client bases, as well as recruiting and promotion procedures.[180]In reality, the FLA scheme has rarely been utilized. There are only four FLAs, most of which are small firms.[181]Compared with FLAs, the more commonly used JLV structure is detailed below.

Table 2: Singapore's Joint Law Ventures[182]

Foreign Law Firm	**Singapore Law Firm**	**JLV status**
Baker & McKenzie (US)	Wong &Leow Partnership	since 2001
Clyde & Co (UK)	Clasis LLC	since 2013

[176] Legal Profession Act (Ch. 161), arts. 130B(7) & 130C(7).
[177] Legal Profession (International Services) Rules 2008, rules 4(2)(a) & 8(1)(a).
[178] Interview with a UK lawyer [name withheld], June 6, 2013.
[179] *Id*.
[180] *Id*.
[181] The only exception is Clifford Chance Asia. Joint Law Ventures/Formal Law Alliances, http://www.lawsociety.org.sg/forPublic/FindaLawFirmLawyer/JointLawVenturesFormalLawAlliances.aspx (last visited May 1, 2014).
[182] Websites of respective law firms; Id. China's Dacheng Law Offices previously formed a Joint Law Venture (JLV) with Central Chambers. SeherHussain, *Singapore: Dacheng Servers Ties with Central Chambers; in JLV with Wong Alliance*, Jan. 26, 2012, ASIAN LEGAL BUS., http://www.asianlegalonline.com/news/singapore-dacheng-severs-ties-central-chambers-jlv-wong-alliance/60445.

Dacheng Law Offices (China)	Wong Alliance LLP	since 2011
Duane Morris (US)	Selvam LLC	since 2011
Hogan Lovells (US & UK)	Lee & Lee LLP	since 2001
Pinsent Masons (UK)	M Pillay LLC	since 2010
Watson, Farley & Williams (UK)	Asia Practice LLP	since 2011

A JLV indicates a legal entity thatan FLP and an SLP jointly established and own.[183] In the context of an FLA, Singapore law services are provided through lawyers in the constituent SLP.[184]A JLV can be more complex. While the constituent SLP of a JLV offersa full-range of Singapore law services, a JLV in itself is allowed to engage in "permitted areas of legal practice"(*i.e.*, commercial areas of Singapore law).[185]Hogan Lovells Lee & Lee exemplifies a long-standing JLV. As a constituent SLP of this JLV, Lee & Lee also functions as an independent domestic firm that encompasses a group of lawyers and maintains a client base separate from the JLV.[186]To a JLV, a prime concern arising fromthe "permitted areas of legal practice" restriction is cost efficiency in arbitration cases. Aforeign attorney can deal with matters before an arbitral forum such as the SIAC.[187] Nonetheless, if the opposing party challenges the arbitral award in court, the JLV must transfer the case to a Singapore-qualified lawyer in the SLP of the JLV. This is because "appearing or pleading in any court" is excluded

[183] Legal Profession Act (Ch. 161), art. 130B(1) & (9).
[184] Legal Profession (International Services) Rules 2008, rule 9(2).
[185] Legal Profession Act (Ch. 161), arts. 130A(1) & N(3); Legal Profession (International Services) Rules 2008, rule 3.
[186] Interview with a UK lawyer [name withheld], June 6, 2013.
[187] *See* Lawrence G S Boo, *Ch. 04: International and Domestic Arbitration in Singapore*, http://www.singaporelaw.sg/sglaw/laws-of-singapore/overview/chapter-4 (last visited May 20, 2014) ("This includes cases where the substantive law involved in the dispute is the law of Singapore.").

from a JLV's permitted practice areas.[188]Thus, the restriction hinders a JLV's provision of full-scale arbitration services in a more cost-efficient way.

The regimes governing JLVhave undergone various stages of reforms since 2000. Under the USSFTA and SAFTA, Singapore accorded preferential treatment to US and Australian law firms. These two FTAs eased requirements for establishing JLVs, as well as FLAs, by reducing the number of resident foreign lawyers and the length of their relevant experiences.[189] For example, the USSFTA reduced the requirement of the minimum number of US lawyers from five to three, including two equity partners.[190] Rather than meeting the five-year experience requirement for each US lawyer, "an aggregate basis of 15 years" for resident lawyers would suffice.[191]

The USSFTA also expanded the scope of relevant experiences for JLVs. In addition to "banking and finance work," the scope was extended to cover so-called "Tier 1" and "Tier 2" key areas such as project finance, capital market and M&As.[192]After the two FTAs, Singapore introduced an "enhanced JLV scheme" in 2008 in order to increase incentives for international firms to set up JLVs.[193]The 2008 scheme enabled the foreign firm of a JLV to share 49% of its constituent SLP's profits in the "permitted areas."[194] In 2012, profit-sharing and holding of equity were increased to the 33% cap on the profits of the entire JLV in areas of cooperation.[195]

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[188] Legal Profession Act (Ch. 161), art. N(3); Legal Profession (International Services) Rules 2008, rule 3.
[189] For an overview of legal services under Singapore's FTAs with the United States and Australia, see ArfatSelvam, *Cross Border Legal Services in ASEAN under WTO*, http://www.aseanlawassociation.org/docs/w2_sing.pdf (last visited June 1, 2014), at 76-78.
[190] George Yeo's Letter, *supra* note 157.
[191] *Id*.
[192] *Id*.
[193] Yun Kriegler, *Singapore Flings: the Politics of Local Tie-ups Revealed*, Apr. 16, 2012, LAW., http://www.thelawyer.com/singapore-flings-the-politics-of-local-tie-ups-revealed/1012180.article; Chong, *supra* note 174, at 9.
[194] Allowing Singapore Law Practices More Flexibility to Grow and Enhance International Competitiveness, May 31, 2012, http://www.mlaw.gov.sg/news/press-releases/allowing-singapore-law-practices-more-flexibility-to-grow-and-enhance-international-competitiveness.html.
[195] *Id*. *See* Jessica Seah, *Have QFLPs Worked for Singapore*, May 21, 2012, LAW.COM,

Singapore has focused its liberalization efforts on reforming JLVs. These measures did attract foreign law firms such as Allens Arthur Robinson, Australia's first JLV following the SAFTA, and China's Dacheng Law Offices.[196] However, ASEAN states that tend to follow Singapore's regulatory changes should be careful. In reality, the failure rate of JLVs has beennoteworthy. From 2000 to 2005, a third of JLVs and all FLAs came to an end.[197]JLVs that involved US firms lasted the shortest amount of time. Shearman & Sterling's JLV with Stamford Partnership and White & Case's JLV with Colin Ng & Partners disbanded after only two years.[198] The Singapore government's recognition of liberalized JLV rules as "limited success" promoted the introduction of the enhanced JLV scheme.[199]However, these enhanced measures did not incur positive market responses. By 2012, three of Singapore "Big Four" firms that had formed JLVs ended their alliances with foreign partners.[200] In particular, Allen & Gledhilldissolved its 11-year JLV with Linklaters and subsequently ended its merger talk with Allen &Overy.[201]

As previously discussed, from the perspective of trade negotiators, the design of JLVs is usually intended as a significant step for legal services liberalization. As the Singapore experience demonstrates, suchan intention is based on a misunderstanding of JLVs. A simple, yet profound, question for ASEAN to consider is whatunderlies the persistent failure of JLVs.

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http://www.alm.law.com/jsp/article.jsp?id=1202555185632&slreturn=20130213113226 ("The rule change was largely seen as facilitating a proposed combination between Allen &Overy and local leader Allen & Gledhill.").

[196] AzadehKhalilizadeh, *First Australian Law Firms Ties Knot with Singapore under Joint Law Venture*, http://www.findlaw.com.au/articles/2204/first-australian-law-firm-ties-knot-with-singapore.aspx (last visited June 3, 2014); Hussain, *supra* note 182.

[197] Chong, *supra* note 174, at 7; *see also id*. (stating that "some critics [labeled] the JLV and FLA models as failed experiments").

[198] Table 1, in Krishnan, *supra* note 6, at 444.

[199] Report of the Committee to Develop the Singapore Legal Sector (2007), at 87.

[200] Drew & Napier, Wong Partnership, and Allen & Gledhill terminated their JLVs with Freshfields, Clifford Chance, and Linklaters, respectively. Table 1, *in* Krishnan, *supra* note 6, at 444; Broomhall, *supra* note 123.

[201] Douglas Wong, *Allen & Gledhill Ends Talks with Law Firm Allen &Overy*, Mar. 26, 2012, BLOOMBERG BUSINESSWEEK, http://www.businessweek.com/news/2012-03-26/allen-and-gledhill-ends-talks-with-law-firm-allen-and-overy.

To be fair, the high failure rate of joint ventures has been proven empirically and JLVs are not an exception.[202] Singapore's measures that focus on profit-sharing have not remedied JLVs' embedded problems. From a pragmatic perspective, as AGC's Legal Profession (International Services) Secretariat has only four to five staff members, monitoring and enforcing the percentage rules on profit- poses significant challenges.[203]

A more difficult obstacle to JLVsis the alignment of management cultures and financial interests. The cultural differences in the JLV context range from corporate strategies andpartnership structuresto standardized forms.[204]Competing financial interests often erode the foundation of a JLV as an economic union. A Singapore firm in a JLV may not be willing to "share the pie" with its foreign partner if a transaction involves primarily ASEAN-related legal issues.[205] Also, an internal conflict of interests arises when the constituent FLP wishes to represent a foreign company that will compete with the SLP's major clients such as Temasek Holdings.

These dilemmas explainthe limited survival and low utilization rates of JLVs and FLAs mechanisms. Notwithstanding these challenges, I also offer the reasons for long-lasting JLVs for ASEAN states' reference. Both Hogan Lovells Lee & Lee and Baker &McKenzie.Wong&Leow have been in existence since 2001.[206] Why and how have these two JLVs operated against the prevailing trend of failure? The fact that Hogan Lovells and Lee & Lee cover different areas of expertise makes them an ideal match. The former's expertise in project finance and offshore

[202] *See* Krishnan, *supra* note 6, at 438-39 (discussing the high failure rate of joint ventures in the business context).
[203] Interview with a Singapore lawyer [name withheld], June 11, 2013.
[204] These differences contributed to the termination of JLV between Allen & Gledhill and Linklaters. Kriegler, *supra* note 193.
[205] *See e.g. id*. ("In some of the major M&A transactions A&G completed in 2010, for example, A&G was the lead adviser to the acquirers and Linklaters played no role.").
[206] Table 1, *in* Krishnan, *supra* note 6, at 444.

M&As and the latter's focus on stock exchanges and employment law enable them to complement rather than compete with each other on the same deals.[207]

Baker &McKenzie.Wong&Leow presents a different model. The two constituent firms have no conflict because Wong &Leow, the SLP, was actually set up by Baker for JLV purposes.[208]A similar practice of an "Alibaba arrangement" under which an FLP enters the Singapore legal market through a small, local proxyis also found in FLAs. The UK firm of Ince& Co launched anSLP, Incisive Law LLC, justa year beforeit formed an FLA.[209]Although the FLA application "surprised" the AGC, the FLA was technically in compliance with the existing law.[210] ASEAN states should note that Singapore rules require both an FLP and an SLP in alliances to possess "relevant legal expertise and experience" with the intention to facilitate the transfer of expertise to the local profession.[211]In my view, allowing an Alibaba arrangement defeats the intention of the LPA that introduces the JLV and FLA mechanisms. The rules should be carefully crafted to prevent such an abuse of regulatory frameworks.

C. The Experiment of Qualifying Foreign Law Practices

In response to the mixed result of liberalization measures, Singapore introduced the QFLP licenses in tandem with the enhanced JLV scheme in 2008.[212] The QFLP mechanism is not mandated by FTAs and can be seen as Singapore's self-initiated FTA-plus commitment to legal services liberalization. The QFLP mechanism is revolutionary. Different from JLVs or FLAs, a

[207] Interview with a UK lawyer [name withheld], June 6, 2013.
[208] *See* Alice Gartland, *Singapore Rising: Licensed to Thrill*, July 6, 2012, LEGALWEEK, http://www.legalweek.com/legal-week/feature/2189476/singapore-rising-licensed-thrill?WT.rss_f=Law+firms&WT.rss_a=Singapore+rising%3A+Licensed+to+thrill%3F&keepThis=true&TB_iframe=true&height=650&width=850 (last visited June 3, 2014) (describing that Wong and Leow was "founded by local lawyers who already worked in Baker & McKenzie for several years [and] shared the same client base philosophy.").
[209] Interview with a UK lawyer [name withheld], June 6, 2013.
[210] *Id*.
[211] Legal Profession (International Services) Rules 2008, rules 4(2) & 8(1).
[212] Chong, *supra* note 174, at 10.

five-year, renewableQFLP license enables a foreign law firm to practice "permitted areas" of Singapore law.[213] In other words, a QFLP can engage in commercial law independently of having a Singapore law firm partner.[214]

The government selected six of 20 FLPs in 2008 and four of 23 FLPs for QFLP licenses, all of which are leading US and UK firms.[215] The two-stage selection process involved the Evaluation Committee and the Selection Committee comprising senior officials from various ministries in charge of law, trade and finance.[216] Also unique to QFLPs, an FLP must be committed to growth in Singapore. These selection criteria include the number of the Singapore offices' resident lawyers, the value of its offshore work, and whether the office will be each firm's regional headquarters.[217]Since fewer than 8% of Singapore-based foreign firms could be QFLPs, they are naturally perceived to hold elite status in the legal market.[218]

Table 3: InternationalLaw Firms Awarded QFLP Licenses[219]

Foreign Law Firm	**Awarded in 2008**	**Awarded in 2013**	**Renewed in 2014**
Allen &Overy (UK)	X		X
Clifford Chance (UK)	X		X
Gibson, Dunn &Crutcher (US)		X	
Herbert Smith Freehills (UK &Australia)	X		Did not apply for renewal
Jones Day (US)		X	
Latham & Watkins (US)	X		X

[213] Legal Profession (International Services) Rules 2008, rules 3 & 11; Award of Qualifying Foreign Law Practice (QFLP) Licences, Dec. 5, 2008, http://www.news.gov.sg/public/sgpc/en/media_releases/agencies/minlaw/press_release/P-20081205-1.

[214] In a QFLP, Singapore law matters can also be handled by Singapore-qualified lawyers. Legal Profession (International Services) Rules 2008, rule 11(1)(b).

[215] Award of Qualifying Foreign Law Practice (QFLP) Licences, Dec. 5, 2008, http://www.news.gov.sg/public/sgpc/en/media_releases/agencies/minlaw/press_release/P-20081205-1;

[216] Award of the Second Round of Qualifying Foreign Law Practice Licences, Feb. 19, 2013, http://www.mlaw.gov.sg/news/press-releases/award-of-second-round-qflp-licences.html.

[217] *Id*.

[218] There are 10 QFLPs out of 130 foreign law firms in Singapore. List of Foreign Firms, *supra* note 122.

[219] Qualifying Foreign Law Practices, http://www.lawsociety.org.sg/forPublic/FindaLawFirmLawyer/QualifyingForeignLawPractices.aspx (last visited May 1, 2014); Award of the Second Round of Qualifying Foreign Law Practice Licences, *supra* note 216; Renewal of Qualifying Foreign Law Practice Licences Awarded in 2008, Feb. 28, 2014, http://www.mlaw.gov.sg/news/press-releases/renewal-of-qualifying-foreign-law-practice-licences-awarded-in-2.html.

Linklaters (UK)		X	
Norton Rose Fulbright (UK & US)	X		X
Sidley Austin (US)		X	
White & Case (US)	X		One-year conditional license

Note: "X" indicates the receipt or renewal of five-year QFLP licenses.

Statistics show that QFLPs did contribute to the growth of Singapore's legal industry. The 2009 to 2014 revenue that the first six QFLP firms generated totaled S$1.2 billion, including 80% from offshore transactions.[220] Singapore's QFLP experiment attracted ASEAN states' attention. Following Singapore's step, Malaysia introduced a similar mechanism known as the Qualifying Foreign Law Firm (QFLF) license in 2012.[221] The key differences between Singapore's QFLP and Malaysia's QFLF is that the latter limits the number of the licenses to five and only foreign firms with international Islamic finance expertise will be considered.[222]Arguably, Malaysia's substantial restriction on practice areas can be a deterrent for international firms, thereby counteracting the intended goal of the new scheme.

Malaysia's reform demonstrates that Singapore's QFLP mechanism can be seen as a milestone for ASEAN's liberalization efforts. To understand Singapore's experiment from a holistic approach, it is important to understand the reasons for QFLP applications. From a law firm's perspective, perception and the cost efficiency are primary considerations. QFLP status accords a foreign firm animmediate reputational advantage, as a QFLP license is perceived as an official "testament" of a firm's global reputation.[223] This advantage benefits pursuing clients

[220] Renewal of Qualifying Foreign Law Practice Licences Awarded in 2008, *supra* note 219.
[221]Liberalisation of Legal Services, *supra* note 120; Legal Profession (Amendment) Act 2012, art. 40G.
[222] The goal is to support the Malaysian International Islamic Finance initiative. *Id*. See Elizabeth Broomhall, *Malaysia to Open Doors to Global Firms Practising Local Law*, Mar. 1, 2013, LEGALWEEK, http://www.legalweek.com/legal-week/news/2251243/malaysia-to-open-doors-to-global-firms-practising-local-law?WT.rss_f=Home&WT.rss_a=Malaysia+to+open+doors+to+global+firms+practising+local+law. The internationalization and maturity of Malaysia's legal market is much lower than Singapore, as 98% of Malaysian firms have no more than five lawyers. *Liberalising Legal Services Sector – Does it Matter? Part 1*, http://www.businesscircle.com.my/liberalising-legal-services-sector-does-it-matter/ (last visited June 2, 2104).
[223] Interview with a US lawyer [name withheld], June 6, 2013.

proactively because they will prefer QFLPs to other foreign firms that are "based in Singapore, but cannot do Singapore law."[224]The client issue is associated with the cost efficiency because a QFLP provides one-stop shop legal services. For matters ofSingapore law, a QFLP can internalize and reduce the cost without recruiting increasingly expensive local firms. An FLP often assists foreign corporate clients with a long-term relationship to be a holding company via a buyout of Singapore-listed corporations. Once the foreign company enters Singapore, anFLP with a QFLP license can keep the same clients for Singapore law-related services and avoids such work being taken away by other firms.[225] These pragmatic reasons contribute to the QFLPs' market popularity.

While the result of Malaysia's QFLF scheme remains to be seen, Singapore's five-year experiment with the QFLP mechanism offers valuable lessons for ASEAN countries in their liberalization efforts. First, the QFLP license aims at increasing the value of offshore legal services and exposing local lawyers to world-class legal practice by obliging foreign firms to commit to growth in Singapore. Without periodic monitoring, these purposes will be frustrated by a game of numbers. For example, one QFLP criterion is the firm's expected increase in the hire of Singapore lawyers.[226]This criterion would prompt applicant firms to inflate the number of local lawyers they will recruit.[227]ASEAN countries should note that focusing on such a number per se will miss the point. A foreign firm may easily "fulfill the quota" by recruiting dual-qualified lawyers or adopting a dual salary scheme, making local lawyers second-class citizens in the firm.

[224] *Id*.
[225] *Id*.
[226] Award of the Second Round of Qualifying Foreign Law Practice Licences, *supra* note 216.
[227] Interview with a UK lawyer [name withheld], June 28, 2013.

One hundred Singapore-qualified lawyers are employed in the first six QFLPs and, thus, on average, a QFLP hires 16 local lawyers.[228]Not all QFLPs have expanded local hiring. Herbert Smith Freehills' recruitment record is substantially below other QFLPs and currentlyincludes only five local lawyers.[229] Presumably for this reason, as well as its inability to generate expected revenues, the firm decided not to renew its QFLP license in 2014.[230]The fact that White & Case's renewal of its QFLP license was extended for only oneyear underscores the challenge of maintaining QFLP status.[231]Sidley Austinadopted a different approach. Since being awarded a QFLP license in 2013,the firm has substantially increased the number of Singapore-qualified lawyers in its international finance practice.[232] These mixed results indicate that the regulatory agency's careful review of the firms' track records is critical to the underlying goals of the QFLP scheme.

Second, Singapore's QFLP experiment may inform ASEAN states of a multi-facetedAlibaba arrangement problem that is intertwined with the JLV/FLA cases discussed above. The utilization and incentive for a QFLP license will decrease if the Alibaba arrangement in the JLV/FLA context is not regulated. Without going through a competitive application, a FLP can simply form an artificial SLP to provide Singapore law services. The permitted scope of such JLV/FLA alliances is even wider than that of a QFLP. This loophole may become a fallback option for firms that could not gain the QFLP status. Furthermore, the 2012 amended rules that

[228] Renewal of Qualifying Foreign Law Practice Licences Awarded in 2008, *supra* note 219.
[229] Yun Kriegler, *Can Herbies Succeed in Singapore without the QFLP?*, Mar. 3, 2014, LAW., http://www.thelawyer.com/analysis/behind-the-law/can-herbies-succeed-in-singapore-without-the-qflp/3017033.article.
[230]*See id*. (stating that the firm's application may have been rejected by the Ministry of Law, "[b]ut in order to 'save face,' the [Ministry] and the firm have agreed to choose a nicer way to work the outcome").
[231]*Id*.
[232] Interview with a Australian lawyer [name withheld], Apr. 27, 2014; *see also* Broomhall, *supra* note 123 ("Of those granted in QFLPs in the second round, Sidley has done the most hiring so far.").

allow QFLPs to form JLVs and FLAs with local firms present a different dilemma.[233] Such alliances may offer full-scale services because a QFLP's commercial law and arbitration practice can be augmented by the Singapore firm partner's litigation capability. Nonetheless, the permission of such an arrangement may lead to distorted results. A QFLP may circumvent the permitted areas restriction by setting up "its" SLP. Clifford Chance exemplifies this Alibaba arrangement practice. The firm became a QFLP in 2008 and formed an FLA with a boutique Singapore firm, Cavenagh Law, in 2012.[234] In fact, this SLP was founded by Clifford Chance partners for FLA purposes.[235] The claim of the new "Clifford Chance Asia" as "the first international law firm offering litigation advice" could mislead the clients that a QFLP can work on litigation matters.[236] As this incident also reveals a QFLP's potential violation of legal profession rules, Singapore's Law Minster hence sharply criticized such an advertisement.[237]

Finally, to further Singapore's goal to "internationalize" local lawyers, QFLPs should be permitted toprovide law school graduates with practice training contracts that would allow them to fulfill the bar admission requirements.Some may argue that this proposal will cannibalize domestic firms' recruitment. This contention ignores the facts that local firms are dominant employers of local graduates and that the tightly-controlled number of QFLPs will only have a

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[233] Legal Profession (International Services) Rules 2008, rule 11(3A).
[234] Elizabeth Broomhall, *Singapore Law Minister Criticises Clifford Chance over 'Inaccurate' Claims*, Oct. 22, 2013, LEGALWEEK, http://www.legalweek.com/legal-week/news/2302060/clifford-chance-under-scrutiny-in-singapore-for-statements-on-litigation; Jonathan Ames, *Clifford Chance Signs Singapore Joint Venture Deal*, Dec. 11, 2012, GLOBAL LEGAL POST, http://www.globallegalpost.com/global-view/clifford-chance-signs-singapore-joint-venture-deal-39831452/. The reason for Clifford Chance to choose to form a formal law alliance rather than a JLV may be because a QFLP in a JLV can only provide Singapore law services through the JLV. An FLA does not prevent a constituent FLP from continuing its permitted areas of practice. Legal Profession (International Services) Rules 2008, rule 11(3B).
[235] The founding partners came from Clifford Chance and the firm's formal JLV partner, WongPartnership. Ames, *supra* note 234.
[236] *Cavenagh Law Links with Clifford Chance for Formal Law Alliance*, Dec. 11, 2012, S'PORE BUS. REV., http://sbr.com.sg/professional-serviceslegal/more-news/cavenagh-law-links-clifford-chance-formal-law-alliance; *Liberalisation of Singapore's Legal Sector: A Reflection*, *supra* note 123, at 17.
[237] Broomhall, *supra* note 234; *Liberalisation of Singapore's Legal Sector: A Reflection*, *supra* note 123, at 17.

limited impact on the market.Under current rules, a JLV can offer such contracts through its Singapore law arm. For instance, "supervising solicitors" at Wong &Leow are qualified to supervise trainees and to train them for its JLV with Baker & McKenzie.[238]Some QFLPs such as Linklaters shifted the hiring focus to junior Singapore associates and prefer that they go through "their own training."[239]Granting the QFLPs qualification to train local graduates will expose them to international legal practice at an early stage. Such qualification may also facilitate QFLPs' commitment to growth in Singapore and incentivize them to recruit NUS and SMU graduates rather than look overseas.

IV. The Roadmap for Reforming ASEAN's Legal Services Market

As ASEAN marches toward its fourth decade, it is necessary for the ten-country bloc to reinvigorate its economic competitiveness on the global stage. Transforming the AEC into a single market and product base will give ASEAN investment advantages over China and India and fortifyits status as Asia's locomotive of growth. As ASEAN governments have recognized, the progressive liberalization of legal services is integral to the seamless multi-jurisdictional practice and the development of ASEAN law. However, the "paper commitments" weaknesses under ASEAN FTAs still undermine the intended result of liberalization. A feasible, incremental roadmap is therefore crucial to revitalizing ASEAN's legal services negotiations. APEC, NAFTAand the EU, as well as Singapore's experimentswith foreign lawyers, JLVs and QFLPs, demonstratethe best practices for ASEAN's prospective liberalization efforts. In line with the AEC objectives and the lessons analyzed above, I will provide a three-step reform proposal for

[238] Legal Profession (Practice Training Period) Rules 2009, rule 5; Practice Training Contracts, http://www.bakermckenzie.com/singapore/practicetrainingcontracts/ (last visited June 5, 2014).
[239] Interview with a UK lawyer [name withheld], June 11, 2013. Instead of offering practice training contracts, some foreign firms, including Linklaters, have short-term internship programs for Singapore law students. Linklaters also provides Singapore-based junior associate to be trained in the London office for two years. *Id*.; Internships, http://www.linklaters.com/JoinUs/locations/Singapore/Pages/Internships.aspx (last visited June 5, 2014).

liberalizing ASEAN's legal services market. These proposals will in turn help reinforce establishment of the AEC, as they further the integration of ASEAN law.

A. Transparency and Harmonization of ASEAN Law

The initial step for legal services liberalization is to deepen the transparency and harmonization of ASEAN legal systems. Emerging ASEAN law and dispute resolution mechanisms lack a centralized enforcement akin to EU law. The lack of transparency in domestic rules on legal services has also delayed the integration progress. I propose the creation of an on-line ASEAN Legal Services Databasemodeled after the inventory of the APEC Legal Services Initiative. The information in the APEC LSI has not been updated since 2010 and does not include the non-APEC members of ASEAN (Cambodia, Laos and Myanmar).To ensure transparency on legal services rules in each country,the database's information should be regularly updated by ASEAN's law ministries and bar associations.

The ASEAN database should be "APEC-plus"by includingthe rules governing both domestic and foreign lawyers and law firms. Requirements for qualifying law degrees, such as Bachelor of Laws (LL.B.) degrees in most ASEAN jurisdictions and J.D. degrees in the Philippines and Singapore, will be included.[240]The database should highlight the rules on different categories of lawyers and whether the full licensing is limited to citizens and permanent residents.[241] The admission examination and practical training periods should be clearly identified. The transparency ofsuch information will facilitate prospective mutual recognition.

[240] For information on the Juris Doctor (J.D.) requirement in the Philippines, see http://law.upd.edu.ph/index.php?option=com_content&view=category&id=36&Itemid=56 (last visited June 6, 2014). In Singapore, only SMU offers J.D. degrees.

[241] The legal profession in most ASEAN countries is "fused," as a qualified lawyer can act as both a solicitor and a barrister. Myanmar's legal profession is complex. The lawyers are categorized as advocates and pleaders, which are further subdivided into ordinary/lower grade pleaders and higher grade pleaders. Qualifications and permitted practice areas vary subject to different categories. Nang Yin Kham, *An Introduction to the Law and Judicial System of Myanmar*, Myanmar Law Working Papers Series, Working Paper No. 001 (2014), at 22.

As for foreign lawyers' Mode 4 practice, simple explanations as to whether a host state permits or prohibits the temporary practice do not suffice. "User friendly" information should include the permitted scope of temporary services (*e.g.*, arbitration or foreign law advice), as well as the permitted length of work, the type of visas and tax implications.[242] The disclosure of these rules can prevent the unauthorized practice of law based on the interpretation of ambiguous regulations. With respect to foreign law firm licenses, the database should also detail authorized forms of commercial associations and practice areas and equity requirements. As Vietnam and Cambodia incidents have previously illustrated, such information may deter the protectionist lobbying forces from pushing the government to narrowly construe the FTA commitments. Overall, the ASEAN database will not only strengthen the transparency of domestic rules, but will also serve as the "single window" for law firms and the authoritative basis for ASEAN negotiations.

Legal harmonization will complement transparency toward ASEAN's integrated legal services market.[243] The approximation of ASEAN's diverse laws, particularly in trade and investment areas, will reduce transaction costs and attract FDIs, thus benefitting ASEAN firms. This objective is in line with ASEAN's principle to comply with "multilateral trade rules and ASEAN's rules-based regimes" in order to fulfill economic commitments and eliminate barriers

[242] India serves as a tax example for the temporary practice. While the Indian court inthe 2012 case of A.K.Balaji vs. Government of India and Ors. held that foreign lawyers' fly-in, fly-out practice is permitted, their presence in the country "may also give rise to potential Indian tax exposure." Vyapak Desai et al., *Practice of Foreign Law in India Foreign lawyers Can "Fly- in and Fly- out,"*5:1 INDIA L.J. (2012), http://www.indialawjournal.com/volume5/issue_1/special_story.html.

[243] *See*SundareshMenon, Keynote Address: ASEAN Integration though Law Concluding Plenary, Aug. 25, 2013, at 7 (discussing ASEAN's harmonization of commercial law); Law Officials Gather to Discuss ASEAN Legal Cooperation, Dec. 5, 2013, Xinhua, http://english.people.com.cn/90777/8476146.html ("The harmonization ofASEANtradelawhas also been a topic of discussion ahead of ASEAN Economic Community (AEC) integration in 2015."). Indonesian President SusiloBambangYudhoyono also called for "a process of harmonization" of ASEAN law. Agnes Winarti, *SBY Calls for Legal Harmonization*, Feb. 17, 2012, JAKARTA POST, http://www.thejakartapost.com/news/2012/02/17/sby-calls-legal-harmonization.html.

to regional integration.[244] The TFEU authorizes the European Council to issue directives to approximate the differences in domestic laws that may distort the internal market.[245] In comparison, the ASEAN Summit lacks such top-down law-making authority under the ASEAN Charter.[246] Legal harmonization in ASEAN has, to date, been conducted through a soft-law approach.[247]

Harmonization measures include the implementation of ASEAN's Intellectual Property Rights Action Plan, Regional Guidelines on Competition Policy, and MRAs on various industrial standards.[248] Prospective efforts should focus on expanding these areas and enhancing periodic reviews of ASEAN states' compliance. An equally important harmonization effort is to acceleratethe mutual recognition of arbitral awards and court judgments within ASEAN. With Myanmar acceding to the New York Convention in 2013, arbitral awards rendered in contracting states can be recognized and enforced in ASEAN.[249] The next step is to adopt an ASEAN

[244] Charter of the Association of Southeast Asian Nations (2007), art. 2(2)(n).

[245] Treaty on the Functioning of the European Union, as amended by the Treaty of Lisbon (2007), art. 115. For provisions on "approximation of laws," see Charter 3 of the Treaty.

[246] For the authorities of the ASEAN Summit, as "the supreme policy-making body," see Charter of the Association of Southeast Asian Nations (2007), art. 7(2).

[247] This approach is in line with ASEAN's non-binding, consensus-based principle. Charter of the Association of Southeast Asian Nations (2007), preamble.

[248] Detailed contents of these initiatives, see ASEAN IPR Action Plan 2011-2015, http://www.aseanip.org/ipportal/index.php?option=com_content&view=article&id=141:asean-ipr-action-plan-2011-2015&catid=218&Itemid=653 (last visited June 15, 2014); ASEAN Regional Guidelines on Competition Policy (2010), at 15-44; Azimon Abdul Aziz et al., *Towards Harmonization of the ASEAN Contract Law: The Legal Treatment of Unfair Consumer Contract Terms among Selected ASEAN Member States*, 2 ASIAN J. ACCOUNTING & GOV. 61, 62 (2011); Simon Pettman, *Standards Harmonisation in ASEAN: Progress, Challenges and Moving Beyond 2015*, ERIA Discussion Paper Series, ERIA-DP-2013-30 (2013), at 9-10. Albeit non-binding, these initiatives serve as guidance for ASEAN states. *See also* Trade Policy Review, Report by the Secretariat, Myanmar, WT/TPR/S/293, Jan. 21, 2014, at 51 ("Myanmar is not a party to any bilateral or regional agreement on anti-trust cooperation. The authorities [will] ensure fair competition in accordance with ASEAN Regional Guidelines on Competition Policy.").

[249] Myanmar Accedes to New York Convention, Client Alert: Regulatory Developments in Myanmar, White & Case (2013). *See* Convention on the Recognition and Enforcement of Foreign Arbitral Awards [New York Convention] (1958), art. III ("Each Contracting State shall recognize arbitral awards as binding and enforce them . . . .").

version of the Hague Convention on Choice of Court Agreements that deters forum shopping and enablesthe recognition and enforcement of civil and commercial judgments within the bloc.[250]

As transparency and harmonization of ASEAN law constitute an integral foundation of legal services liberalization, ASEAN states should focus on ASEAN legal studies. The education effort can be strengthened by enrichingASEAN law courses and by establishingan intra-ASEAN law school scheme akin to the EU's Erasmus Exchange Program.[251]Although ASEANset 2015 as the year of the AEC's completion, a 2014 survey revealed that 55% of ASESN enterprises were unaware of the AEC.[252]Improving an understanding of ASEAN law will enable ASEAN lawyers to better serve their clients and facilitate their mobility in the prospective integrated legal services market.

B. Accelerating the AEC's Free Movement and Establishment of Lawyers

[250] Convention of 30 June 2005 on Choice of Court Agreements [Hague Convention], arts. 1 & 8. *See*Menon, *supra* note 243, at 8 ("The Hague [C]onvention might present a ready platform for ASEAN to harmonise a key area of law namely the enforcement of judgment . . . ."). ASEAN states may be concerned about joining the Hague Convention, which will oblige them to recognize and enforce judicial decisions rendered in contracting parties, including Mexico, the United States and the European Union. Hence, I propose the ASEAN version of the Convention, which limits the effect of recognition and enforcement to ASEAN jurisdictions. The contracting parties to the Hague Convention, see Hague Convention on Choice of Court Agreements, http://uk.practicallaw.com/0-507-2280 (last visited June 8, 2014).

[251] An ASEAN law course example is "ASEAN Economic Community Law and Policy," offered by Edmund Sim at NUS. *See also* R. Rajeswaran, Legal Education in ASEAN in the 21st Century, http://www.aseanlawassociation.org/9GAdocs/w2_Malaysia.pdf (last visited June 8, 2014), at 5 & 9 (explaining that most ASEAN law courses are introductory and optional and that promoting exchanges may "effect greater harmonization of" ASEAN law); RahmatMohamad, *Cross Border Legal Practice in ASEAN under WTO* (2003), at 12 ("In Malaysia, for example, none of the Law Schools have made a serious attempt to introduce ASEAN legal system as a compulsory law course in its law curriculum."). A recent government-initiated law exchange was the Memoranda of Understanding concluded between two Singapore law schools, NUS and SMU, and two Myanmar institutions, the University of Yangon and the University of Mandalay. *Landmark MOUs on Legal Education between Singapore and Myanmar*, Feb. 27, 2014, http://www.smu.edu.sg/news/2014/02/27/landmark-mous-legal-education-between-singapore-and-myanmar; *see also* Chia SiowYue, *Free Flow of Skilled Labour in ASEAN*, *in*ASEAN ECONOMIC COMMUNITY SCORECARD: PERFORMANCE AND PERCEPTION 107, 116 (SanchitaBasu Das ed. 2013) ("At the Second [ASEAN University Network] Rectors' meeting in March 2010, progress of the implementation of the ASEAN Credit Transfer System (ACTS) was discussed."); Laurel S. Terry, *International Initiatives that Facilitate Global Mobility in Higher Education*, 2011 MICH. ST. L. REV. 305, 325-26 (2011) (discussing ASEAN countries' initiatives modeled after the Bologna Process).

[252] *See* Dylan Loh, *Many Businesses Unaware of ASEAN Economic Community, June 6, 2014*, CHANNEL NEWSASIA, http://www.channelnewsasia.com/news/business/singapore/many-businesses-unaware/1139802.html ("A survey . . . found that 55 per cent of some 380 firms polled across the region were not aware of the AEC. And Singapore companies had the highest level of ignorance – at 86 per cent.").

The second major milestone for liberalizing ASEAN's legal services market is to remedy the "paper commitments" problem through a treaty-based approach. To integrate cross-ASEAN legal practice, a "cost-efficient" way that has profound impact on law firms is to legalize the Mode 4 "fly in, fly out" practice. ASEAN states' regulatory regimes vary to a great extent. While some countries left the practice unregulated (*e.g.*, Singapore, Indonesia and Thailand), others either expressly permitted it (*e.g.*, Vietnam) or disallowed it (*e.g.*, Brunei).[253]Incoherent interpretation of ambiguous rules may subject ASEAN lawyers to criminal penalty for unauthorized practice of law, hence increasing ASEAN firms' compliance cost. The ASEAN Agreement on the MNP demonstrates improvement. However, its effectiveness depends on individual commitments.[254] As of 2014, only a few states, such as Indonesia and Malaysia, have committed to the legal services sector.[255]

To complement the AEC's "free flow of services" goal, I call for ASEAN states to explicitly allow ASEAN lawyers' temporary practice within the bloc.[256]This will ensure meaningful liberalization because the ASEAN agreement will accord more preferential treatment to ASEAN lawyers than other ASEAN FTAs, including the AANZFTA. Similar to the EU's Lawyers' Services Directive, the commitments under the ASEAN Agreement on the MNP should allow ASEAN lawyers to use home-county professional titles for practicing non-domestic law. ASEAN law ministries can introduce an e-notification of the application mechanism for

[253]*See generally* Inventory, *supra* note 58; Brunei Darussalam International Trade in Legal Services, International Bar Association, http://www.ibanet.org/PPID/Constituent/Bar_Issues_Commission/ITILS_Brunei_Darussalam.aspx (last visited June 16, 2014). In comparison, there are five ways for foreign lawyers to be admitted in US states. Summary of State Foreign Lawyers Rules (2014), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mjp_8_9_status_chart.authcheckdam.pdf (last visited Aug. 1, 2014).
[254]ASEAN Agreement on the Movement of Natural Persons (2012), arts. 4 & 6.
[255] Annex 1: Indonesia's Schedule of Movement of Natural Persons (MNP) Commitments & Annex 1: Malaysia's Schedule of MNP Commitments, ASEAN Agreement on the Movement of Natural Persons (2012).
[256] Roadmap for an ASEAN Community: 2009-2015 (2009), at 25-26.

monitoring the length and nature of temporary practice. The APEC Business Travel Card scheme allows qualified business visitors to cut time spent at immigration checkpoints.[257] ASEAN states should implement a comparable scheme to facilitate temporary practice of law and business by designating "ASEAN lanes" at major ports of entry. These measures will decrease transaction costs for transnational legal practice in the region.

From the perspective of law firms, providing ASEAN law services will be augmented by establishing a permanent basis in the member states. Indonesia and the Philippineshave banned Mode 3 commercial presence of foreign law firms entirely, whereas some other ASEAN stateshave restrictedpractice areas and types of associations.[258] The prospective packages of commitments under the AFAS should liberalize the commercial presence of ASEAN law firms. To avoid repeating the "paper commitments" mistake, the AFAS commitments should reduce equity limitations and the restrictions on the number of resident lawyers and their residential periods.[259]In practice, law firms' "name" issue causes concern and confusion. For instance, Rajah &Tann's Cambodian presence is known as R&T Sok& Heng Law Office and Allen & Gledhill's office in Malaysia is known Rahmat Lim & Partners.[260]Allowing ASEAN firms to use uniform names under the AFAS by easing the associate firm requirement will help them integrate ASEAN law practice and strengthen the international branding of ASEAN law expertise.

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[257] 19 APEC members, including Brunei, Indonesia, Malaysia, the Philippines, Singapore, Thailand and Vietnam, participated in the scheme. APEC Business Travel Card, http://travel.apec.org/abtc-summary.html (last visited June 16, 2014).

[258]*See generally* Inventory, *supra* note 58. In practice, many international law firms handle Indonesian matters through Singapore or Hong Kong offices. International law firms are keen on opening an Indonesian office, as Indonesia's energy-related work constitutes a major area of ASEAN law practice.

[259] For example, Vietnam requires each foreign law firm to have minimum two resident lawyers who stay in the country for at least 183 days. Amended Lawyer Law (2012), art. 68(2).

[260]Rahmat Lim & Partners, http://www.allenandgledhill.com/Pages/network.aspx (last visited June 16, 2014); R&T Sok& Heng Law Office, http://kh.rajahtann.com/ (last visited June 16, 2014). Foreign (non-ASEAN) firms follow the same rule. For example, Baker & McKenzie's Malaysian office is known as Wong & Partners. Welcome to Wong & Partners in Malaysia, http://www.bakermckenzie.com/Malaysia/ (last visited June 16, 2014).

Singapore's incremental approach, based on the USSFTA and SAFTA requirements and self-initiated FTA-plus measures, provides lessons for liberalizing foreign firms' corporate structures and permitted practice areas. The restrictions on legal forms of commercial associations between local and foreign firms should be eased. Although the JLV/FLA mechanism proved unpopular in the market, providing a menu of diverse legal options can be a model for ASEAN states. A QFLP scheme that allows foreign firms to practice certain areas of domestic law can serve as an inducement for international law firms. Importantly, the regulatory frameworks for these approaches should prevent the Alibaba arrangement that defeats the intention of the rules. These regulatory changes will enhance ASEAN law practice and strengthen the AEC's objective for a free flow of investment.[261]

C. Mutual Recognition and the Concept of ASEAN Legal Consultants

As the final step for integrating ASEAN's legal services market, it is important to conclude the ASEAN MRA Framework on Legal Services pursuant to the AEC's mandate to complete MRAs for professional services by 2015.[262] Based on the practices of ASEAN MRAs on architectural and engineering services, I propose to establish the ASEAN Lawyer Council,consisting of regulatory body representatives.[263] ThisCouncil will provide a forum for

[261] Roadmap for an ASEAN Community: 2009-2015 (2009), at 27-28.

[262] *Id*. at 26. *See also* ASEAN Integration Monitoring Report, *supra* note 18, at 113 ("The agreements on accountancy services and surveying qualification services are framework MRAs, so that another stage of negotiated accords is required to turn them into fully functional MRAs."). To promote mutual recognition of engineering services, APEC also established the APEC Engineer Coordinating Committee. The APEC Engineer Manual: The Identification of Substantial Equivalence (2009), at 8-9. ASEAN MRA on legal services may follow the same approach.

[263] Note that the approaches of ASEAN MRAs vary across sectors. ASEAN-level institutions, such as the ASEAN Architecture Council and the ASEAN Chartered Professional Engineer Coordinating Committee, were established to enforce MRAs on architectural and engineering services. Other MRAs do not include an ASEAN-level approval mechanism. *Id*.; DeundenNikomborirak&SupunnavadeeJitdumrong, *ASEAN Trade in Services*, *in*THE ASEAN ECONOMIC COMMUNITY: A WORK IN PROGRESS 95, 104 (SanchitaBasu Das et al. eds. 2013). For the approval procedure of the MRA, see Appendix E: Assessment Statement Flow Chart, ASEAN MRA on Architectural Services (2007). To avoid protectionism of local bar associations, an ASEAN-level regulatory institution is essential to ensure legal services liberalization. *See also*Ong, *supra* note 6, at 9 (calling for an "intra-ASEAN regulatory regime

exchanging information and identifyingthe best practices for ASEAN states. It will enable continuing intra-ASEAN negotiations for MRAs related to legal services, including recognition of legal education and qualification. More importantly, the Council will interact with international lawyers' associations and reflect the ASEAN stance in multilateral negotiations.

Recognizing the divergence of existing domestic rules for such recognition, the MRAs can be conducted on an "ASEAN Minus X" basis as an initial step.[264]Common law jurisdictions such as Singapore, Malaysia and Brunei may first develop MRAs on legal services. The experiences of EU directives and Singapore FTAs may serve as guidance. Notably, the current legal profession rules of these countries already recognize law degrees from Singapore, Australia and New Zealand.[265] Extending such recognition to ASEAN states will further promote intra-ASEAN education exchange and facilitate the recognition of legal qualification.

The most meaningful liberalization measure will be to recognize practicing certificates and grant permission for ASEAN lawyers' practice on a permanent basis rather than a "fly in, fly out practice." To construct a feasible action plan, ASEAN's liberalization agenda should focus on limited licensing instead of full licensing, which grants the right of audience. A full license, comparable to the Lawyers' Establishment Directive that qualifies EU lawyers to practice domestic law, will incur intense protectionism counteractive to ASEAN's

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that can govern and regulate ASEAN cross-border legal practice.").

[264]*See* Roadmap for an ASEAN Community: 2009-2015 (2009), at 26 (stating that the ASEAN Minus X formula can be used to allow flexibilities).

[265] For example, Malaysia's Legal Profession Act recognizes Bachelor of Laws (LL.B.) degrees from selected schools in Singapore, the United Kingdom, Ireland, Australia and New Zealand for admission purposes. Qualifications to be a 'Qualified Person,' http://www.lpqb.org.my/index.php?option=com_content&view=article&id=131&Itemid=77 (last visited June 17, 2014). *See also*Zaki Abdul Rahman, *Implications of the ASEAN Charter on Legal Education in ASEAN*, http://www.aseanlawassociation.org/10GAdocs/Brunei1.pdf (last visited June 17, 2014), at 1 ("Historically, Bruneian students have had to travel abroad to obtain their law degrees, traditionally from the UK, Malaysia and Australia.").

liberalizationefforts.[266]Although ASEAN-wide recognition of legal education may simplify full licensing restrictions, the obstacle will be the required changes to the national admission requirement limited to citizens.[267]These changes exceed the mandate of the AEC. ASEAN states may consider adopting a mechanism similar to Singapore's FPE that enables foreign attorneys to practicethe commercial laws of the host country. Preferential requirements ofaptitude testing and work experience can be applied to ASEAN lawyers.

Given ASEAN's development stage, the legalization of limited licensing across the region will better suit the pragmatic needs of law firms and the AEC. ASEAN's limited licensing scheme should undergo a two-step reform. First, based on NAFTA and the KORUS FTA practices, obliging ASEAN jurisdictions to develop FLC rules will clarify the status of foreign lawyers. Registered FLCs will be allowed to join ASEAN firms, as locally qualified lawyers are permitted to work in foreign firms. Hence, the enactment and convergence of ASEAN FLC rules will benefit the internalization of the ASEAN legal services market. Second, establishing an ASEAN Legal Consultant (ALC) mechanism will grant ASEAN lawyers preferential treatment, accelerating a free flow of legal services within the prospective AEC.[268]The practice areas of an ALC will include laws of the home country, ASEAN law and international law. With the emergence of AEC rules, the capacity to practice ASEAN law will provide ASEAN lawyers with additional advantages in legal practice. The ASEAN law practice covers not only cross-

[266]*See generally* Directive No. 98/5, *supra* note 77, art. 10.

[267] For example, in Cambodia and Thailand, even a permanent resident is not qualified to be admitted to the bar. Law on the Bar [of Cambodia], art. 31(1); Lawyers Act [of Thailand] (1985), art. 35(1).

[268] In my view, ASEAN's limited license will create a system comparable to the European legal consultant mechanism under the Lawyers' Establishment Directive, although the laws of the host country will be excluded from permitted practice areas. Directive No. 98/5, *supra* note 77, art. 5. *See also*Ong, *supra* note 6, at 10 ("[ASEAN countries should] agree to the idea of a restricted reciprocity of admitting and providing practising certificates to each other . . . ."); Mohamad, *supra* note 251, at 12 ("It is imperative for [ASEAN] countries to establish common qualification entrance for ASEAN lawyers to practice in any member countries if liberalization of legal services is to progress."). An ASEAN Legal Consultant system will be a feasible scheme to materialize these suggestions.

border M&As, but also trade and investment disputes before the ASEAN dispute resolution mechanisms. In comparison with FLC rules, ALC requirements will be further reduced under prospective AFAS commitments. The MRA on legal services will also facilitate the operation of the ALC scheme.

The ASEAN Lawyer Council should develop FLC and ALC requirements and registration procedures. Furthermore, as EU experiences illustrate, the integration of legal services makes a pan-ASEAN code of professional conduct indispensable.[269] The uniform ethical rules will address the "double deontology" dilemma where ASEAN lawyers may encounter conflicts of domestic rules.[270]This dilemma arises in cross-border cases that involve bribery or terrorism-related money laundering.[271] A lawyer'sreporting duties under a country's rules contravene another country's confidentiality requirement.[272] To regulatethe evolving cross-border legal practice, ASEAN's code of conduct should also incorporate ethical obligations on legal outsourcing. The expansion of outsourcing services may expand in ASEAN countries and, hence, the code should ensure pertinent rules such as requirements for conflict checks and preservation of confidentiality.[273] These soft-law ethical rules will complement the treaty-based liberalization of legal services in ASEAN and galvanize the transformation of the AEC as an integrated legal market.

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[269]*See* Mary C. Daly, *The Dichotomy between Standards and Rules: A New Way of Understanding the Differences in Perceptions of Lawyer Code of Conduct by U.S. and Foreign Lawyers*, 32 VAND. J. TRANSNAT'L L. 1117, 1159-61 (1999) (discussing that in 1988, the Council of the Bars and Law Societies of the European Union "adopted the Code of Conduct for Lawyers in the European Community (CCBE Code).").

[270]*See* Hans-JurgenHellwig, *At the Intersection of Legal Ethics and Globalization: International Conflicts of law in Lawyer Regulation*, 27 PENN ST. INT'L L. REV. 395, 395-96 (2008-09) (defining double deontology in the European context).

[271]*Id*. at 398-99.

[272]*Id*.

[273]*See also*Jayanth K. Krishnan, *Outsourcing and the Global Legal Profession*, 48 WM. & MARY L. REV. 2189, 2201-16 (2006-07) (analyzing growing trends of legal outsourcing); Report on the Outsourcing of Legal Services Overseas, Association of the Bar of the City of New York: Committee on Professional Responsibility (2009), at 3-12 (identifying ethical issues involving legal outsourcing).

V. Conclusion

From the Uruguay Round to the Doha Round, accelerating trade in legal services has been a prime objective of international law firms and the "Friends of Legal Services" countries. With the economic power shifting to Asia, the ten-country ASEAN has become a rapidly emerging legal market. This article examined the bloc's legal services liberalization in the context of the WTO and FTAs vis-à-vis the actual operations of ASEAN-based law firms. By providing the most-updated assessment of FTAs and their enforcement, the article argued that the "paper commitments" weakness has obstructed ASEAN's liberalization efforts. This articlefurther contended that afeasible, incremental roadmap is critical to a seamless multi-jurisdictional practice in ASEAN's legal services market.

To achieve the AEC's objective to form a single market and production base, ASEAN's progressive liberalization of legal services is indispensable. Facilitating cross-border legal practice will enhance the bloc's legal capacity building andstrengthen its status for attracting FDIs and ASEAN law development. The decade-long evolution of legal services negotiations in the WTO and FTA arenas indicates the importance and complexity of achieving meaningful liberalization. The Singapore case reveals the actual effectiveness of liberalization measures such as JLVs and QFLPs. The experiences of APEC, NAFTA, the EU and Singapore provide the best practices for ASEAN's liberalization measures. To reinvigoratelegal services negotiations, it is important to buttressASEAN's legaltransparency and harmonize rules on the "fly in, fly out" practice and the commercial presence of law firms. Other key recommendations include establishingMRAs on legal services, creating the ALC mechanism and enacting pan-ASEAN rules of professional conduct. These reform proposals will integrate ASEAN's legal services market and fortifyitscompetitivenessunder the multilateral trading system.

A commentary on the Reform of Investor-State Dispute Settlement Mechanism under Investment treaty

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Ⅰ. Introduction
Ⅱ. What's ISDS mechanism?
Ⅲ. Main concerns about the current ISDS mechanism
Ⅳ. Evaluations of the suggested paths for reform of ISDS mechanism
Ⅴ. Concluding remarks

Abbreviation

- IIA: International Investment Agreement
- BIT: Bilateral Investment Treaty
- FTA: Free Trade Agreement
- TPP: Trans-Pacific Partnership
- TTIP: Transatlantic Trade and Investment Partnership
- ISD: Investor-State Dispute
- ISDS: Investor-State Dispute Settlement
- ISA: Investor-State Arbitration
- ITA: Investment Treaty Arbitration
- SSDS: State-State Dispute Settlement
- ICSID: International Centre for Settlement of Investment Disputes
- PCA: Permanent Court of Arbitration
- ICJ: International Court of Justice
- SCC: Stockholm Chamber of Commerce
- SDGs: Sustainable development goals
- ISM: Investor-State Mediation
- KAFTA: Korea-Australia Free Trade Agreement
- RCEP: Regional Comprehensive Economic Partnership

Ⅰ. Background(1)(UNCTAD, June 2013)

- Many countries are dissatisfied with the current IIA (and the ISDS) regime because;
  - Growing uneasiness about the actual effects of IIAs in terms of promoting foreign direct investment(FDI)
  - Reducing policy and regulatory space
  - Increasing exposure to ISDS
  - The lack of specific pursuit of sustainable development objectives
- Nonetheless, countries wait and see as to the discussions on the IIA regime reform because;
  - Views on IIAs are strongly diverse, even within countries, and the complexity and multifaceted nature of the IIA regime and the absence of a multilateral institution (like the World Trade Organization (WTO) for trade)
  - A government's concerning about more substantive changes might undermine a country's attractiveness for foreign investment, and first movers could particularly suffer in this regard.
  - Questions about the concrete content of a "new" IIA model and fears that some approaches could aggravate the current complexity and uncertainty.

Ⅰ. Background(2)

- IIA reform has been occurring at different levels of policymaking, although not in a full throttle.
  - At the national levels, revising model BIT(ex. 2012 US Model BIT)
  - At the bilateral and regional levels, negotiating IIAs with novel provisions and reformulations(TPP, TTIP).
  - At the multilateral level, discussing specific aspects of IIA reform(ex. The 2006 amendments to the ICSID Arbitration Rule)
- In Korea, the discussion on the reform of the IIA or ISDS proceedings has brought much attention during the KORUS FTA but it has been faded away since.
- Loan Star Investment Management SPRL filed an arbitration claim to ICSID against the Korean government on Dec. 21, 2012, in accordance with Korea-Belgium-Luxembourg BIT (LSF-KEB Holdings SCA and others v. Republic of Korea (ICSID Case No. ARB/12/37))

Ⅰ. Background(3)

- Lone Star claims two losses from the KEB acquisition in 2003 to the sale of the stock in 2012;
  - The refuse and delay by the Korean government on the approval of sales
  - A capital gain tax on the profits by the Korean National Tax Service → KORUS FTA provisions may apply
- Using the Korea and the Belgium-Luxembourg BIT which does not deny the right to arbitration for a paper company, Lone Star filed an arbitration claim through its Belgian corporation.
  - Should a clause on the denial of the right to arbitration for a paper company in the "Denial of Benefits" provision, Lone Star's file for arbitration was impossible.
- To prevent a second Lone Star case,
  - Amendment of the previous IIAs, inclusion of reformed provisions in newly completed IIAs and research and discussion on the international discussion on the IIAs reform for ISDSS procedure

II. Introduction of ISDS mechanism

1. Meaning of ISDS mechanism
2. Current state of the ISDS Cases

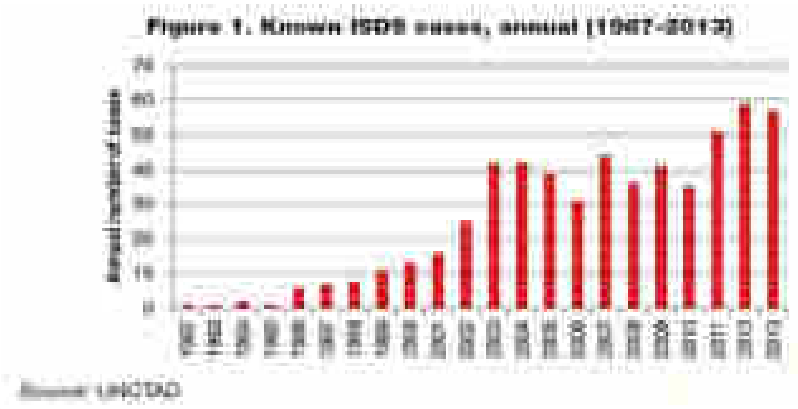
1. Meaning of ISDS mechanism

- The essential structure of IIA consists of substantial and procedural provisions, and definition.
- Significance: ISDS is a dispute settlement mechanism to settle Investor-State Dispute (ISD) which occurs as the host country violates its obligations under an investment agreement (Substantial obligations).
- Key features:

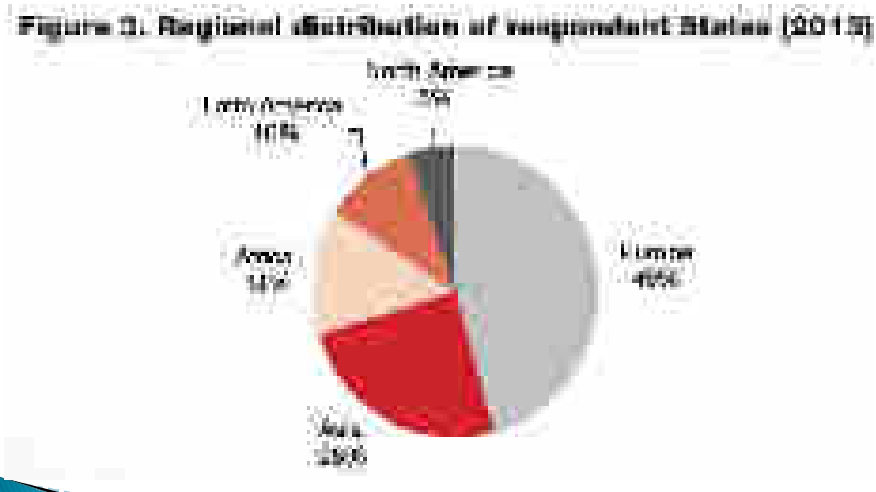
- After Negotiation between disputing parties, investor may choose between a domestic court and international arbitration mechanism to settle a dispute.
- In most cases, international arbitration mechanism is chosen by investor.
- International arbitration is a key procedure of ISDS mechanism in the current IIA, and some commentators use the terms, Investor-State Arbitration(ISA) or Investment-Treaty Arbitration (ITA), instead of ISDS mechanism, to stress out the point that arbitration claim is made based on an investment treaty.

2. Current state of the ISDS Cases (UNCTAD, April 2014)

- By end of 2013, 98 States have been respondents in a total of 568 known treaty-based cases(UNCTAD, April 2014)

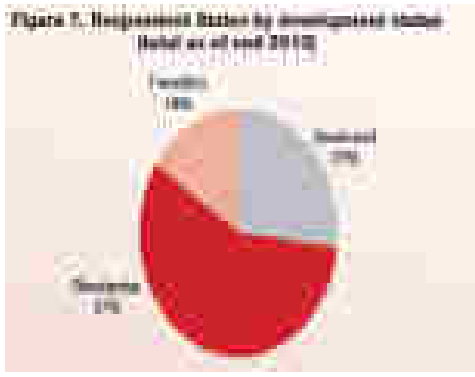


3. Regional distribution of respondent States

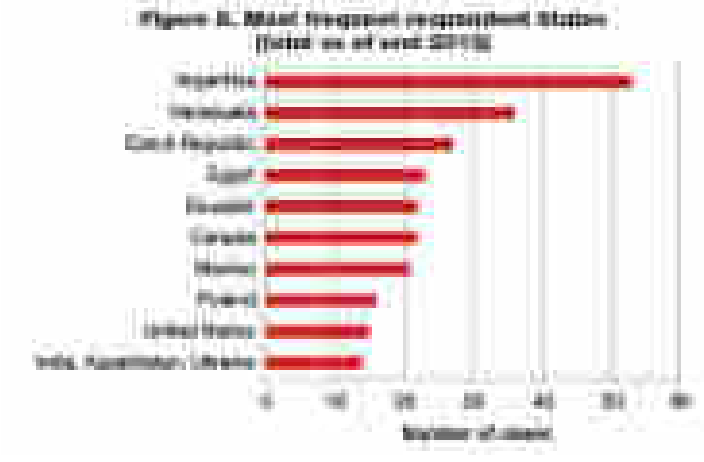


4. Respondent States by development status

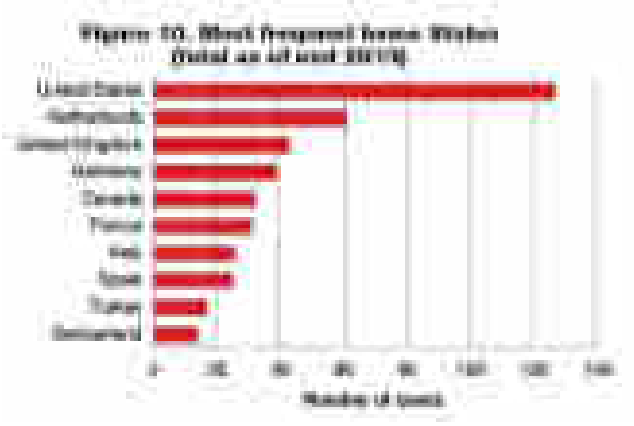
- In total, over the years at least 98 governments have been respondents to one or more investment treaty arbitration
- About three-quarters of all known cases were brought against developing and transition economies.



5. Most frequent respondent States

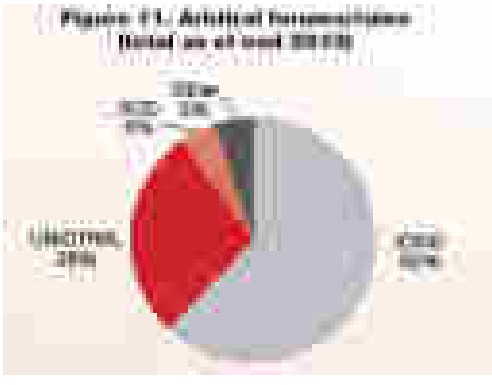


6. Most frequent home States



7. Distribution of known cases among arbitral institutions /rules

- ICSID Convention & ICSID Additional Facility Rules: 62%
- UNCITRAL Rules: 28%
- SCC Rules: 5%
- other: 5%



Ⅲ. Main concerns about the current ISDS mechanism

1. Lack of Transparency
2. Inconsistent and erroneous arbitral decisions
3. Lack of arbitrators' independence and impartiality
4. Cost-and time-intensity of arbitration

1. Lack of Transparency(UNCTAD, June 2013)

- Even though the transparency of the systems has improved since the early 2000s, ISDS proceedings can still be kept fully confidential-if both disputing parties so wish
  - ex) The 2013 agreement reached by an UNCITRAL Working Group regarding transparency in ISDS proceedings (In the case of UNCITRAL, the new rules have a limited effect in that they are designed to apply not to all future arbitrations but only to arbitrations under future IIAs).
  - ex) No information has been disclosed in regard of LSF-KEB Holdings SCA and others v. Republic of Korea (ICSID Case No. ARB/12/37) in accordance with Korea-Belgium BIT(2006). Korea-Belgium BIT(2006) doesn't include any transparency provisions.
  - ex) It is only ICSID which keeps a public registry of arbitrations. Out of the 85 cases under the UNCITRAL Arbitration Rules administered by the Permanent Court of Arbitration(PCA), only 18 were public(as of end 2012).

2. Inconsistent and erroneous arbitral decisions

- Divergent legal interpretations of identical or similar treaty provisions as well as differences in the assessment of the merits of cases involving the same facts(e.g. Ronald S Lauder v. Czech Republic, UNCITRAL Final award).
  - → Leading to uncertainty about the meaning of key treaty obligations and lack of predictability of how they will be applied in future cases.

- No appeal mechanism
  - Existing review mechanism: the ICSID annulment process(ICSID Convention Art. 52) or national-court review at the seat of arbitration(for non-ICSID cases), operate within narrow jurisdictional limits.
  - ICSID annulment committees are created on an ad hoc basis for the purpose of a single dispute.
  - They may also arrive at inconsistent conclusion, thus further undermining predictability of international investment law.

3. Lack of arbitrators' independence and impartiality

- Arbitrators lack the independence of judges
  - Because they are chosen by the parties to the dispute and are paid by the hour.

- Arbitrators' interest in being-re-appointed in future cases and their frequent "changing of hats"
  - Serving as arbitrators in some cases and counsel in others).
  - ➔ This creates serious issues of conflict of interest.

4. Cost-and time-intensity of arbitration

- Is arbitration a speedy and low-cost method of dispute resolution?
- Answer may be "no":
  - On average, costs, including legal fees(which on average amount to approximately 82% of total costs) and tribunal expenses, have exceeded $8 million per party per case. Lawyers' fees may reach $1,000 per hour for senior partners in top-tier law firms(Gaukrodger and Gordon, 2012)
  - Even if the government wins the case, tribunals have mostly refrained from ordering the claimant investor to pay the respondent's costs. High costs are also a concern for investors.
  - Long duration of arbitration: most of which take several years to conclude.

Ⅳ. Evaluations of the suggested paths for reform of ISDS mechanism

1. Four broad paths for reforming the international investment regime(UNCTAD, June 2014)
2. Five main paths for Reform of ISDS mechanism (UNCTAD, June 2013)

1. Four broad paths for reforming the international investment regime

(1) Maintaining the status quo

(2) Disengaging from the IIA regime

(3) Introducing selective adjustments

(4) Pursuing systematic reform

(1) Maintaining the status quo

Content of policy action	Not pursuing any substantive change to IIA clauses or investment-related international commitments
Level of policy action	• continue negotiating IIAs based on existing models • leave existing treaties untouched
Advantages	• Sending the investor-friendly image of the host state • The easiest and most straightforward to implement. • Avoiding unintended, potentially far-reaching consequences arising from innovative approaches to IIA clauses.
Disadvantages	• Not addressing any of the challenges arising from today's global IIA regime and might contribute to a further stakeholder backlash against IIAs.

(2) Disengaging from the IIA regime

Content of policy action	Eliminating investment-related commitments
Level of policy action	Taking policy action regarding different aspects: · national (e.g. eliminating consent to ISDS in domestic law and terminating investment contracts) · bilateral/regional (e.g. terminating existing IIAs)
Advantages	• The effective shielding from ISDS-related risks.
Disadvantages	• most of the desired implications will materialize only over time and only for one treaty at a time. • Quitting the system does not immediately protect the State against future ISDS cases, as IIA commitments usually endure for a period through survival clauses. • Harm to the national image in terms of complying with a treaty.

(3) Introducing selective adjustments

Content of policy action	Pursuing selective changes to: • move towards rebalancing rights and obligations(e.g. non-binding CSR provisions) • change specific aspects of ISDS (e.g. early discharge of frivolous claims)
Level of policy action	Taking policy action at three levels of policymaking (selectively): · national (e.g. modifying a new model IIA) · bilateral/regional (e.g. negotiating IIAs based on revised models or issuing joint interpretations) · multilateral (e.g. sharing of experiences)
Advantages	• The establishment of priority and modification on the most challengeable task. • The experimental application of the modified provisions to newly agreed treaties can be gradually extended after reviewing the result. • The use of "soft"(i.e. non-binding) modification minimizes risk.
Disadvantages	• Selective adjustments in future IIAs cannot comprehensively address the challenges posed by the existing stock of treaties. • It cannot fully deal with the interaction of treaties with each other and, unless the selective adjustments address the most-favoured-nation(MFN) clause, it can allow for "treaty shopping" and "cherry-picking".

(4) Pursuing systematic reform

Meaning	• **designing international commitments that promote sustainable development and that are in line with the investment and development paradigm shift.** • **With policy actions at all levels of governance, this is the most comprehensive approach to reforming the current IIA regime.**
Content of policy action	Designing investment-related international commitments that: • create proactive sustainable-development-oriented IIAs (e.g. add SDGs investment promotion) • effectively rebalance rights and obligations in IIAs(e.g. add investor responsibilities, preserve policy space) • comprehensively reform ISDS
Level of policy action	Taking policy action at three levels of policymaking: • national (e.g. creating a new model IIA) • bilateral/regional (e.g. (re-)negotiating IIAs based on new model) • multilateral (e.g. multi-stakeholder consensus-building, including collective learning)
Advantages	• Overcoming the previous critiques of systemic legitimacy and enabling to make an overall reform.
Disadvantages	• Hard and challengeable tasks to implement over a short term are included, which would require more support, action, time and efforts of the states.

2. Five main paths for Reform of ISDS mechanism (UNCTAD, June 2013)

(1) Promoting alternative dispute resolution(ADR)

(2) Tailoring the existing system through individual IIAs

(3) Limiting investor access to ISDS

(4) Introducing an appeals facility

(5) Creating a standing international investment court

(1) Promoting alternative dispute resolution(ADR)

Reform plan	• **Introduction or strengthening of non-binding ADR methods(e.g. conciliation and mediation)** **– e.g. CETA ISDS Text Art. x-19 Mediation: introduction of separated mediation provision** **– e.g. ICSID recently established a Chairman's list of conciliator who could likely serve as third-party neutrals facilitating mediation proceedings.** • **Setting up an ombuds office or appointing an ombudsman to serve as a one-stop-shop for complaints(e.g. 1999 Korea's Office of the Foreign Investment Ombudsman)**
Advantages	• Procedural flexibility • Saving the time and money • Finding a mutually acceptable solution • Preventing escalation of the dispute and preserving a workable relationship between the disputing parties.
Disadvantages	• No guarantee that an ADR procedure will lead to resolution of the disputes.
Evaluations	• Considering multiple advantages of ADR, ADR which includes ISM should be further expanded and bolstered. Newly completed IIAs should provide more detailed provisions on the ADR procedure.

(2) Tailoring the existing system through individual IIAs(1)

Features	**Main features of the existing system would be preserved and that individual countries would apply tailored modifications to selected aspects of the ISDS system in their new IIAs.**
Reform plan	• Setting time limits for bringing claims.(e.g. KORUSFTA Art. 11.18(1): File an arbitration claim within three years) • Increasing the contracting parties' role in interpreting in order to avoid legal interpretations that go against their intentions(e.g. CETA Art. x-27(2): "Where serious concerns arise as regards matters of interpretation that may affect investment, the Committee on Services and Investment may recommend to the CETA Trade Committee the adoption of interpretations of the Agreement. An interpretation adopted by the CETA Trade Committee shall be binding on a Tribunal established under this chapter."). • Establishing a mechanism for consolidation of related claim(e.g. 2012 US Model BIT Art. 33). • Providing for more transparency in ISDS(e.g. KORUSFTA Art. 11.21.; CETA Art. X-33; UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, effective date: 1 April 2014). • Including a mechanism for an early discharge of frivolous(unmeritorious) claims(e.g. CETA Art x-29: Claims Manifestly Without Legal Merit) or rejecting unfounded claims(Art. X. 30 Claims unfounded as a Matter of Law)

(2) Tailoring the existing system through individual IIAs(2)

Reform plan	• Setting a binding code of conduct for arbitrators to prevent conflicts of interest(e.g. CETA Art. X-25: In case an arbitrator is found not to comply with the code, he/she will be replaced. That decision is taken by an outside party (the Secretary General of the International Centre for the Settlement of Investment Disputes (ICSID) and not by the fellow arbitrators. This is important, because the fellow arbitrators risk being perceived as being more lax on possible conflicts of interest.). • Providing for a list of arbitrators pre-agreed by the contracting parties to strengthen Arbitrator's independence(e.g. CETA Art. X-25: In case of disagreement between the disputing parties, the arbitrator will be selected from this list. This ensures that the Union or Canada have always agreed to at least two of the three arbitrators that will act under CETA and will have vetted them to ensure that they live up to the highest standards. • The losing party pays the costs(e.g. CETA Art. X.36 para. 5)
Evaluation	• Relatively straightforward given that only two treaty parties need to agree. • Limited in effectiveness: the modifications are applied only to newly concluded IIAs. It may become a limited reform rather than a comprehensive one. • The introduction of transparency enhancement provisions such as UNCITRAL Rules on Transparency is likely to address the previous transparency issues. However, excluding the UNICTRAL Rules as KAFTA did may limit the effectiveness of reform. • Imposing the burden of costs to the party which lost a case may prevent the abuse of arbitration on an investor side. A host country may end up bearing an astronomical arbitration cost should it lose a case. The burden of excessive costs is still be a pending issue. • Conflict of interest which raises an issue of independence and neutrality of an arbitrator has been advanced in the CETA reform plan. Still, the selection of arbitrator and the bearing of the related costs by the parties may be resulted in the limited independence of an arbitrator.

(3) Limiting investor access to ISDS

개념	**This option envisages narrowing down the range of situations in which investors may resort to ISDS.**
Reform plan	① By reducing the subject-matter scope for ISDS claims(e.g. China-Japan-Korea BIT: claims relating to Intellectual property rights and to prudential measures regarding financial services) ② By restricting the range of investors who qualify to benefit from the treaty(e.g. KORUSFTA Art.11.11 Denial of benefits). ③ Preventing fraudulent or manipulative claims(e.g. CETA Art. X-17.3) ④ By introducing the requirement to exhaust local remedies before resorting to international arbitration(few e.g. in the existing IIAs).
Advantages	• These options can help to slow down the proliferation of ISDS proceedings, reduce States' financial liabilities arising from ISDS awards and save resources.
Disadvantages	• ④ damages the purpose of introducing the international arbitration procedure mechanism, which is the core of the current ISDS, and returns to the traditional investment dispute settlement mechanism. There is still an issue of fairness and trust on the decision of a domestic court on a foreign investor side. • Similar to the "tailored modification" option, this option results in a piecemeal approach towards reform.
Evaluation	• It may work as a short term solution, but not a comprehensive reform. • Lack of theoretical grounds to exclude IPR-related or financial prudence-related disputes from the subject for arbitration.

(4) Introducing an appeals facility(1)

Meaning	**- An appeals facility implies a standing body with a competence to undertake substantive review of awards rendered by arbitral tribunals.** **- A means to improve consistency among arbitral awards, correct erroneous decisions of first-level tribunals and enhance the predictability of the law.**
Advantages	- An appeals facility would rectify some of the legitimacy concerns about the current ISDS regime. - Authoritative pronouncements by an appeals facility on issues of law would guide both the disputing parties and arbitrators adjudicating disputes. - An appeals facility would add direction and order to the existing decentralized, non-hierarchical and ad hoc regime.
Disadvantages	- The introduction of an appellate stage would further add to the time and cost of the proceedings. - For the appeals option to be meaningful, it would need to be supported by many countries. - Difficulty of establishing a single appeal mechanism, because there are Over 3,000 BITs and investment chapter in trade agreement. Cf.) WTO Appellate system under a single treaty. - Practical challenges: Ex) Would the facility be limited to the ICSID system or be expanded to other arbitration rules? Who would elect its members and how? How would it be financed? Would the appeal be limited to the points of law or also encompass questions of fact?, etc.

(4) Introducing an appeals facility(2)

Reform plan	• The need of appeal mechanism to maintain consistency in arbitration and to correct a wrong decision. The success of the WTO Appellate system shows that there is a high chance of success for ISDS Appellate system as well. • The idea of an Appellate structure in investment disputes has been ensuing for several years now. - In 2002, the Bipartisan Trade Promotion Authority Act identified for US free trade agreements a negotiating objective of providing for an Appellate body or similar mechanism to provide coherence to the interpretation of investment provisions in trade agreements - The ICSID mentioned the idea of the ICSID Appeals facility in its working paper of 2002. Following a series of meetings in 2005 they concluded that it would be premature to establish an ICSID appellate mechanism. • Even though some IIAs started making a clause on the possibility of appeal mechanism, few IIAs have introduced specific provisions on appeal mechanism. • The introduction of appeal mechanism at a multilateral level in a long term - First step may be the establishment of ICSID Appellate system (Deepu Jojo Sushama, 2014) - The establishment of Standing Appellate Body may be appropriate (Debra P. Steger 2012)

(5) Creating a Standing international Investment Court(SIC)

Meaning	**- This implies the replacement of the current system of ad hoc arbitration tribunals with a new institutional structure.** **- SIC would consist of judges appointed or elected by States on a permanent basis, for example, for a fixed term.** **- Theoretical ground: ISD is a public law dispute which judges the legitimacy of the execution of sovereignty by a host nation against an investor. It is inappropriate to settle ISD under the current private model of arbitration. Only a court with tenured judges would establish a fair system widely regarded to be free of perceived bias.**
Advantages	- SIC would go a long way to ensure the legitimacy and transparency of the system, facilitate consistency and curacy of decisions and ensure independence and impartiality of adjudicators. - A standing investment court would likely be much more consistent and coherent in its approach to the interpretation and application of treaty norms, compared with numerous ad hoc tribunals.
Disadvantages	- This solution would be the most difficult to implement: - Requiring a complete overhaul of the current regime through a coordinated action by a large number of States. - SIC may well start as a plurilateral initiative, with an opt-in mechanism for those States that will wish to join.
Evaluation	- The establishment of SIC is the most ideal and the least realistic solution. The alternative can be the modification of ICSID into a similar concept of SIC and, through consolidation, make the ICSID as a single ITA forum.

Ⅴ. Concluding remarks

- Reluctance of individual countries on the IIA reform.
- EU has been relatively more active in IIA reform. (e.g. CETA investment chapter)
- TPP
  - The draft of Investment Chapter : More detailed provisions on transparency
- TTIP
  - Possible inclusion of the EU reform proposal which was introduced in the CETA.
- Lack of interest and discussions on IIA and ISDS reform in Korea.
  - Started having interest at the time of the negotiations on KORUS FTA
  - There are some recent BITs and FTAs which have included some of the reform plan but still very marginal.
  - Despite the interest on the ISDS mechanism with the KORUS FTA, the clear direction for reform has not been fully discussing.
- Future direction for Korea
  - The establishment of Korea's own reform plan with the consideration of the current international discussions on IIA reform.
  - The amendment of the previous IIAs (Esp. BITs) with the counterparts and the application of the reform plan to the future IIAs.
  - Introduction of Reform of IIA or ISDS in the RCEP.

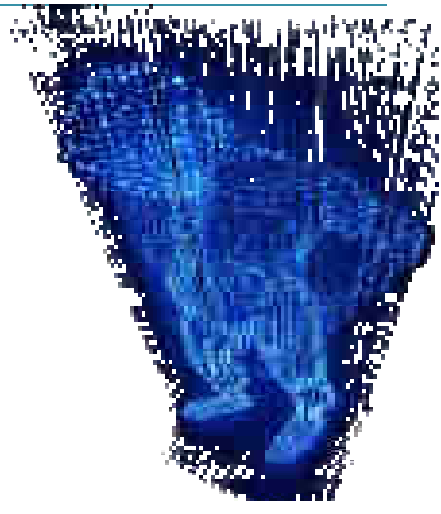
Thank you very much!

The Third Wave of International Intellectual Property Legal System: Focusing on the TPP IPR Charter

YOO Joonkoo, KNDA, MOFA, Nov. 6. 2014

Changing Perspectives of IPRs

- What are the universal and true natures of IP?
- Rebalancing interests between stakeholders
- Enforcement concerns, vital or key issues of IPRs
- Relation with Multilateral IPRs Agreement



Contents

- ***Historical Perspectives on IPRs***
- ***Changing Real Nature of IPRs***
- ***Analysis of TPP IP Chapter***
- ***Conclusion and Policy Implication***

Property, Intellectual Property

- The First Era(17C~WIPO): recognition of intangible property rights

- The British Statute of Anne(1710) and the Statute of Monopolies(1624)
- The North German Confederation(1867): legislative power over the IP protection to the confederation, modern usage of IP
- Mass. Cir. Ct. *Davoll et al. Brown*, "intellectual property, labors of mind"
- Sec. 1 of the French law of 1971(5, 10, 15 yrs)

☞ "intellectual Monopoly"

International Protection of IPRs

- The 2nd Era(WIPO~TRIPS): minimum level of Int'l protection of IPRs and Harmonization of different domestic IP laws

- Paris Convention(1883), Berne Con.(1886), BIRPI(United International Bureaux for the Protection of IP, 1893)
- WIPO(1967)
- WTO TRIPS(1994), TRIPS Plus legal system

☞ Shifting from National level of protection to Int'l one

TPP, Milestone of the 3rd Wave

- The 3rd Wave(Post TRIPS): changing in nature and scope of IP Laws

- U.S. bilateral FTA initiative to change TRIPS legal system
- TRIPS-plus v. U.S.-minus
- Future of the TPP

☞ Changing the TRIPS legal system, no more playground to compete

Basic Premises & Questions of IPRs I

- Creation of mind or knowledge generation

- To stimulate innovation, creation, and invention
- What preconditions to grant intellectual monopolies?
- Realized into commodities and products
- Relation between creation of mind and products

☞ Shifting in nature of originality, distinctiveness, and inventive step to expression, commodities itself, 'new'

Basic Premises & Questions of IPRs II

- Balance of interests

- Multilayered and complex legal structure
- International level, controversial legacies: b/w developing and developed, inventors and users, individual and corp., owners and inventors, and public and private sectors
- TPP A.2.(c): "promote access and preserve the public domain
- Law and policy perspectives: to increase the capacity building of knowledge generation

☞ Rebalancing intensity of protection?

Basic Premises & Questions of IPRs III

- Relation with TPP IP and multinational agts.

- Complex dimension of regional and multilateral IP agts
- Different perspectives on MFN
- TRIPS, Bilateral FTA, RTA, and TPP
- Existing 11 U.S FTA, total trade volume 8.5%(Korea 2.7%, Singapore 1.4%, Australia 1.0%)

☞ Spaghetti bowl effect of IPRs regime

Basic Premises & Questions of IPRs IV

- Enforcement issues: core and crucial issue?

- Excessive enforcement cost, complex procedure and remedies, immoderate amount of damage
- H.4.4: "include lost profits…measured by the market price or retail price"
- H.4.9: "with a view to deterring future infringements"
- Element of "commercial advantage" for criminal penalty
- Socio-economic perspective, presupposition of equal conditions cf. exclusionary prices

☞ Evading substantive issues of IPRs, No expectation to be enforced

Copyright and Related Rights I

- Rapid technological evolution of Internet

- To strike balance b/w the legitimate interests of artists and rights holders

→ Termination rights to revoke

- The U.S. law mainly focuses on mixing strong proprietor rights and enforcement avenues with an open and robust set of user rights

☞ The TPP agenda seeks to harmonize only the proprietor side of this situation especially on the Internet and through intermediaries

Copyright and Related Rights II

- Exclusive Reproduction Rights

- The U.S. §106(1) "copies or phonorecords < TPP.G.1. "in any manner or form"

- Copies: The U.S. §101 "fixed by any method, material objects" ("sufficiently permanent or stable to be perceived, reproduced, communicated for a period of more than transitory duration" < TPP FN 102: no clear definition of "fixed", "circulation as tangible objects"

cf. KORUS FN(fixed issue): reservation to the Party's law

☞ The TPP might shift original fixed expression to somewhat just different expression

Copyright and Related Rights II-1

- Temporary Electronic Copies

- No flexibility of Internet Treaties(WCT & WPPT)
- No "certain independent economic significance"
- Flexibility in the WCT was incorporated in the U.S. – Chile FTA
- Korea Copyright Act(2011. 12.2): temporary storage may be permitted not to infringe copyright

☞ Highly debatable in the court

Copyright and Related Rights III

- Parallel Imports(Right of Distribution)

- Contrary to the dominant multilateral IP agts protecting ability of DL to determine when IPRs "exhaust"
  cf. WCT 6(2)
- Controversial issue in the TPP negotiation: "right to authorize or prohibit the making available to the public"
- U.S FTA-Australia, Singapore, and Morocco(prohibition of PI), Subsequent FTAs(KORUS) have no such prohibition, NZ Lifted a ban on PI(1998)

☞ Market segmentation, price discrimination → alternating existing FTAs or forum shopping?

☞

Copyright and Related Rights IV

- Copyright Term Extensions

- Disproportionate costs w/t lengthening copyright terms, "a windfall to the heirs and assignees" and "depriving living authors of the ability to build on the cultural legacy of the past" cf. Hemingway(1961; 2013)
- "Sonny Bono Copyright Term Extension Act" of 1998
- (NP) "not less than" 50, 70, 100 a/f the author's death (Corp) "not less than" 50, 70, 75, 95 a/f the first authorized publication

☞ Probability to extend copyright term more than TPP in the future

Copyright and Related Rights V

- Technological Protection Measures

- WCT(Int'l agts) → DMCA(U.S. congress) → TPP
- "Knowingly" requirement, cf. 17 USC §1201, strict liability
- No flexibility in the WCT(reserved to domestic law), DMCA 17 USC § 1201(a)(2), ACTA Art. 5. 27.6(b)(i) Term Extension Act" of 1998
- The ban on the making and selling of circumvention tools → (make it impossible for users to circumvent a TPM even when they have right to)

☞ Exhaustion of IPRs only applies to domestic

Patent and Data Protection I

- Scope of Patentability

- Controversial, vague inventive step requirement:

"an enhanced efficacy of known product"

2005 Amended India Patents Act Section 3(d)

- Exclusions from patentability v. patentability: diagnostic, therapeutic and surgical method

- KORUS 18.8.2, linkage exclusion of patent into commercial exploitation, no exclusion of patent w/t commercial exploitation) v. TPP E.1.2(may exclude)

☞ One of the evergreening strategies

Patent and Data Protection II

- Patent Term Extensions

- No such provisions in TRIPS(recognition of the known delays), optional or exempt pharmaceutical products in the U.S-Peru

- Transition period for Parties not providing such system

- Unreasonable delays filling of the application or requests for examination: KORUS(4 yrs, 3ys), the U.S.- Chile(5, 3), Singapore(4, 2), CAFTA(5, 3), Australia(4, 2)

☞ Early marketing patent examination and marketing approval → invalid patent and unsafe or inefficacious medicines

Patent and Data Protection III

- Data Exclusivity

- TRIPS a/g the "unfair competition"

- No flexibility(2007 New Trade Policy) like "reasonable period of time" → "at least five years" cf. biologics 12years of the U.S. proposal

- Agricultural chemical products: 5 years

- Biologics: debating on the 0, 5, 8, 12 years, cf. transition period(category A, B, C)

☞ Two-tiered system(PDP): w/t 1 year a/f annex A countries becomes high income country status(IBRD) for two years consecutively

Patent and Data Protection IV

- Patent/Registration Linkage

- Not in the TRIPS and Parties of TPP

- Safety and efficacy marketing authorities

- No one automatic stays and a 180-day period generic exclusivity in the like Hatch-Waxmann Act

- Transition period(category A, B, C)

- Evergreening, cf. U.S.-Australia FTA imposing penalties for linkage evergreening

☞ Specific "EVOLA" U.S. registered patent is 17, relating EVOLA more that 100

Future and Implications of TPP

- Impact to WTO/DDA regardless of TPP deal
- Fragmentation and discrepancies of Int'l IPRs legal system
- Spaghetti-bowl-effect of IPRs?
- Forum shopping within the TPP Parties?

Commentaries on "Examining the Liberalization of ASEAN's Legal Services Market: Challenges and Reforms"

Jiyeon Choi, Research Fellow, KLRI

Thank you, Professor Hsieh, for the presentation. This presentation provided me with the full picture of the liberalization of ASEAN's Legal Services Market as to its potentials and also drawbacks, along with suggestions for improvements.

By illustrating Singapore's example of legal services liberalization, this presentation clearly shows that it is not a mere possibility but could be a concrete win-win strategy for each and every ASEAN countries to open up and build an integrated legal market, in terms of financial advantages and also of promoting legal developments. While laying out the sunny sides of the unified legal market, Professor Hsieh did not ignore to back up his arguments by suggesting proposals for reform, including securing legal transparency and enacting a universal rules of professional conduct, just to name a few out of many strategies raised. I agree with Professor Hsieh that the reform proposals will fortify the competitiveness of ASEAN's legal services market under the multilateral trading system, thought with some limitations.

Liberalization of Legal Services Market in Korea

I myself am an attorney licensed to practice law in the State of Illinois, United States. I passed the Bar in 2007, and it was in June of 2007, while I was studying for the Bar after graduating, when I got the phone call from my parents in Korea relaying the news article saying that the Korean signed the US-Korea FTA opening the Korean Legal Services Market. Of course the main concern of my parents, that initiated that phone call, was whether I, the US attorney, could return to Korea and still practice law.

It turned out that such legal services liberalization became a reality, step by step, from the enactment of the Foreign Legal Consultant Act in 2009 through the ratification of the FTA between Korea and the US in 2011. I would not say that such liberalization took place very

rapidly, considering that discussions on opening the Korean market has been started to be placed on the tablesince the Doha Development Agreement long ago, and also because the stages of opening the market are carefully designed to provide sufficient buffer for domestic law firms. Perhaps protecting the domestic players while complying with international agreement would be the main concern of most governments, and Korea seems to be one of them.

Advantages of Integrated Legal Services Market

It is not unnecessary to be protective at the beginning and to measure every possible harm before actions are undertaken to minimize damages in the future; however, it is also important for governments in Asia, like Korea, to carefully investigate pros that they could take advantage of through the system and be proactive to maximize such profit for its domestic economy. In this sense, I concur with Professor Hsiehthat integration of the legal market will enhance the economic competitivenessas a whole by attracting FDIs from other parts of the world, and as he provided, Singapore's case vividly evidences such argument. Hong Kong would be another example of successful liberalization of its legalservices market, although HK portrays a peculiar trait as the Special Administration Region, with influences of both China and Britain.

Concerns on Opening Up the Market

Surely there are examples of countries proving that market liberalization was not all pink – German legal market was shaken by US and British Law Firms following its liberalization in 1998, many merged into US or British firms. It was also reported that many competent attorneys from British Firms took positions at US Firms raising concerns nationwide,and the same happened with Australian attorneys moving to British Firms when the Australian legal market opened. However, the Australian government changed the perspective and approached legal services as one of the ordinary businesses, not different from any other entrepreneurs, allowed non-attorneys to hold shares and to become directors of law firms, and this approach was appreciated as the main force to reinforce the competitiveness of its domestic law firms.

So the pros of the liberalization of the legal services market seemed undisputable, namely the obvious the economic expansion and growth with influx of FDIs, but the issues that each country has with regard to such market opening seemed clear as to the protection of domestic law firms

and lawyers. Then the question remains as to how to deal with the problem that the governments face while maximizing the benefits of complying with international agreement.

Merely arguing that exposing to competition will horning domestic firms' competitive edge, despite the example of the Australia that supports such notion, will not be very powerful, especially with the solid numbers proving otherwise.

In Korea, after the first phases of market liberalization, records showed that not only private companies but public corporations also chose to retain foreign law firms for international transactions in large scale. The case of the Korean National Oil Corporation is representative, as the Corporation retained a British Firm for acquisition of a British petroleum company, which involved transacting billions of dollars.

The amount of retainers paid to foreign legal services providers continuously surpassed that paid to Korean law firms, since the market opened. To respond to such increasing loss, the legislators as well as the practitioners in the field, including the Korean Bar Association members try to come up with measures to effectively protect the domestic businessesand to comply with its international commitments while avoiding overprotecting the market; however, obviously, there is no hard and fast rule to solve the issues.

Balancing between Pros and Cons – Possible Solutions?

Singapore and Hong Kong shows successful cases of liberalization, and the literature and information available also proves that the potentials for ASEAN countries as a whole is great with the legal services market liberalization. Yet, I cannot help but wonder if there is any solid solution that may help to protect local market players while pursuing integration of the market, as one can easily imagine that ASEAN countries would face similar difficulties that Korea encounter/will encounter – losing its domestic firms even before strengthening their competitiveness.

Japan may shed light to this question as it is assessed that Japan accomplished legal services market liberalization successfully, without posing significant threat to its national firms, by implementing stages of change built up through a very long term plan. Unfortunately, not all

countries may follow Japan's footsteps, as most countries are bind by "paper commitments" and their opening up the market is eminent.

In this regard, I would like to conclude my comments with asking if Professor Hsieh may provide any suggestions or possible solutions that may accomplish both liberalization of the legal services market and avoidance of endangering its domestic firms in ASEAN countries. How to balance between the two would be the key question. Thank you.

A Discussion on the TPP IP Chapter

Since APEC suggested the TPP as one of the regional integration models in the Asia-Pacific area to achieving a Free Trade Area of the Asia-Pacific (FTAAP), perhaps, the TPP has progressed most substantially of three pathways to the FTAAP. However, this ongoing TPP negotiation involves a lot of controversial issues and these controversies function as an obstacle to reaching agreements in many TPP Chapters. And the core of the controversy includes Intellectual property rights (IPR).

Although IPR protection is a key issue in the TPP negotiation, it seems that negotiators still have long way to go before drawing conclusion. In the negotiation, there is sharp tension among negotiating countries. Negotiators for the TPP IP chapter experience huge gaps between developed countries' position and those of developing countries. After joining in the TPP negotiations, the United States aims at setting the high-standards trade rules and addressing 21st-centry issues in global economy through the TPP. From the US' stance, the IPR protection might be at the center for building the TPP as the high-standards, 21st-century agreement. Also, IP-intensive industries in the US make a lot of efforts for informing the government about their positions to get a greater profit if the TPP negotiations will be successful. Therefore, the US proposes IP obligations that go beyond WTO rules.Generally speaking, in the negotiations, developed countries led by the US proposed various TRIPs-plus standards for strong protection and enforcement of IPRs while developing countries are reluctant to accept the US' proposals.

Controversial issues range widely in the whole of the negotiation. About the controversy, it should be noted that these are not only about a tension between developed countries and developing countries but also about the issue of balancing IPRs protections and other cultural and social values such as human rights and freedom of expression. There are critics argue that the proposed standards by the US are only for the IP-intensive industry, particularly large corporations' benefits. According to the critics, brand-name firms may generate a powerful lobby to effect to the negotiation. And opponents of strong IP protections also warn that such issues will affect freedom of information, civil liberties and access to medicines globally. In particular, regarding the pharmaceutical IP, they argue thatexcessively high standards for IP in the US' proposal will keep drug costs expensive and it will also likely to affect access to

important medicines such as cancer drugs.These critics become stiffening after the text for the IP Chapter negotiation was revealed by Wikileaks on October 16, this year and in November, last year despite the secrecy of TPP negotiating texts.

Regardless of the authenticity of the TPP IP leaked texts,probably, the most important matter is keeping a balance between IPRs and social values properly. This is about answering the question how we can protect and enjoy both IPRs and social values. This is because IPRs' wide-ranging effects on medicines, publishers, internet services, civil liberties. These closely affect to our ordinary life. In this regard, the fact that the European Parliament voted down the Anti-Counterfeiting Trade Agreement (ACTA) with concerns on human rights and freedom of expression in 2012 might be also a considerable factor. In light of IPRs' wide-ranging effects,such balancing issue should be deeply considered from a long-term perspectiveand such consideration should include negotiating countries'abilityto implement.

Comments on "Could Predatory Pricing Rules substitute Antidumping Laws in the Proposed China-Japan-Korea Free Trade Agreement"

HAN Xuehua[1)]

Today I will discuss *Could Predatory Pricing Rules substitute Antidumping Laws in the Proposed China-Japan-Korea Free Trade Agreement* written by Professor Bi Ying from Zhejiang University of China.

I would like to begin by thanking Professor Bi for an excellent presentation. You bring up highly substantive and interesting points that go to the heart of the rationale for the antidumping rules of international trade. The debate on whether antidumping law should be integrated into competition law is a relatively new but very significant issue. Many proposals have been brought up with the same purpose to reform the antidumping system, and your proposal to implement predatory pricing as a solution in the Northeast Asian context is both timely and insightful.

The only rationale of antidumping law is to deal with international predatory dumping. Modern competition rules target the same predatory conduct but they are more meticulous than antidumping law and are less susceptible to protectionist abuse. In many countries predatory pricing is considered anti-competitive and is illegal under competition laws. It is usually difficult to prove that prices dropped because of deliberate predatory pricing rather than legitimate price competition.

However, at current, there do not exist international predatory pricing rules. Predatory pricing remains a national issue. At the international level, the WTO practice shows that it was really hard to progress on negotiating stricter rules on antidumping measures. The idea of gradually incorporating predatory pricing rules into antidumping investigations in bilateral and regional trade zones seems more feasible and realistic, as you point out and as was seen in other trade agreements around the world.

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1) HAN Xuehua is a PhD candidate at Ewha Womans University, Korea. She is a state scholarship student sponsored by China Scholarship Council. She can be contacted at: iamsnowhan@gmail.com

In order to assess the substitution feasibility in the CJK FTA, the author explored predatory pricing in China, Japan and Korea respectively, which are three economic strongholds in the East Asian Economy. It is well known that all of the three countries have faced the most antidumping measures in the world. However, there is no single understanding of predatory pricing in these three countries. Each of these countries has two sets of competition rules concerning predatory pricing, i.e., dominance orientated predatory pricing and unfair predatory pricing. The efforts to harmonize predatory pricing rules so as to abolish antidumping laws would confront more difficulties in the proposed CJK FTA than other RTAs.

Though antidumping is not likely to be abolished soon, the author's proposal to gradually achieve substitution by first implementing predatory pricing rules in bilateral or regional trade areas appears to be a practical and gradual solution.

The analysis and conclusion raised several questions for me:

First is a question of practical implementation. Given the difficulty of proving predatory pricing, wouldn't international predatory pricing rules only exacerbate the evidentiary problems? Implementing the rules within a single economy is difficult enough—is it feasible across three large and dynamic economies? How can these difficulties, if any, be alleviated?

Second and perhaps more basically, is predatory pricing itself a feasible proposition for companies in the stream of international trade? The difficulty of undercutting competitors would seem to be only amplified in international trade, where the market is so much bigger there are so many more suppliers. Have there been cases of international predatory pricing, whether in the other FTAs or under domestic rules?

Third, as an offshoot of the first and second questions, I would like to make the perhaps bolder proposal that predatory pricing alone is too limited for a well-ordered system of international trade. Rather the full range of competition law, or at least the most important parts such as rules against monopolization and cartels, should be harmonized across trade partners—or at least provisions should be in place so that

competition authorities can cooperate more effectively. How do you see the relationship between predatory pricing and other competition rules—is predatory pricing the foot in the door, to let more competition rules into international trade, or do you see it as the end goal?

Finally, what are your thoughts on the prospect of predatory pricing becoming a part of the CJK FTA? Does it seem likely given the examples in other trade agreements, or do you foresee difficulties?

Thank you.

Comments on "Trends of Investment Chapters in FTAs- Centering around Investor-State Dispute Mechanism-"

LEE Seuyeun (Yonsei University)

Nowadays, most FTAs being concluded all include an investment chapter. But considering the impact that a FTA can have on the economies of the contracting parties, the number of FTAs including an investment chapter is significantly lesser than BITs. Still, it is quite of a surprise to find that only three FTA investment chapters, including the NAFTA Chapter 11, have been invoked as the ground for submitting an investment arbitration claim. But with the advent of mega-regional trade agreements like the TPP and the TTIP just waiting around the corner, we can anticipate that FTA investment chapters might play a more active role in the future.

For this commentary, I would like to pinpoint three trends that are looming up in the international investment arbitration plane in regard with dispute settlement, the last one having a direct relationship with the recently concluded FTAs of Korea.

The IBA Rules for Investor-State Mediation

Despite the popularity of investor-state dispute settlement, the system is remarked to be too costly, and as a result alternative ways of settling investment disputes are being encouraged. And the most recent one is the IBA Rules for Investor-State Mediation. If the disputing parties agree to a solution through mediation halfway into the dispute, that means that the disputing parties do not have to pay the costs for the rest of the dispute settlement process and therefore can save that much money. But saving money is not the only advantage of mediation. Mediation paves the way for the disputing parties to compromising a solution that both of them can be satisfied with. As a result, no hard feelings on both sides, and investment can commence like before.

With these advantages of mediation in mind, the International Bar Association drafted and adopted the IBA Rules for Investor-State Mediation in late 2012. Because the object of the rules is to afford flexibility and predictability to the disputing parties, the rules work as a default rule, which means that the disputing parties can derogated from them on agreement. It is too early to see yet if these rules will be successful, but still they warrant some attention.

Transparency

The second thing that I wanted to talk about was the draft Transparency Convention of UNCITRAL. Transparency has always been an issue in investor-state dispute settlement. This is because one, one of the disputing parties is a state, and two, most investment arbitration cases were high-profile ones in the first place. This is even more so when the public policy objectives of the state are at stake, like in the recent plain packaging cases initiated by Philip Morris. The public wants to know what is going on behind the closed doors of the arbitral tribunal's chambers, but this is not possible without the agreement of the disputing parties.

In this situation, the UNCITRAL decided to further the public's need for information. Last year, it had adopted "Rules of Transparency in Treaty-Based Investor-State Arbitration," which applied only to the settlement of disputes arising under investment treaties concluded after 1 April 2014. And Just last month(Oct.), the UNCITRAL finalized the “Transparency Convention” to supplement the Rules.

Interestingly, there was an exchange of letters between Korea and Australia in regard of the Transparency Rules. The purpose of this exchange of letters was to decide by consultation whether to make available the Transparency Rules to investment disputes initiated under the newly concluded Korea-Australia FTA.

The Recently Concluded (but not yet in force) FTA Trio of Korea

The third and last topic that I will be talking about is the recently concluded FTAs of Korea, which are the Korea-Columbia FTA, Korea-Australia FTA, and the Korea-Canada FTA. The investment chapters of these three FTAs provide for a detailed investor-state dispute settlement procedure reminiscent of the NAFTA.

What is interesting is that the Korea-Australia FTA was negotiated at a time when Australia announced that it will not include ISD provisions in future international investment agreements. So is the Korea-Australia FTA Investment Chapter sure proof that Australia has changed its tune?

Another thing is that the Korea-Turkey FTA's Investment Agreement's ISD provision is very different from the previous three FTAs, despite the fact that they were negotiated during similar periods. What caused this is not clear, but in my guess the different stances of Korea's FTA counterparts might be the cause of this divergence.

Special Session for Small and Medium Enterprises and Sustainable Development I

8. A Conversation with NAKAGAWA Junji (University of Tokyo) on "WTO, Mega-FTAs and Global Governance"
   (1)Chair: ELMS Deborah
   (2)Panelists: KIM Soo-Yeon, HSIEH Pasha
   (3)Open-Floor Discussion

WTO, Mega-FTAs and Global Governance

International Conference on "Trade and Global Governance: A Panoramic View of Free Trade Agreements and WTO", organized by the Korean Society of International Economic Law
November 6, 2014, Novotel Ambassador Hotel Gangnam, Seoul
Junji Nakagawa (University of Tokyo)

1. Changing structure of global trade governance
 (1) The stalemate of the Doha Development Agenda
 (2) Proliferation of FTAs
2. Globalization of value chains
3. The era of mega-FTAs?
4. Beyond mega-FTAs: Reinvigorating the WTO

1. Changing structure of global trade governance
(1)The stalemate of the Doha Development Agenda

Nov-01	Doha Ministerial agreed to launch the DDA.
Jan-02	Talks started by selecting chairpersons of negotiating groups.
Mar-03	Members missed deadline for deciding on modalities on agriculture and NAMA.
Sep-03	Cancun Ministerial collapsed.
Jul-04	Members agreed on a framework for the DDA at GC meeting. They also agreed to start negotiations on trade facilitation.
Dec-05	Hong Kong Ministerial agreed to eliminate agricultural export subsidies by 2013, but failed to agree on the modalities.
Apr-06	Members missed the deadline for agreeing on the modalities.
Jul-06	DG Lamy suspended the negotiations.
Feb-07	Lamy declared the resumption of the negotiations.
Jul-07	Chairs of negotiating groups on agriculture and NAMA published draft texts.
Jul-08	**Informal Ministerial failed to agree on the modalities.**
Dec-08	Revised chairman's texts were published.
Jul-09	US and developing countries deadlocked on further liberalization by the latter.
Mar-10	Members held stock-taking meeting.
Apr-11	Chairs of negotiating groups submitted reports.
Jun-11	Lamy provided a draft LDC-plus package.
Dec-11	Geneva Ministerial agreed on the need of seeking new approach.
Dec-13	Bali Ministerial agreed on trade facilitation, agriculture and development.

Changed power structure of WTO members is the main cause of the DDA stalemate

GATT rounds

– The Quod (US, EU, Japan and Canada) could conclude negotiations by reaching agreement among them, which were then adopted by consensus.

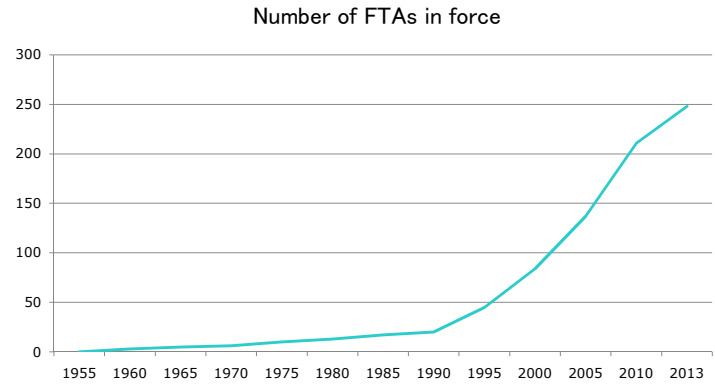
DDA

– As the new key players (US, EU, India, Brazil and China) disagree on a number of issues on the DDA negotiating agenda, there is a slim chance that they will reach agreement on the whole package of the DDA.

Negotiating positions of the key players

	offense	deffense
US	substantive NAMA from emerging markets	agricultural subsidies
India	service mode 4	agricultural import restriction
Brazil	agricultural reform in OECD countries	flexibility for protecting national industries
China		no further liberalization

(2) Proliferation of FTAs



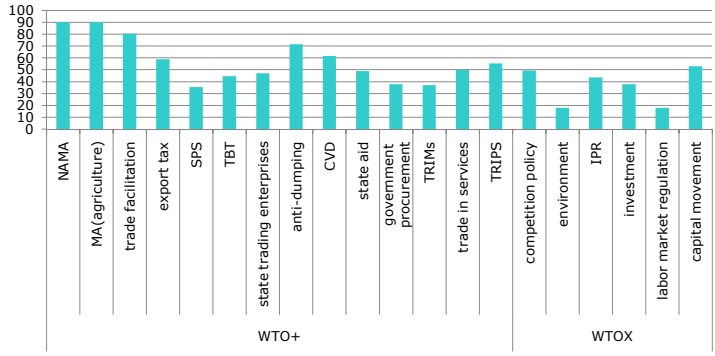
(Source: JETRO, FTAs of the World and Japan, Nov. 2013 (in Japanese). Available at http://www.jetro.go.jp/jfile/report/07001093/fta_ichiran_2012.pdf)

Main causes of the proliferation of FTAs

- Delay and deadlock of the multilateral trade negotiations
- Domino effect of regionalism
- **Globalization of value chains**

Recent FTAs aim at deep integration

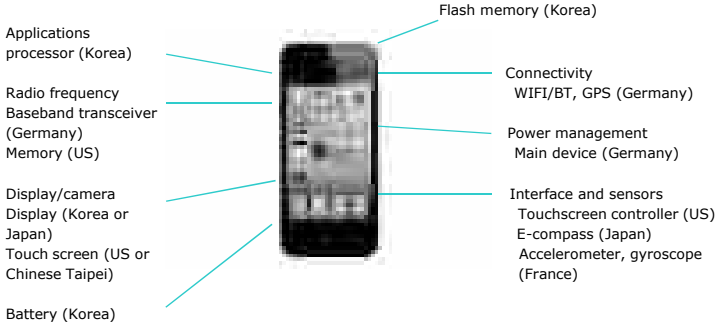
WTO plus and WTO extra in 90 FTAs (1990–2011)



(Source: Made from WTO, Updated dataset on the content of PTAs. Available at http://www.wto.org/english/res_e/publications_e/wtr11_dataset_e.html)

2. Globalization of value chains

Global value chains – iPhone 4



(Source: OECD, *Interconnected Economies: Benefiting from Global Value Chains*, Paris: OECD, 2013, p.10, Figure 1.)

GVC requires deep integration

・Factories and offices are unbundled internationally. This is created by the **trade-investment-services-IPR nexus**.

・Firms engaged in GVC require a broad range of regulatory and policy framework for the efficient functioning of their GVC.

⇒GVC requires **deep integration**.

Regulatory & policy framework for global value chains

Policies for GVC	Policy measures needed
Policies for the reduction of service link costs	Trade liberalization; Trade facilitation; Enhancement of logistical/telecommunication/financial services; Liberalization of movement of business persons; Harmonization of laws and regulations
Policies for the reduction of production costs of each production process	Human resource development; Liberalization and facilitation of investment; Enhancement of production support services; Stable and flexible labor laws and institutions; Trade liberalization; Trade facilitation; Protection of intellectual property rights; Competition policy; Harmonization of laws and regulations; Development of supporting industries; Formation of industrial agglomeration

Mismatch between GVC and FTAs

- GVC requires deep integration throughout the whole value chains.
- Many bilateral FTAs are needed to achieve this. It will take time and costs.
- Even if they cover the whole value chains, their contents are not necessarily the same.

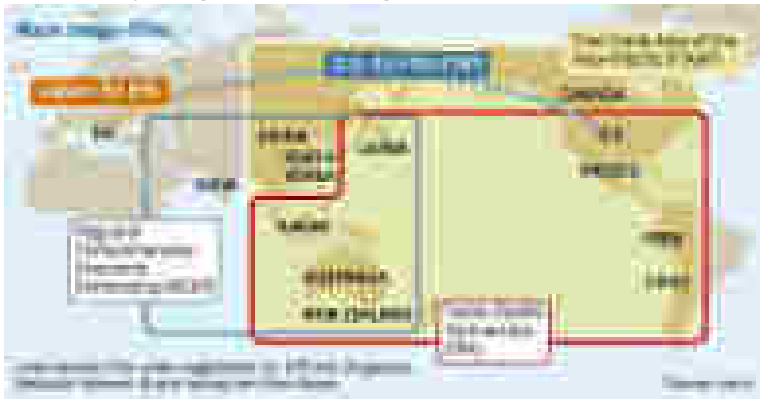
Divergence of FTAs may result in additional barriers to business transactions of firms engaged in GVC.

⇒spaghetti bowl of rules of origin

fragmentation of rules across FTAs

3. The Era of mega-FTAs?

Major mega-FTAs under negotiation (November 2014)



(Source: Kazushi Kagaya, "Trading Up", *Nikkei Asian Review*, 5 December 2013.)

Why do mega-FTAs matter?

- Mega-FTAs are being negotiated among major trading countries in the world.

Global share of mega-FTAs (2013, %)

	Population	GDP	Import	Inward FDI
TPP	11.4	37.5	26.9	31.5
RCEP	48.8	28.7	28.5	23.5
TTIP	11.7	46.2	41.3	29.9

(Source: IMF, World Economic Outlook 2014, Washington, D.C.: IMF, 2014)

- The discrepancy between the GVC and FTA territory may be less serious for mega-FTAs than ordinary bilateral FTAs.
- They cover a wide range of rules that are needed for GVC.

Subject matter coverage of mega-FTAs

	TPP	TTIP	RCEP	WTO
Goods market access	Yes	Yes	Yes	Yes
rules of origin	Yes	Yes	Yes	Yes
trade facilitation	Yes	Yes	Yes	Yes
SPS	Yes	Yes	Yes	Yes
TBT	Yes	Yes	Yes	Yes
trade remedies	Yes	Yes	Yes	Yes
government procurement	**Yes**	**Yes**	No	GPA
intellectual property rights	**Yes**	**Yes**	Yes	TRIPS
competition policy	**Yes**	**Yes**	Yes	No
trade in services	**Yes**	**Yes**	Yes	GATS
E-commerce	**Yes**	**Yes**	No	No
investment	**Yes**	**Yes**	Yes	TRIMS
capital movement and payment	**Yes**	**Yes**	?	No
environment	**Yes**	**Yes**	No	No
labor	**Yes**	**Yes**	No	No
dispute settlement	Yes	Yes	Yes	Yes
institutional matters	Yes	Yes	Yes	Yes
cooperation	Yes	No	Yes	TA, AfT
energy and raw materials	No	Yes	?	No
cross-cutting issues				
(1)regulatory coherence	**Yes**	**Yes**	No	No
(2)competitiveness and business facilitation	Yes	No	No	No
(3)promotion of SME utility	**Yes**	**Yes**	No	No
(4)development	Yes	No	No	No

TPP might become *de facto* global standards for GVC

- TPP, with its open accession clause, will attract more parties from the Asia-Pacific region.

Korea announced its intension to join the TPP.

Other APEC members that have expressed interest in joining the TPP

– Philippines, Taiwan, Thailand

Other states that have expressed interest

– Columbia, Costa Rica, Laos

- TPP is likely to become the first mega-FTA to be concluded.

Rules of the TPP might be incorporated in other mega-FTAs by reference. Regulatory coherence and the discipline on state-owned enterprises are also being negotiated under the TTIP.

Negotiation of mega-FTAs are accelerated

	TPP	TTIP	RCEP
Oct-02	NZ, Singapore and Chile agreed to launch the TSEPA negotiation.		
Apr-05	5th meeting. Brunei joined.		
Jun-08	Negotiation concluded.		
May/Nov-08	Members ratified TSEPA (P4)		
Mar-09	P4 financial service and investment negotiation started.		
Mar-09	US announced to join.		
Sep-09	US announced to join P4. Australia, Peru and Vietnam followed.		
Mar-10	1st meeting		
Dec-12	15th meeting. Canada and Mexico joined.		
May-13	17th meeting		1st meeting
Jul-13	18th meeting. Japan joined.	1st meeting	
Aug-13			1st ministers meeting
Sep-13			2nd meeting
Oct-13	TPP leaders meeting	2nd meeting	
Dec-13	TPP ministers meeting	3rd meeting	
Jan-14			3rd meeting
Feb-14	TPP ministers meeting		
Mar/Apr-14		4th meeting	4th meeeting
May-14	TPP ministers meeting		
Jun-14	TPP chief negotiators meeting	5th meeting	5th meeting
Jul-14		6th meeting	
Aug-14			2nd ministers meeting
Sep/Oct-14	TPP chief negotiators meeting	7th meeting	
Oct-14	TPP ministers meeting		
Nov-14	TPP leaders meeting		

4. Beyond the mega-FTAs: Reinvigorating the WTO

- In developing the globalization of value chains, firms strictly select trade and investment locations according to their locational advantages.

Mega-FTAs may fix and advance the disparity between those countries selected (=parties to the mega-FTAs) and those not selected.

Most of the latter will be LDCs.

Poverty and social instability in LDCs will persist. This will be bad for global peace and stability.

- In order to avoid such outcome, LDCs should be given a chance to join the GVC.

It is necessary to make a situation where any country in the world may adopt rules for GVC and compete against each other for joining GVC.

WTO is a better framework

functions	WTO	FTA
special treatment to developing countries	Very good (broad S&D, capacity building, Aid-for-Trade)	Weak (limited S&D)
monitoring rule implementation	Very good (notification and monitoring at Commissions, etc)	Weak (Joint Commission)
trade policy review	Very good (TPRM)	Weak (Joint Commission)
dispute settlement	Very good (judicialized DS)	Weak (weak DS)

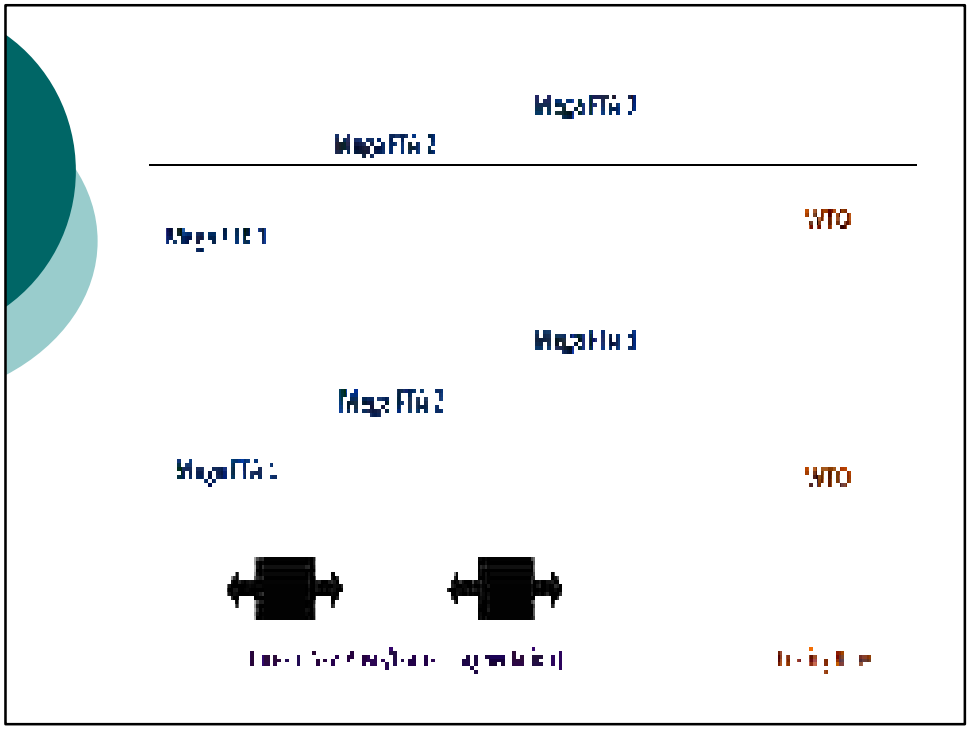
- These are important and effective institutional infrastructure of the WTO as the core of the global trading system, which cannot be attained by the TPP and other mega-FTAs.
- We should, therefore, redefine the role of the WTO, based on the requirements of global value chains, a new reality of the 21st century global economy. We should give it a new mandate, and mobilize its institutional infrastructure for the realization of the new mandate.

How can this be realized?

Who takes the initiative?

Reinvigorating the WTO: Three possible scenarios

1) Co-existence of fragmented mega-FTAs and WTO
2) Co-existence of harmonized mega-FTA rules (WTO2.0) and WTO (Baldwin: 2012)
3) Adding an issue-based plurilateral agreement to the WTO (Nakatomi: 2014)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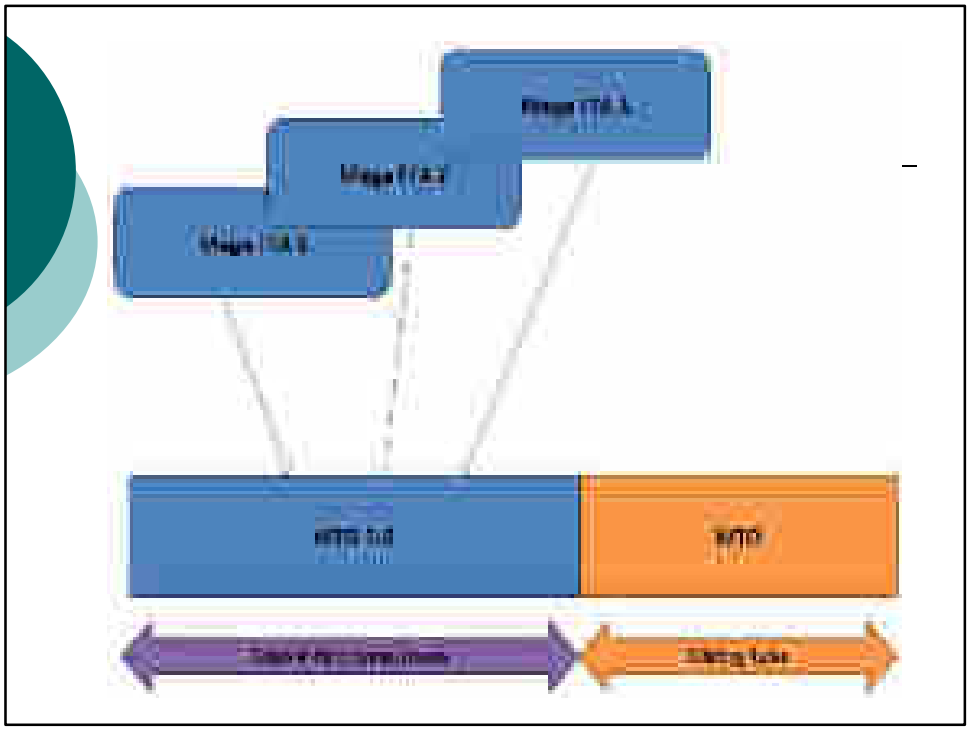
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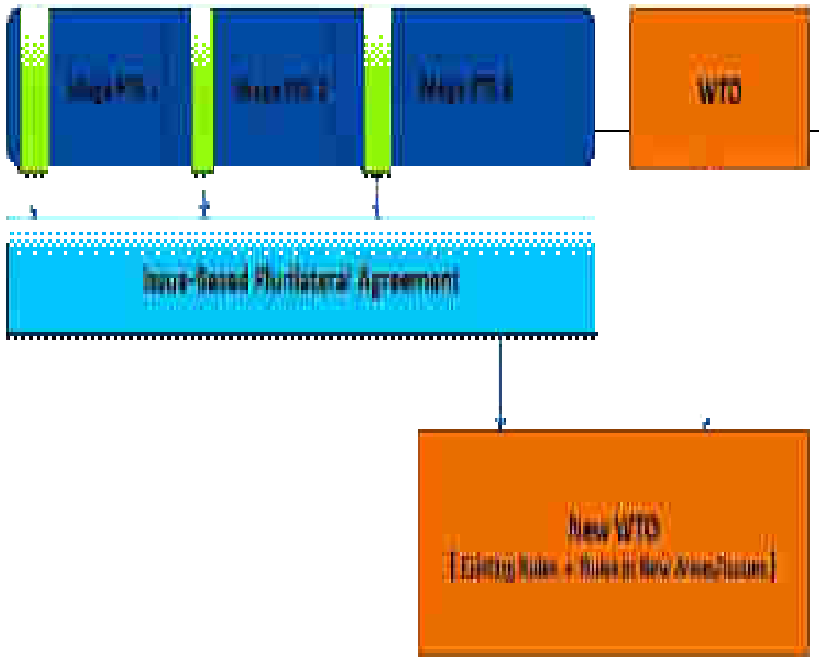

Reinvigorating the WTO

- The most feasible scenario will be the first one.
- Baldwin's WTO 2.0 is an interesting proposal, but as it is about establishing an exclusive club, fixing the status quo of global value chains, it should be dismissed.
- Nakatomi's proposal is least feasible but most appropriate for reinvigorating the WTO.

How can we make it happen?

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Session 3 Fundamentals of Global Trade Governance

Room: Champagne A Hall

CHAIR: CHOI Seung-Hwan (Kyunghee University)

Presenters

9. WANG Heng (Southwest University of Political Science and Law, China): Cultural Exceptions in International Trade : Challenges and the Prospect
10. DESIERTO Diane (University of Hawaii): Balancing National Public Policy and Free Trade

Discussants

PARK Deok-Young (Yonsei University)

WANG Sang-Han (Sogang University)

Junior Discussant

LEE Cheon-Kee (Korea University)

Presenters

11. KIM Jong Bum (Yonsei University): Mega-RTAs under the WTO Law
12. FUKUNAGA Yuka (Waseda University): Equivalence of SPS/TBT Standards and Public Policy Objectives

Discussants

YOO Hee-Jin (Anyang University)

OH Sun-Young (S oongsil University)

Junior Discussants

SOHN Ji-Young (Ewha Womans University)

KANG Sung-Jin (Korea University)

Cultural Exceptions in International Trade: Challenges and the Prospect

Heng Wang*

Outline. Please do not quote or circulate.

1. Introduction

It is very difficult, if not impossible, to find a commonly accepted definition of the concept of "culture". The reasons include that culture is a living reality that changes constantly, and that the concept of culture is prone to be politically and culturally constructed and manipulated for various purposes.[1] Culture may be negatively affected by free trade. Some cultural products may not survive if free trade prevails in every instance, and a heated debate arise in the intersection between trade regulation and cultural protection, which was metaphorically referred to as the term "shelf space".[2] Countries may protect culture due to the concerns including national identity, cultural sustainability, sufficient supply of cultural works,[3] among others. Therefore, one may describe it as a "culture and trade" or "culture versus trade" issue.

The specific nature of cultural goods and services has been explicitly recognized by cultural rules. Cultural goods and services are regarded as "commodities of a unique kind" under the United Nations Educational, Scientific and Cultural Organization (UNESCO) Universal Declaration on Cultural Diversity.[4] Furthermore, the specificity of cultural goods and services is highlighted "as vectors of identity, values and meaning", and therefore shall

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1 Peter Van den Bossche, Free Trade and Culture: A Study of Relevant WTO Rules and Constraints on National Cultural Policy Measures 8 (2007).

2 Chi Carmody, *Creating "Shelf Space": NAFTA's Experience with Cultural Protection and Its Relevance for the WTO*, 2 ASIAN JOURNAL OF WTO & INTERNATIONAL HEALTH LAW & POLICY 287, 288 (2007).

3 Anirudha Rajput, *Book Review: Free Trade and Cultural Diversity in International Law, by Jingxia Shi, Hart Publishing*, 10 MANCHESTER JOURNAL OF INTERNATIONAL ECONOMIC LAW, 444, 445, 448 (2013).

4 United Nations Educational, Scientific and Cultural Organization, Universal Declaration on Cultural Diversity Art. 8.

not be treated as "mere commodities or consumer goods."[5] The real policy debates on trade and culture probably began after World War I.[6] It has been a real issue for countries on how to regulate trade in cultural goods and services, in particular whether cultural exceptions should be provided.

2. Negotiations on cultural exceptions

It is not surprising to find that culture exceptions negotiations are not easy. Under cultural exceptions, culture is usually exempt from trade liberalization, or is governed by special provisions.[7] As an example, cultural exception may concern the exclusion of audiovisual goods and services from trade disciplines, based on the arguments that cultural goods and services are different from ordinary products. Under this exclusion, for instance, certain subsidies, quotas, and other measures to support domestic cultural products could be permitted.[8] EU law is a good example here. Granting culture a special status within EU law, EU law such as Audiovisual Media Services Directive provides the protection for audiovisual sector, and France could maintain subsidy schemes and quotas.[9]

France and the US took different positions in cultural exceptions in the WTO Uruguay Round negotiations, and the EU intended to maintain the cultural exceptions in its negotiation with US on the recent bilateral trade and investment agreement.[10] In the Uruguay Round, European Union considered several strategies to protect the audiovisual industry, the exclusion of

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5 Universal Declaration of Human Rights Art. 8.

6 Mira Burri, *Trade versus Culture: The Policy of Cultural Exception and the World Trade Organization*, *in* PALGRAVE HANDBOOK OF EUROPEAN MEDIA POLICY 480, (Caroline Pauwels, et al. eds., 2013).

7 Gilbert Gagné, *Free Trade, Cultural Policies, and the Digital Revolution: Evidence from the U.S. FTAs with Australia and South Korea*, 9 ASIAN JOURNAL OF WTO & INTERNATIONAL HEALTH LAW & POLICY 257, 259 (2014);Mira Burri, *The European Union, the World Trade Organization and Cultural Diversity 11.*(*at* http://ssrn.com/abstract=2389603.

8 ICTSD, *"Cultural Exception" Proves Early Sticking Point in EU-US Pact Preparations*, BRIDGES, VOLUME 17 - NUMBER 14, Apr. 25, 2013. 2013.

9 *European Commissioner for Trade Karel De Gucht on the Transatlantic Trade and Investment Agreement: The cultural exception is not up for negotiation!,* Brussels, 22 April 2013(2013), *available at* http://trade.ec.europa.eu/doclib/press/index.cfm?id=890&title=European-Commissioner-for-Trade-Karel-De-Gucht-on-the-Transatlantic-Trade-and-Investment-Agreement-The-cultural-exception-is-not-up-for-negotiation!

10 ICTSD, *"Cultural Exception" Proves Early Sticking Point in EU-US Pact Preparations*, BRIDGES, VOLUME 17 - NUMBER 14, 2013.

audiovisual sector from the coverage of the agreement, the cultural specificity, and the cultural exception.[11] WTO negotiations do not necessarily please trade proponents who argue that audiovisual services are subject to progressive trade liberalization like other sectors, against cultural advocates who instead highlights audiovisual services' cultural nature.[12] The continual clash of views arose on culture and trade in the Uruguay Round negotiations. On one hand, the United States claimed that film and television products were marketable commodities subject to the ordinary trade rules like other commodities, and cultural diversity could constitute disguised protection. On the other hand, the EU, Canada, and others countered that trade should not interfere with culture, and regarded the U.S. request as infringement on the sovereign right on cultural and diversity issues.[13] The idea of a "cultural exception" arose, and it led to a compromise that audiovisual sector would be governed by the GATS, but the MFN requirements "would not be applicable for the time being".[14] These negotiation debates remain in current negotiation such as the TTIP. [15]

3. Cultural exceptions in trade law: Rules and Practice

3.1 Trade rules relating to cultural exceptions

Cultural exceptions could be found in multilateral and regional trade law. For trade in goods, GATT Article IV on Special Provisions relating to Cinematograph Films accommodates some needs for protecting film industries through screen quotas favoring films of national origin. In addition, GATT Article XX(f) permits measures for protecting "national treasures of artistic, historic or archaeological value", and could be related to cultural goods.

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11 Sandrine Cahn & Schimmel Daniel, *The Cultural Exception: Does it Exist in GATT and GATS Frameworks? How Does it Affect or is it Affected by the Agreement on TRIPS ?*, 15 CARDOZO ARTS & ENTERTAINMENT LAW JOURNAL 281, 293 (1997).

12 Byung-il Choi, *Trade Barriers or Cultural Diversity? The Audiovisual Sector on Fire*, *in* GOVERNING GLOBAL ELECTRONIC NETWORKS: INTERNATIONAL PERSPECTIVES ON POLICY AND POWER X, (William J. Drake & Ernest J. Wilson III eds., 2008).

13 Id. at, 241.

14 Id. at.

15 European Commissioner for Trade Karel De Gucht on the Transatlantic Trade and Investment Agreement: The cultural exception is not up for negotiation! 2013.

Having said that, the clause is only applicable to goods and is of limited application scope when it comes to cultural goods. GATT Article XX(a) also contains the exception for measures necessary for protecting public morals. Potentially it could be invoked regarding cultural goods but the stringent requirements of necessity test and chapeau need to be met. Some observes argue that GATT Article XIX on emergency action on imports of particular products may cover cultural goods when it cannot resist competition but it can operate only at a limited degree.[16] Beyond GATT 1994, measures to protect cultural diversity or expressions could be governed by WTO jurisprudence if they negatively affect trade-related intellectual property rights, or government procurement.[17]

Regarding trade in services, GATS Article XIV(a) allows measures "necessary to protect public morals or to maintain public order". The GATT exception on protecting "national treasures of artistic, historic or archaeological value" is not available under the GATS. From this perspective, one may argue that less support for cultural exceptions. GATS provisions have been applied in a number of culture related disputes including *Canada-Periodicals* and *China-Publications*. In *China-Publications*, GATS Article XIV(a) exception on public morals has been invoked.

At the regional level, cultural exceptions could be found in some FTAs. The FTAs signed by the US, EU and China are not the same, and will be discussed here. The FTAs of the US usually do not highlight cultural exceptions, and the FTAs vary from one to another. For instance, the FTA cultural reservations in the FTAs of the US could depend on the negotiation capacity of the US FTA partners.[18] On one hand, US-Bahrain FTA, for instance, incorporates GATT Article XX and GATS Article XIV respectively in its chapter on exceptions.[19] On the other hand, Article 2005 of the Canada–US

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16 Cahn & Daniel, CARDOZO ARTS & ENTERTAINMENT LAW JOURNAL, 285 (1997).
17 Won-Mog Choi, *SCREEN QUOTA AND CULTURAL DIVERSITY: DEBATES IN KOREA-US FTA TALKS AND CONVENTION ON CULTURAL DIVERSITY*, ASIAN JOURNAL OF WTO & INTERNATIONAL HEALTH LAW & POLICY, 281 (2007).
18 Ivan Bernier, *THE RECENT FREE TRADE AGREEMENTS OF THE UNITED STATES AS ILLUSTRATION OF THEIR NEW STRATEGY REGARDING THE AUDIOVISUAL SECTOR 15.*(*at* http://www.diversite-culturelle.qc.ca/fileadmin/documents/pdf/conf_seoul_ang_2004.pdf.
19 US-Bahrain FTA Art. 20.1.

Free Trade Agreement (CUSFTA) contains cultural exception clauses, exempting cultural industries from most trade disciplines. North American Free Trade Agreement (NAFTA) incorporates the CUSFTA provision and contains a same cultural exception clause.[20] This cultural industries clause itself is of limited effect as it contains a retaliation provision under which the other party could take responding measures "of equivalent commercial effect". This cultural clause is of "tempered and contradictory nature".[21] For digital trade, the US showed some deference to FTA partners' cultural measures regarding audiovisual services, but these measures are "frozen" at the current level and may concern solely normal offline technologies.[22]

Some FTAs of EU differ from Chinese FTAs that will be discussed later. The first feature is the possible extension of natural treasures from trade in goods to trade in services. WTO exceptions have been adopted in some FTAs of the EU without extension. Some FTAs, such as EU-Central America Association Agreement, incorporate GATT Article XX directly. [23] EU-Chile Free Trade Agreement does not incorporate GATT Article XX directly, but contains most exceptions under GATT Article XX, including that protecting national treasures.[24] Notably cultural protection is available under the services trade in comparison with the WTO law. Under EU-Central America Association Agreement, the general exceptions for trade in services article permits measures "necessary for the protection of national treasures of artistic, historic or archaeological value", which goes beyond GATS Article XIV.[25]

As the second feature, EU FTAs often contain protocol on cultural co-operation,[26] articles on cooperation in the audio-visual field,[27] or special clause on culture. Some EU FTAs contain a more detailed article on culture:

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20 NAFTA Annex 2106.
21 Carmody, ASIAN JOURNAL OF WTO & INTERNATIONAL HEALTH LAW & POLICY, 294, footnote 18 (2007).
22 Mira Burri, *Cultural Diversity as a Concept of Global Law: Origins, Evolution and Prospects*, 2 DIVERSITY, 1070-1071 (2010).
23 EU-Central America Association Agreement Art. 158.1.
24 EU-Chile Free Trade Agreement Art. 91(e).
25 EU-Central America Association Agreement Art. 203.1.
26 EU-Korea Free Trade Agreement, Protocol on Cultural Co-operation (2011).
27 EU-Chile Free Trade Agreement Art. 39.(the cooperation is conducted mainly through "training programmes in the audio-visual sector and means of communication, including co-production, training, development and distribution activities")

promoting cultural diversity, producing cultural goods and services, and cooperate in cultural events.[28] In regional agreements, the EU has sought excluding cultural services from trade commitments with promising intensified cultural co-operation "without any sizeable concrete commitments".[29]

The third feature of some FTAs of the EU is the exclusion of audiovisual sectors from the services trade chapter. For instance, EU-Chile Free Trade Agreement excludes audio-visual services from its chapter on services.[30]

Detailed rules on cultural exceptions are not found in most of Chinese FTAs. In China's FTAs with both developing and developed countries. The China-New Zealand FTA, China-Singapore, China-Costa Rica FTA, China-Iceland FTA and China-Switzerland FTA incorporate the general exceptions of the GATT and GATS.[31] China-New Zealand FTA and China-Switzerland FTA contain additional clauses relating to cultural concerns. Differing from other FTAs, the China-New Zealand FTA provides that nothing in it shall be construed to prevent adopting measures "necessary to protect national works or specific sites of historical or archaeological value, or to support creative arts of national value".[32] As a broad concept, the definition of "creative arts" takes new technologies into account and covers creative online content, among others. The list of MFN exemptions of Switzerland under China-Switzerland FTA covers audiovisual services whose conditions creating the need for the exemption is "promotion of common cultural objectives". It also stipulates that nothing in it shall prevent taking measures necessary to "restrict the illicit import of cultural property" under the framework of UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.[33] China's

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28 *Agreement on Trade, Development and Cooperation between the European Community and South Africa*, Art. 85.
29 Burri, DIVERSITY, 1071 (2010).
30 EU-Chile Free Trade Agreement Art. 95.2(b).
31 China-New Zealand FTA Art. 200(1) ;China-Iceland FTA Arts. 11, 82 (2013);China-Switzerland FTA Arts. 2.7, 8.15;China-Costa Rica FTA Art. 159(1), 159(2);China-Singapore Free Trade Agreement Art. 105(1), 105(2)(with minor difference, removing the general exception to MFN treatment under GATS Art. XIV:(e)) (2008).
32 China-New Zealand FTA Art. 200(3).
33 Id. at, Art. 200(4).

FTAs vary to some extent to different trading partners. China is probably in the process of forming its own cultural exceptions "model".

3.2 Trade law practices involving cultural exceptions

A number of WTO disputes involve cultural issues directly or indirectly, some of which would be discussed below. In *Japan – Alcoholic Beverages II*, Japan argued that shochu and spirits are not like products as to (i) end-uses, and (ii) consumers' tastes and habits. For instance, in the view of Japan, most shochu and spirits are drunk during meals and after meals respectively. Shochu are often consumed with hot water but not with tonic water. Conversely, some spirits may be consumed with tonic water but not with hot water.[34] Although Japan claimed that Japanese consumers regard shochu as different from spirits and drink it in different settings and did not specifically refer to 'cultural' concerns, the differential tax scheme could be deemed as a reflection of "cultural values and practices" with respect to alcohol. [35]

In *Canada-Periodicals*, cultural goods such as periodicals could be subject to GATT Article III. The legal reasoning in *Canada-Periodicals* ended in "a more technocratic argument about the common characteristics of different products" instead of cultural exceptions.[36] Some have observed that the panel of *Canada-Periodicals* has actually rejected cultural exception doctrine.[37]

In *China-Publications*, UNSECO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (CCD) and the UNESCO Universal Declaration on Cultural Diversity have been invoked by the parties.[38] In China's view in *China-Publications*, reading materials and

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[34] Panel Report, *Japan — Taxes on Alcoholic Beverages*, ¶ 4.54, WT/DS8/R, WT/DS10/R, WT/DS11/R (Jul. 11, 1996)

[35] TANIA VOON, CULTURAL PRODUCTS AND THE WORLD TRADE ORGANIZATION 14 (New York: Cambridge University Press. 2007).

[36] Joel Richard Paul, *Cultural Resistance to Global Governance*,, 22 MICHIGAN JOURNAL OF INTERNATIONAL LAW 1, 50 (2000).

[37] Frederick Scott Galt, *THE LIFE, DEATH, AND REBIRTH OF THE "CULTURAL EXCEPTION" IN THE MULTILATERAL TRADING SYSTEM: AN EVOLUTIONARY ANALYSIS OF CULTURAL PROTECTION AND INTERVENTION IN THE FACE OF AMERICAN POP CULTURE'S HEGEMONY*, 3 WASHINGTON UNIVERSITY GLOBAL STUDIES LAW REVIEW 909, 914 (2004).

[38] Panel Report, *China — Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, § 4.207, WT/DS363/R (Aug.12,

finished audiovisual products constitute cultural goods, possibly having "a major impact on public morals".[39]

Highlighting their specific characteristics "[a]s vectors of identity, values and meaning", China argued that cultural goods and services not only meet a commercial need, but also "play a crucial role in influencing and defining the features of society."[40] China also claimed that cultural goods may make a impact on "societal and individual morals."[41] Therefore, China requested the Appellate Body to be "mindful" in the appeal of the specific nature of cultural goods.[42] The panel here has not ruled out the possible effect of cultural goods on public morals, and indicated that public morals may vary from one member to another member, affecting by a member's "prevailing social, cultural, ethical and religious values". [43] The adjudicators seem to rely more on assumption[44] or necessity analysis.[45]

Generally speaking, the possible jurisprudence on cultural exceptions and trade has not been fully elaborated by the Panel and the Appellate Body. One observe suggested that the WTO adjudicators probably would follow "conventional analysis" of trade law and are unlikely to clarify the relationship of the CCD with the WTO law based on their rulings in *EC-Hormones* (not to disrupt "delicate and carefully negotiated balance" of the WTO Agreement).[46] The WTO adjudicators have permitted the invocation of GATT public morals exception for cultural goods.[47] The WTO judges have referred to non-WTO law in cases including US-Shrimp and it remains to see how far they could go in terms of cultural exceptions.

2009)WT/DS363/R ;Appellate Body Report, *China — Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, § 25, WT/DS363/AB/R (Dec. 21, 2009)

39 *China — Publications and Audiovisual Products*, at § 7.751.

40 *China — Publications and Audiovisual Products*, at § 25.

41 Id. at, § 141.

42 *China — Publications and Audiovisual Products*, at § 25.

43 Id. at, § 7.763.

44 Id. at;*China — Publications and Audiovisual Products*, at § 148.

45 *China — Publications and Audiovisual Products*, at § 336.

46 Burri, DIVERSITY, 1068 (2010).

47 Id. at, 1069.

4. Conclusions

Some observers argued that the underlying rhetoric of trade and culture debate is changed from cultural exceptions to cultural diversity.[48] The crux here is the balance of culture and trade. Several conclusions may be concluded.

First, the fast developing FTAs, along with the possible WTO jurisprudence, may help to tackle the trade and culture debate in the future. The FTAs of US and China have not gone too far than the WTO law. Given the impasse of WTO negotiations and the cautious position of WTO panel and Appellate Body, it is likely that FTAs in the future could be a more feasible forum to address cultural exception issues by rulemaking. The development of cultural exceptions could occur in the "mushrooming" of the FTAs. It is noteworthy that the increasingly fragmented FTAs have inherent challenges. For instance, the availability and content of FTA cultural exceptions may depend on the negotiation capacity of countries. The multilateral trade regime has its own unique advantage for rule uniformity and should be strengthened.

Other challenges include different positions of countries. The trade rulemaking may be affected by countries' cultural concerns and market access prospect for relevant goods and services.[49] Different countries have taken different positions with regard to cultural exceptions. As discussed above, cultural exceptions become a key issue in FTA negotiations including the TTIP negotiations between the EU and the USA. The implementation and interpretation of these FTAs are more important, and may in turn affect the multilateral trade regime.

Second, the proper balance between trade rules and cultural rules is the key to cultural exceptions. The difficulties of balancing trade and non-trade concerns remain. Cultural exceptions not only involve the WTO rules and FTAs, but also concern other organizations and rules such as UNESCO. As a

[48] Burri, The European Union, the World Trade Organization and Cultural Diversity 11.
[49] Gagné, ASIAN JOURNAL OF WTO & INTERNATIONAL HEALTH LAW & POLICY, 270-271 (2014).

typical example, the CCD overlaps with the WTO law and is invoked in previous disputes. The CCD contains several principles in terms of its relationship with other rules. Mutual supportiveness has been highlighted regarding the relationship between the CCD and other treaties, which the CCD is not subordinated to other treaties.[50] The parties need to consider CCD provisions when interpreting and applying other treaties or entering into other international obligations.[51] Under the CCD, nothing in this Convention is to be interpreted as modifying parties' rights and obligations under other treaties.[52] Many but not all WTO members joined the CCD. It remains an open issue as to how the above principles could be applied to the interpretation of multilateral and regional trade rules. In any case, public policies based on cultural concerns shall not be abused for protectionism.

Last but not least, cultural exceptions may affect a wide range of rules. Cultural exceptions may be relevant to the protection of culture, cultural diversity, choices of the society, the pride for the culture, the opportunity in the future high-tech sector, job creation and even global governance, among others.[53] They become increasingly important in the digital age.

Cultural exceptions are related not only to trade law, but also concern competition law and other areas. They have significant implications for domestic and international law. For instance, competition law may be adopted to ensure the supply of cultural goods and services. The specific nature of cultural goods and services may be taken into account in the definition of relevant market, among others.[54] Potentially competition law may constitute a potential field for cultural concerns.

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50 Convention on the Protection and Promotion of the Diversity of Cultural Expressions Art. 20.1(a) (2005).
51 Id. at, Art. 20.1(b).
52 Id. at, Art. 20.2.
53 European Commissioner for Trade Karel De Gucht on the Transatlantic Trade and Investment Agreement: The cultural exception is not up for negotiation! 2013.
54 Mira Burri, *Keeping promises: Implementing the UNESCO Convention on Cultural Diversity into EU's internal policies 24.*(*at* http://ssrn.com/abstract=1675290.

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BALANCING NATIONAL PUBLIC POLICY AND FREE TRADE[1]

Diane A. Desierto[2]

I think we need to start a discussion about the future — a future which honours the aims of the Marrakesh Agreement, which is worthy of our role in international relations, trade and development, and which delivers for the people we are here to serve — particularly the poorest. It is time to face up to the undeniable problems we have in this organization and have an open and honest discussion about how we can move forward.
- WTO Director-General Roberto Azevedo[3]

INTRODUCTION: AN 'EITHER-OR' DILEMMA AT THE WTO?

In the wake of the World Trade Organization's (WTO) miserable impasse with India regarding the ratification of the Protocol to the Trade Facilitation Agreement (TFA) that was concluded during the Ninth WTO Ministerial Conference held in Bali, Indonesia on December 2013, WTO Director-General Roberto Azevedo admitted that while the WTO succeeds in resolving trade disputes and monitoring trade practices, it was failing on its ability to deliver new multilateral results from trade negotiations.[4] This systemic failure in the trade negotiations pillar of the WTO is evident to all of its 160 Members, from thirteen years of stalled negotiations under the Doha Round and the inability of the

[1] Paper prepared for Korea Society of International Economic Law (KSIEL) International Conference on "Trade and Global Governance: A Panoramic View of Free Trade Agreements and the WTO", November 6-7, 2014, Novotel Ambassador Gangnam, Seoul, Korea. This paper draws from insights in the author's forthcoming book, DIANE A. DESIERTO, PUBLIC POLICY IN INTERNATIONAL ECONOMIC LAW: THE ICESCR IN TRADE, FINANCE, AND INVESTMENT (Oxford University Press, February 2015) [hereafter, "DESIERTO 2015"].

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[3] WTO Director-General's Statement at the Trade Negotiations Committee Formal Meeting, 16 October 2014, at http://www.wto.org/english/news_e/news14_e/tnc_stat_16oct14_e.htm (last accessed 18 October 2014).

[4] Speech by WTO Director-General Roberto Azevedo, Canada, 9 October 2014, at http://www.wto.org/english/news_e/spra_e/spra36_e.htm (last accessed 18 October 2014).

WTO to encourage agreements between developing and developed countries on the Doha Development Agenda;[5] the contemporaneous proliferation of around 585 regional trade agreements (RTAs)[6] which, at best, do not appear to have facilitated global agreement under the Doha Round;[7] and more recently from India's demand for permanent changes to WTO rules to avoid sanctioning developing countries' food security policies.[8] While many WTO Members publicly criticized India for unfairly holding the TFA hostage,[9] other powerful Green Room[10] members at the WTO have maintained silence over India's concerns on food security other than to affirm the devastating consequences of failing to ratify the TFA,[11] even if there may well be economic and policy grounds to publicly

[5] *See* Sungjoon Cho, *The Demise of Development in the Doha Round Negotiations,* 45 Texas International Law Journal (2010), pp. 573-601, at 577-582.

[6] As of 15 June 2014, the WTO reports 585 notifications of RTAs (separately counting goods, services and accessions), with 379 in force. *See* http://www.wto.org/english/tratop_e/region_e/region_e.htm (last accessed 1 October 2014).

[7] *See* Colin B. Picker, *Regional Trade Agreements v. The WTO: A Proposal for the Reform of Article XXIV to Counter this Institutional Threat,* 26 University of Pennsylvania Journal of International Economic Law 2 (2005), pp. 267-319; Antoni Estevadeordal, Kati Suominen, and Christian Volpe Martincus, *Regional Trade Agreements: Development Challenges and Policy Options,* Inter-American Development Bank November 2012 paper, at http://www10.iadb.org/intal/intalcdi/PE/2013/11955.pdf (last accessed 1 October 2014).

[8] *See* J.P. Singh, "India's multi-faceted WTO refusal", The Washington Post, 5 August 2014, at http://www.washingtonpost.com/blogs/monkey-cage/wp/2014/08/05/indias-multi-faceted-wto-refusal/ (last accessed 1 October 2014); Jayati Ghosh, "India faces criticism for blocking global trade deal but is it justified", The Guardian, 22 August 2014, at http://www.theguardian.com/global-development/poverty-matters/2014/aug/22/india-criticism-blocking-global-trade-deal (last accessed 1 October 2014).

[9] On criticisms against India's position from emerging markets/developing country members as well as developed country members, see Raymond Zhong and Peter Kenny, "WTO Fails to Ratify Trade Agreement", Wall Street Journal, 31 July 2014 at http://online.wsj.com/articles/u-s-pressures-india-on-wto-trade-agreement-1406820288 (last accessed 1 October 2014); "India's blocking of WTO deal triggers harsh criticism", 1 August 2014, at http://www.dw.de/indias-blocking-of-wto-deal-triggers-harsh-criticism/a-17825484 (last accessed 1 October 2014); Alvise Armellini and Helen Maguire, "Europe-Asia summit set to criticize India over WTO blockage", DPA International, 17 October 2014, at http://www.dpa-international.com/news/asia/europe-asia-summit-set-to-criticize-india-over-wto-blockage-a-39923664.html (last accessed 18 October 2014); "Kerry challenges Modi over WTO stance", Agence France Presse and Taipei Times, 2 August 2014, at http://www.taipeitimes.com/News/world/archives/2014/08/02/2003596499 (last accessed 1 October 2014).

[10] On the heavy impact of unrepresentative Green Room members on WTO decision-making, *see* Kent Jones, *Green room politics and the WTO's crisis of representation,* 9 Progress in Development Studies 3 (October 2009), pp. 349-357.

[11] Canada Statement on WTO Failure to Adopt Protocol for Trade Facilitation Agreement, 1 August 2014, at http://www.international.gc.ca/media/comm/news-communiques/2014/08/01a.aspx?lang=eng (last

demonstrate to India that its continued participation in global trade under multilateral trading rules was critical for ensuring cheaper access to food for India's population and ultimately, higher wages for some of the poorest in India.[12]

India's disengagement from ratifying the Protocol to the TFA was more a matter of how the WTO Membership could reach permanent decisions on food security with the same expeditiousness as the TFA – it was not at all the case that the WTO was indifferent to food security within the multilateral trade negotiation agenda. The WTO Ministerial Conference at Bali had issued a Ministerial Decision that would have insulated India from suit under the WTO Dispute Settlement Mechanism for any of its public stockholdings for food security purposes, while the entire WTO membership was still negotiating a permanent solution on the critical issue of food security.[13] In response, India reiterated its position that resolving food security issues had to be prioritized with same emphasis as trade facilitation under the Bali ministerial decisions, stressing that, "overall balance is important even in a limited package of outcomes. The Bali outcomes were negotiated as a package and must be concluded as such…developing countries such as India must have the freedom to use food reserves to feed their poor without the threat of sanctions."[14] This call for rebalancing of priorities in multilateral trade negotiations, to specifically address food security, fully aligns with the conclusions and recommendations of Olivier De Schutter, the UN Special Rapporteur on the Right to Food:

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accessed1 October 2014); Statement by US Ambassador Michael Froman on the World Trade Organization Trade Facilitation Agreement Protocol Failure, July 2014 at http://www.ustr.gov/about-us/press-office/press-releases/2014/July/Statement-by-Amb-Froman-on-WTO-Trade-Facilitation-Agreement-Protocol-Failure (last accessed 1 October 2014); Statement by EU Trade Commissioner Karel de Gucht on Trade Facilitation Agreement, 4 August 2014, at http://trade.ec.europa.eu/doclib/press/index.cfm?id=1144 (last accessed 1 October 2014).

[12] *See for example* Joshua Meltzer, "Improving Indian Food Security: Why Prime Minister Modi Should Embrace the WTO", Brookings, 16 May 2014, at http://www.brookings.edu/research/opinions/2014/05/16-world-trade-organization-india-food-security-meltzer (last accessed 1 October 2014).

[13] WTO Ministerial Decision of 7 December 2013, *Public stockholding for food security purposes*, WT/MIN (13)/38, WT/L/913, at http://wto.org/english/thewto_e/minist_e/mc9_e/desci38_e.htm (last accessed 1 October 2013).

[14] "Permanent solution on food security in WTO rules is a must, says Amit Narang", Livemint, 24 October 2014, at http://www.livemint.com/Politics/xzW8fnSJ25UDdOsqZq5ddL/Permanent-solution-on-food-security-in-WTO-rules-is-mustm-s.html (last accessed 24 October 2014).

"…Food security is presently treated under the WTO as the grounds for exceptions for a very limited range of trade liberalization commitments. A more appropriate reframing of agricultural trade rules would explicitly recognize that market-determined outcomes do not necessarily improve food security and that the purpose of agricultural trade rules should be to facilitate food security-enhancing policies, even though this may require limiting the pace of trade liberalization in some sectors and/or granting States additional policy flexibility in pursuit of international recognized food security objectives. WTO Members should preserve and create a range of flexibilities in the Doha Round negotiations in order to ensure that the future international trade regime operates in lock step with multilateral and national efforts to address food insecurity. In particular, they should:

1. Make WTO measures more compatible with the pursuit of food security and the human right to food. Negotiators should ensure that, for example, the future criteria of the green box does not impede the development of policies and programs to support food security and the realization of the right to food; and that they are tailored to the specific national circumstances of developing countries. The proposed amendment in the draft agricultural modalities to Annex 2 in the [Agreement on Agriculture] is of vital importance for many developing countries and should be agreed to immediately and without expectation of trade concessions.

2. Exclude defining the establishment and management of food reserves as trade-distorting support, when these schemes serve the needs of food-insecure vulnerable groups. States should also adapt the provisions of the [Agreement on Agriculture] and other WTO agreements (e.g. public procurement) to ensure compatibility with the establishment of food reserves at national, regional and international level; and they should bring clarity to the overlap of responsibilities and commitments which could impact the efforts of countries that engage in efforts to establish food reserves at regional level.

3. Ensure that marketing boards and supply management schemes are not prohibited in the future framework for agricultural policy nor precluded under loan conditionality and other policy reforms by the international financial institutions. Options available under the WTO framework to establish such policies should be further explored.

4. Guarantee the possibility for developing States to insulate domestic markets from the volatility of prices on international markets. States, particularly developing States in accordance with the principle of special and differential treatment, must retain the freedom to take such measures. The negotiations should i) strengthen and materialize the proposed safeguard measures – Special Safeguard Mechanism (SSM) and

Special Products (SPs); and ii) ensure that States maintain flexibilities to regulate the volume of imports in order for policies such as marketing boards and supply management schemes to be fully functional, as measures such as the SSM can only be implemented on a temporary basis. In particular, the conditions should be put in place so that it is in the interests of developing countries to adopt tariff-rate quotas on key tariff lines, and thus manage import volumes and price volatility more durably. States should also carefully examine the impacts of additional cuts to tariffs on national food security. States should refuse such cuts if they are unable to counterbalance negative impacts on food-insecure vulnerable groups with national policies, including social safety-nets and the creation of non-agricultural employment opportunities. States should consider reducing tariffs on key inputs for agricultural production taking into account the need to promote increased food production in a sustainable and socially-inclusive manner.

5. Take steps to limit States' excessive reliance on international trade in the pursuit of food security. In building their capacity to produce the food needed to meet consumption needs, States should support in particular poor small-scale farmers and the production of staple foods.

6. In the case of a failed Doha Round, propose medium and long-term changes to the existing WTO framework to ensure pro-food security programs are not categorized as trade-distorting support. This should include, for example, changes to the green box criteria and rules on safeguards. Such changes should be fast-tracked and aimed at facilitating access to these measures without requiring additional concessions from food insecure developing countries."[15]

India's ongoing deadlock with the WTO over food security and the ratification of the Protocol to the TFA may well signal the 'death' knell and crisis, which for many, reverberates throughout the WTO and the Doha Development Agenda.[16] The deadlock

[15] Olivier De Schutter, United Nations Special Rapporteur on the Right to Food, *The World Trade Organization and the Post-Global Food Crisis Agenda: Putting Food Security First in the International Trade System,* Briefing Note No. 4, November 2011, pp. 16-17, at http://www.srfood.org/images/stories/pdf/otherdocuments/20111116_briefing_note_05_en.pdf (last accessed 1 October 2014).

[16] *See among others* Rorden Wilkinson, *Of Butchery and Bicycles: The WTO and the 'Death' of the Doha Development Agenda,* 83 The Political Quarterly 2 (April-June 2012), pp. 395-401; David Kleimann and Joe Guinan, *The Doha Round: An Obituary,* Global Governance Programme Policy Brief, Issue 2011/June 2011, at http://www.aspeninstitute.org/sites/default/files/content/docs/pubs/TheDohaRound_AnObituary_June2011.pdf (last accessed 1 October 2014); Surendra Bhandari, *Doha Round Negotiations: Problems, Potential Outcomes, and Possible Implications,* 4 Trade Law & Development 2 (2012), pp. 353-384; Susan C. Schwab, *After Doha: Why Negotiations are Doomed and What We Should Do About It,* 90 Foreign Affairs

signals the governance crisis for the WTO in addressing the competing public policy claims of WTO Members. It is symptomatic of an erroneously hardening 'either-or' approach used when asserting and engaging public policy at the WTO.

Public policy could very well encompass both the State's trade concerns, as well as other significant public interests entrusted to the State, such as environmental safety, social protection, and cultural preservation.[17] This is clear from the nature of public policy as a highly subjective, value-driven[18] matter of governance undertaken by different authoritative decision-makers, at various levels, national and international. By definition, public policy is quite unspecific as to any *a priori* content of policy,[19] other than as to matters of source (e.g. ensuring that the policy arises from public decision-makers or public agencies) and objective (e.g. aiming to address societal problems of a given population).[20] Drawing from the original pioneering work of Harold Lasswell,[21] policy

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104-117 (2011); Daniel C. Esty, *The World Trade Organization's Legitimacy Crisis,* 1 World Trade Review 1 (2002), pp. 7-22; SONIA E. ROLLAND, DEVELOPMENT AT THE WTO (Oxford University Press, 2012), pp. 243-263.

[17] *See* Tristan Le Cotty and Tancrede Voituriez, *The Potential Role for Collective Preferences in Determining the Rules of the International Trading System,* pp. 165-188, at p. 178 in PAUL EKINS AND TANCREDE VOITURIEZ (EDS.), TRADE, GLOBALIZATION, AND SUSTAINABILITY IMPACT ASSESSMENT: A CRITICAL LOOK AT METHODS AND OUTCOMES (Earthscan 2009);

[18] *See* Harold D. Lasswell and Myres S. McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest,* 52 Yale Law Journal 2 (March 1943), at pp. 203-295, at p. 207 ("None who deal with law, however, can escape policy when policy is defined as the making of important decisions which affect the distribution of values.").

[19] Robert E. Goodin, Martin Rein, and Michael Moran, *The Public and its Policies,* pp. 3-38 in MICHAEL MORAN, MARTIN REIN, AND ROBERT E. GOODIN (EDS.), THE OXFORD HANDBOOK OF PUBLIC POLICY (Oxford University Press, 2006).

[20] MICHAEL HILL AND PETER HUPE, IMPLEMENTING PUBLIC POLICY: GOVERNANCE IN THEORY AND IN PRACTICE (SAGE Publications 2002), at p. 5 ("What is, in general, striking about the definitions of public policy indicated here is the purposive character public policies are expected to have, and the way in which they are expected to be related to (societal) problems."); CHARLES L. COCHRAN AND ELOISE F. MALONE, PUBLIC POLICY: PERSPECTIVES AND CHOICES (5th edition, Lynne Rienner Publishers, 2014), at p. 3 ("Public policy can be described as the overall framework within which government actions are undertaken to achieve public goals, with a good working definition of public policy, for our purposes, being the study of government decisions and actions designed to deal with a matter of public concern. Policies are purposive courses of action devised in response to a perceived problem. Public policies are filtered through a specific policy process, adopted, implemented through laws, regulatory measures, courses of government action, and funding priorities, and enforced by a public agency. Individuals and groups attempt to shape public policy through the mobilization of interest groups, advocacy education, and political lobbying. Official policy provides guidance to governments over a range of actions and also provides mutual accountability links between the government and its citizens. The policy process includes several key aspects: a

process research looks to the analysis of context in the policy cycle or the "key stages of policymaking: the ways in which people struggle to define issues as problems worthy of attention on government agendas; how people analyze problems and devise and select among policy alternatives; how people implement policy; and how people evaluate and sometimes terminate policy."[22]

With these conceptual clarifications, one can reasonably accept that compliance with the rules of multilateral trade is itself also a matter of public policy.[23] When we speak of balancing "national public policy" and "free trade", we are, in reality, speaking of competing priorities of public policy decision-making that take place both at the national level of a State that is a WTO Member, as well as at the collective multilateral level under the political organs and dispute settlement functions of the WTO. The 2001 Doha Ministerial Declaration promised that the WTO membership would collectively undertake the task of balancing public policies and integrate trade with sustainable development:

> "2. International trade can play a major role in the promotion of economic development and the alleviation of poverty. We recognize the need for all our peoples to benefit from the increased opportunities and welfare gains that the multilateral trading system generates. The majority of WTO members are developing countries. We seek to place their needs and interests at the heart of the Work Programme adopted in this Declaration. Recalling the Preamble to the Marrakesh Agreement, we shall continue to make positive efforts designed to ensure that developing

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definition of the problem to be addressed, the goals the policy is designed to achieve, and the instruments of policy that are employed to address the problem and achieve the policy goals. Public policy is the heart, soul, and identity of governments everywhere.").

[21] Harold D. Lasswell, *The policy orientation,* pp. 3-15 in DANIEL LERNER AND HAROLD D. LASSWELL (EDS.), THE POLICY SCIENCES: RECENT DEVELOPMENTS IN SCOPE AND METHOD (Stanford University Press, 1959).

[22] Peter de Leon and Christopher M. Weible, *Policy Process Research for Democracy: A Commentary on Lasswell's Vision,* 1 International Journal of Policy Studies 2 (2010), pp. 23-34, at p. 23.

[23] *See* Tonia Novitz, *International law and human rights in the context of globalization,* pp. 107-130, at p. 120, in PATRICIA KENNETT (ED.), GOVERNANCE, GLOBALIZATION, AND PUBLIC POLICY (Edward Elgar Publishers, 2008); World Trade Report 2012, Part II, *Trade and public policies: A closer look at non-tariff measures in the 21st century,* pp. 36-46, at http://www.wto.org/english/res_e/booksp_e/anrep_e/wtr12-2a_e.pdf (last accessed 1 October 2014).

countries, and especially the least-developed among them, secure a share in the growth of world trade commensurate with the needs of their economic development. In this context, enhanced market access, balanced rules, and well targeted, sustainably financed technical assistance and capacity-building programmes have important roles to play…

6. We strongly reaffirm our commitment to the objective of sustainable development, as stated in the Preamble to the Marrakesh Agreement. *We are convinced that the aims of upholding and safeguarding an open and non-discriminatory multilateral trading system, and acting for the protection of the environment and the promotion of sustainable development can and must be mutually supportive.* We take note of the efforts by members to conduct national environmental assessments of trade policies on a voluntary basis. We recognize that under WTO rules no country should be prevented from taking measures for the protection of human, animal or plant life or health, or of the environment at the levels it considers appropriate, subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, and are otherwise in accordance with the provisions of the WTO Agreements. We welcome the WTO's continued cooperation with UNEP and other intergovernmental environmental organizations. We encourage efforts to promote cooperation between the WTO and relevant international environmental and developmental organizations…

8. We reaffirm our declaration made at the Singapore Ministerial Conference regarding internationally recognized core labour standards. We take note of work under way in the International Labour Organization (ILO) on the social dimension of globalization…

10. 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 and 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…".[24]

[24] WTO Ministerial Declaration, Doha, 14 November 2001, at http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm (last accessed 1 October 2014). Italics added.

It should thus be clear that the multilateral trade agenda since the start of the Doha Round in 2001 was precisely intended to integrate national and international public policy discourses. Public policy cannot be framed under a simplistic 'either-or' dilemma where States simply have to choose between trade interests and non-trade objectives. Rather, the fundamental paradigmatic shift at least acknowledged in the Doha Ministerial Declaration (if not implemented in practice to date in stalled trade negotiations), is to reexamine the functional decisions and interactions of the WTO and its Members, and how these ensure that the overall global wealth created from increasing trade liberalization and expanding foreign market access under the WTO system, would not be generated through multiple social externalities – such as means and processes of production that incur severe and unjustifiable environmental damage, permit oppressive labor conditions, tolerate food insecurity and the debilitating dislocations bred by poverty, accept the demise of cultural traditions and theft of indigenous knowledge – and rigidly incapacitate the abilities of WTO Member States to govern in ways that render them unable to respond rapidly to economic crises and emergencies in their jurisdictions, nor appropriately address fluctuating public policy needs of their citizens.[25]

The Doha Ministerial Declaration expressly hearkens back to the Preamble to the Marrakesh Agreement Establishing the World Trade Organization, which mandates the WTO and its Members with the duty of "recognizing that their relations in the field of trade and economic endeavor should be conducted with a view to raising the standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect the and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development."[26] Balancing

[25] *See* WTO Secretariat, *Harnessing trade for sustainable development and a green economy,* 2011, at http://www.wto.org/english/res_e/publications_e/brochure_rio_20_e.pdf (last accessed 1 October 2014);

[26] Marrakesh Agreement Establishing the World Trade Organization, Preamble, first paragraph, at http://www.wto.org/english/docs_e/legal_e/04-wto_e.htm (last accessed 1 October 2014).

national public policy and free trade is thus a matter for cyclical coordination[27] by WTO Members to ensure trade and non-trade policy compliance, particularly since the survival of the world trade system also depends on prohibiting unjustified trade distortions and dismantling pretextual State protectionism that prevents consumers and producers from benefiting from the most efficient prices and production of goods and services all over the world.[28] Simply put, the task of balancing national public policy and free trade is, at its core, also about how the world trade system responds to felt resource, environmental, and social inequalities that *unjustifiably* undergird trade.[29]

Balancing free trade commitments with other national public policies is, ultimately, a search for *sustainable policy flexibility* – one that enables WTO Members' transparent calibration of all public policy interests (trade, environment, economic social and cultural rights, among others), in a manner that is both accountable to its citizens and responsible to all other participants in the world trade system. In order to achieve sustainable policy flexibility, this Article contends that public policy interests within the WTO system will require better functional and institutional coordination on all three functional pillars of the WTO – trade negotiations, dispute settlement, and trade monitoring – while also needing to empirically integrate WTO Members' preexisting

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[27] *See* YVES BONZON, PUBLIC PARTICIPATION AND LEGITIMACY IN THE WTO (Cambridge University Press, 2014), at p. 136 ("…policy coordination would have the benefit of regulating the interface between domestic regulations and WTO principles so as to 'insulate from the scrutiny of negative integration domestic regulation that is assumed either non-protectionist or efficient, because it conforms to international regulation.' When faced with sensitive questions, it can be observed that the dispute settlement organs have referred on occasions to instruments of policy coordination originating outside the WTO, a practice that some have referred to as 'judicial activism'. The dispute settlement organs have thus shown a preference for trade measures that are directly aimed at the protection of multilaterally approved goals or interests.").

[28] *See* K. William Watson and Sallie James, *Regulatory Protectionism: A Hidden Threat to Free Trade,* Cato Institute Policy Analysis No. 723, April 9, 2013, at http://object.cato.org/sites/cato.org/files/pubs/pdf/pa723.pdf (last accessed 1 October 2014); Robert Howse, *Regulatory Measures,* pp. 441-462, at p. 458, in AMRITA NARLIKAR, MARTIN DAUNTON, ROBERT M. STERN (EDS.), THE OXFORD HANDBOOK ON THE WORLD TRADE ORGANIZATION (Oxford University Press, 2012).

[29] JOSEPH E. STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS (Norton, 2002), at pp. 3-10; THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY (Harvard University Press, 2014), at Part III (The Structure of Inequality); Ajit K. Ghose, *Global economic inequality and international trade,* International Labour Organization 2001, at http://www.ilo.int/wcmsp5/groups/public/@ed_emp/documents/publication/wcms_142309.pdf (last accessed 1 October 2014).

international commitments on economic, social, cultural, rights and environmental duties to better inform the process of public policy coordination. This approach to balancing economic and social objectives through an emerging principle of coordination is modeled after the method adopted by the International Court of Justice in the *Pulp Mills on the River Uruguay (Argentina v. Uruguay)* case.[30] In interpreting a treaty-based regime in regard to the joint demands of economic development and environmental protection when using a shared resource, the Court emphasized the importance of continuous cooperation and coordination between States to accomplish both objectives:

> "76. In the *Gabcikovo-Nagymaros* case, the Court, after recalling that '[t]his need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development', and added that '[i]t is for the Parties themselves to find an agreed solution that takes account of the objectives of the Treaty'…
>
> 77. The Court observes that it is by cooperating that the States concerned can jointly manage the risks of damage to the environment that might be created by the plans initiated by one or other of them, so as to prevent the damage in question, through the performance of both the procedural and the substantive obligations laid down by the 1975 Statute. However, whereas the substantive obligations are frequently worded in broad terms, the procedural obligations are narrower and more specific, *so as to facilitate the implementation of the 1975 Statute through a process of continuous consultation between the parties concerned*...
>
> 177. Regarding Article 27 [of the 1975 Statute], it is the view of the Court that its formulation reflects not only the need to reconcile the varied interests of riparian States in a transboundary context and in particular in the use of a shared natural resource, *but also the need to strike a balance between the use of the waters and the protection of the river consistent with the objective sustainable development*…Article 27 embodies this interconnectedness between equitable and reasonable utilization of a shared resource and the balance between economic development and environmental protection that is the essence of sustainable development."[31]

[30] *Pulp Mills on the River Uruguay (Argentina v. Uruguay),* Judgment, I.C.J. Reports 2010, paras. 75, 181-189.

[31] Id. at paras. 76-77 and 177. Italics added.

To date, the WTO system lacks a functional system for coordinating the protection of trade and non-trade public policies of the WTO membership. **Part II (Segmented Efforts at Balancing National Public Policy and Free Trade through the DSU, TPRM, and Trade Negotiations)** discusses how public policy provisions in the WTO covered Agreements are unequally implemented and variably engaged within the three functional pillars of the WTO, namely dispute settlement as facilitated by the WTO dispute settlement organs (the Appellate Body and dispute settlement Panels) pursuant to the Dispute Settlement Understanding (DSU);[32] trade monitoring conducted through the Trade Policy Review Mechanism (TPRM) administered by the WTO General Council acting in the capacity of the Trade Policy Review Board (TPRB);[33] and trade negotiations under the WTO Ministerial Conference, the supreme decision-making body of the WTO.[34] While there are numerous provisions in the WTO covered agreements that enable WTO Members to calibrate their compliance with trade commitments and other significant public policy priorities,[35] there is no formal mechanism or mandate that requires deliberate cross-referencing between the WTO political organs and the WTO dispute settlement organs on the manner by which they discharge their functions in the process of calibrating public policies of WTO Members. One therefore finds more development on the interpretation of public policy exceptions (as in GATT Article XX and GATS Article XIV) in the jurisprudence of the Appellate Body and Panels, in

[32] Annex 2 of the WTO Agreement, *Understanding on rules and procedures governing the settlement of disputes*, at http://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm (last accessed 1 October 2014).

[33] Annex 3 of the WTO Agreement, *Trade Policy Review Mechanism (TPRM),* at http://www.wto.org/english/docs_e/legal_e/29-tprm_e.htm (last accessed 1 October 2014). *See* Steffen Grammling, *WTO's Trade Policy Review Mechanism: Explanations and Reflections,* FES Dialogue on Globalization No. 3, April 2009, at http://library.fes.de/pdf-files/bueros/genf/06316.pdf (last accessed 1 October 2014); Julien Chaisse and Mitsuo Matsushita, *Maintaining the WTO's Supremacy in the International Trade Order: A Proposal to Refine and Revise the Role of the Trade Policy Review Mechanism,* 16 Journal of International Economic Law 1 (2013), pp. 9-36.

[34] Article IV:1 to IV:4 of the Marrakesh Agreement Establishing the World Trade Organization.

[35] *See among others* general exceptions under General Agreement on Tariffs and Trade (GATT) Article XX and General Agreement on Trade in Services (GATS) Article XIV; Article 2.2 of the Sanitary and Phytosanitary Measures (SPS) Agreement; Article 2.2 of the Technical Barriers to Trade (TBT) Agreement; provisions on special and differential treatment (S&D); balance of payments measures under GATT Article XII, GATT 1994 Article XVIII:B, and GATS Article XII:1. *For discussion of public policy provisions in the WTO covered agreements, see* ROBERT HOWSE, THE WTO SYSTEM: LAW, POLITICS, AND LEGITIMACY (Cameron May, 2007), at p. 82; DESIERTO 2015, at Chapter 3.

contrast to the scant consideration afforded for a WTO Member's public policy programming and priorities within the TPRM process, or the awkward compartmentalization of "trade issues" and "non-trade" issues in the trade negotiations process manifested in the deadlocks in Doha and Bali.

Part III (The Public Policy Institutional Deficits in the WTO System: Who Undertakes 'Balancing'?) discusses the unequal participation and leveraged access to information between and among WTO Members (Green Room members vis-à-vis other coalitions), as well as those involving States as WTO Members vis-à-vis other non-State public policy stakeholders, such as public interest groups, civil society or nongovernmental organizations, international institutions and UN specialized agencies.[36] While each WTO Member, in theory, has an equal vote in trade negotiations, in practice, participation varies according to international economic and political influence, the capacity to effectively use the political processes of the WTO, as well as the basic ability to detect foreign market access violations and marshal the resources necessary to avail of the dispute settlement system.[37] So long as systemic, rather than incremental, reforms to participation and transparency are not fully designed across all three functional pillars of the WTO, it will be difficult to foster durable decisions on calibrating national public policy and free trade that would be generally accepted, and perceived legitimate, by

[36] JOHN H. BARTON, JUDITH L. GOLDSTEIN, TIMOTHY E. JOSLING, AND RICHARD H. STEINBERG, THE EVOLUTION OF THE TRADE REGIME: POLITICS, LAW, AND ECONOMICS OF THE GATT AND THE WTO (Princeton University Press, 2006), at pp. 61-90 (on the politics of the GATT/WTO legal system); Miguel Rodriguez Mendoza and Marie Wilke, *Revisiting the single undertaking: towards a more balanced approach to WTO negotiations,* pp. 486-506 in CAROLYN DEERE BIRKBECK (ED.), MAKING GLOBAL TRADE GOVERNANCE WORK FOR DEVELOPMENT: PERSPECTIVES AND PRIORITIES FROM DEVELOPING COUNTRIES (Cambridge University Press, 2011).

[37] KATI KULOVESI, THE WTO DISPUTE SETTLEMENT SYSTEM: CHALLENGES OF THE ENVIRONMENT, LEGITIMACY AND FRAGMENTATION (Kluwer Law International, 2011), at pp. 26-27 ("…The 153 Members of the WTO are remarkably unequal in terms of size, population as well economic and political weight. According to Zampetti, such inequality 'translates into an asymmetry in the ability to participate in decision-making processes, as such democratically suspect if not illegitimate which has the potential to perpetuate if not reinforce an uneven distribution of benefits and burdens in the world economy.' In addition, many smaller developing countries also lack the capacity and human resources to participate efficiently in the WTO processes. The Geneva missions of the most influential WTO Members, such as Canada, the European Community, Japan, and the US have several professionals dealing exclusively with WTO issues. In contrast, developing country diplomats tend to represent their countries also in numerous other international agencies and not all developing country Members even have permanent missions in Geneva. This makes it difficult for such countries to participate effectively in the functioning of the WTO or to keep their national constituencies adequately informed.").

WTO Members, the private sector and trade associations, as well as non-State public policy stakeholders at large.

In the **Conclusion (Actualizing the 'Principles of Coordination and Cooperation' – The WTO as the Forum for International Public Policy),** this Article emphasizes that normatively reorienting international trade policy within the spectrum of numerous public policies of WTO Members to include environmental duties and economic social and cultural rights, while also realigning governance functions and participation rights at the WTO, would help save the WTO from growing perceptions of diminished relevance and institutional illegitimacy.[38] Sustainable policy flexibility, as originally envisaged in the Preamble to the Marrakesh Agreement Establishing the WTO, materializes only when the WTO recognizes that its functional pillars in dispute settlement, trade policy review, and trade negotiations have to approach public policy balancing through a textured understanding of a 'law of coordination'[39] based on the law-making agreement of States.

II. Segmented Efforts at Balancing National Public Policy and Free Trade through the DSU, TPRM, and Trade Negotiations

Public policy issues in the trade context have been differentially approached and valued within the three functional pillars of the WTO. As will be shown in the following subsections, there has been more development in the interpretive practices of the WTO dispute settlement organs in regard to treaty provisions as they relate to public policy exceptions in GATT Article XX and GATS Article XIV, in contrast to the trade policy review process or the multilateral trade negotiations process.

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[38] *See* Henry Gao and C.L. Lim, *Saving the WTO from the Risk of Irrelevance: The WTO Dispute Settlement Mechanism as a 'Common Good' for RTA Disputes,* 11 Journal of International Economic Law 4 (2008), pp. 899-925.

[39] HERSCH LAUTERPACHT, THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY (5th edition, The Lawbook Exchange Ltd., 2008), pp. 415-416.

A. 'Public Policy' Jurisprudence of the WTO Appellate Body and Panels

Article 3(2) of the WTO DSU expressly provides that dispute settlement at the WTO "is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the [Dispute Settlement Body] cannot add to or diminish the rights and obligations provided in the covered agreements."[40] Dispute settlement must thus stay within this fundamental remit of simply conducting 'clarification' of existing provisions of WTO agreements, and the 'preservation' of the rights and obligations of WTO Members as detailed in the WTO agreements.

In practice, the WTO Appellate Body and Panels demonstrate a broad understanding of their duty to clarify provisions in the WTO agreements that inherently contemplate calibration or enable flexible 'policy space' for WTO Members,[41] and, in turn, appear amenable to the application of a "principle of proportionality" when

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[40] Annex 2 of the WTO Agreement, *Understanding on rules and procedures governing the settlement of disputes,* Article 3(2).

[41] Olivier Cattaneo, *Has the WTO Gone Too Far or Not Far Enough? Some Reflections on the Concept of 'Policy Space',* pp. 57-83, at pp. 77-78, in CHALLENGES AND PROSPECTS FOR THE WTO (Cameron May, Ltd. 2005):

"In practice, WTO panels and the Appellate Body have contributed to the preservation and broadening of Members' policy space by emphasizing Members' freedom to regulate as they wish, except to the extent that WTO provisions restrain them from doing so. For example in *US-Gasoline,* the Appellate Body recognized that WTO Members 'have a large measure of autonomy to determine their own policies on the environment (including its relationship with trade), their environmental objectives and the environmental legislation they enact and implement.' In relation to several trade remedy provisions, panels and the Appellate Body have pointed out that the methodology to be used is not prescribed and that Members may therefore determine what methodology to use. In *Japan-Alcoholic Beverages II,* the Appellate Body similarly underlined that WTO rules 'are not so rigid or so inflexible as not to leave room for reasoned judgments in confronting the endless and ever-changing ebb and flow of real facts in real cases in the real world. Finally, in *EC-Hormones,* the Appellate Body recognized Members' policy space by stating that '[w]e cannot lightly assume that sovereign states intended to impose upon themselves the more onerous, rather than the less burdensome obligation by mandating conformity or compliance with such standards, guidelines and recommendations. To sustain such an assumption and to warrant such a far-reaching interpretation, treaty language far more specific and compelling than that found in Article 3 of the SPS Agreement would be necessary."

interpreting what I call in shorthand as 'public policy calibration provisions'.[42] Apart from proportionality, various jurisprudential tests have also been developed in the interpretation of the public policy calibration provisions in the WTO agreements, including, for example, tests of "reasonableness"[43] as well as "necessity".[44] Ultimately, however, the scope of discretion that the WTO tribunals assume when crafting these jurisprudential tests turns on the actual textual elasticity of each public policy calibration provision. The following subsections sketch some of these differences.

1. General exceptions under GATT Article XX and GATS Article XIV

The WTO Appellate Body and Panels have developed a fairly substantial body of jurisprudence interpreting several of the specific enumerated exceptions under GATT Article XX and GATS Article XIV.[45] These provisions operate as complete defenses for a WTO Member seeking to justify measures that would ordinarily be viewed as trade-

[42] Mads Andenas and Stefan Zleptnig, *Proportionality and Balancing in WTO Law: A Comparative Perspective,* pp. 147-172, at pp. 166-167 in KERN ALEXANDER AND MADS ANDENAS (EDS.), THE WORLD TRADE ORGANIZATION AND TRADE IN SERVICES (Martinus Nijhoff Publishers, 2008); Axel Desmedt, *Proportionality in WTO Law,* 4 Journal of International Economic Law 3 (2001), pp. 441-480; Andrew D. Mitchell, *Proportionality and Remedies in WTO Disputes,* 17 European Journal of International Law 5 (2007), pp. 985-1008.

[43] Catherine Button, *The WTO's 'Objective Assessment' Standard of Review and Panel Review of Health Measures,* pp. 85-114 in ANDREW D. MITCHELL (ED.), CHALLENGES AND PROSPECTS FOR THE WTO (Cameron May, 2005), at p. 110 ("Reasonableness also recommends itself as a standard of review because the concept is familiar to panels and the WTO. First, the SPS Agreement, the TBT Agreement and GATT are all littered with references to obligations that are expressly qualified by the concept of reasonableness….Moreover, Panels and the Appellate Body have frequently turned to reasonableness when interpreting the Agreements…In short, the concept of reasonableness is not entirely at odds with GATT/WTO review.").

[44] *See* Benn McGrady, *Necessity Exceptions in WTO Law: Retreaded Tyres, Regulatory Purpose and Cumulative Regulatory Measures,* 12 Journal of International Economic Law 1 (2009), pp. 153-173; Panagiotis Delimatsis, *Determining the Necessity of Domestic Regulations in Services: The Best is Yet to Come,* 19 European Journal of International Economic Law 2 (2008), pp. 365-408; RÜDIGER WOLFRUM, PETER TOBIAS-STOLL, ANJA SEIBERT-FOHR (EDS.), WTO: TECHNICAL BARRIERS AND SPS MEASURES (Martinus Nijhoff Publishers, 2007), at p. 94 ("When one applies the necessity test as developed by the panels and the Appellate body, the existence of an international obligation to respect the right in question will be a strong indicator of the importance of the values protected by the measure, and even more so if the obligation has the status of *jus cogens*.").

[45] *See* MICHAEL TREBILCOCK, ROBERT HOWSE, ANTONIA ELIASON, THE REGULATION OF INTERNATIONAL TRADE (4th edition, Routledge, 2013), pp. 656-780; PETER VAN DEN BOSSCHE AND WERNER ZDOUC, THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION (3rd edition, Cambridge University Press, 2013), pp. 543-605 [hereafter, "VAN DEN BOSSCHE AND ZDOUC"].

restrictive or non-conforming with any of the obligations under GATT or GATS.[46] These exceptions do not apply to obligations other than those under GATT and GATS, respectively.[47] The Appellate Body and Panels interpret GATT Article XX and GATS XIV following the same two-tiered methodology:[48] first, by provisionally examining if the WTO Member establishes that its defense applies under specific enumerated exception, and second, by determining if the WTO Member also demonstrates that the general requirements of the *chapeau* to these provisions have been met. Considering the extraordinary impact of GATT Article XX and GATS Article XIV as defenses that would, if applicable, prevent any finding of liability for breach of WTO obligations from attaching to the WTO Member that issued the challenged domestic measure, it is unsurprising that the Appellate Body and the Panels appear to strive for restraint when calibrating the ordinarily trade-restrictive measure with the WTO Member's assertion of public policy interests as enumerated in GATT Article XX and GATS Article XIV. For example, the "public morals" specific exception in GATT Article XX(a) and GATS Article XIV(b) refers to "standards of right and wrong conduct maintained by or on behalf of a community or nation".[49] In *EU-Seal Products*, the Appellate Body clarified

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[46] *See* DANIEL C. ESTY, GREENING THE GATT: TRADE, ENVIRONMENT, AND THE FUTURE (Peterson Institute, 1994), at p. 48; VAN DEN BOSSCHE AND ZDOUC, pp. 546-547.

[47] *China – Measures Related to the Exportation of Various Raw Materials,* WT/DS394/AB/R, WT/D2395/AB/R, WT/DS398/AB/R, 30 January 2012, at para. 307.

[48] *See United States – Standards for Reformulated and Conventional Gasoline,* WT/DS2/AB/R, 29 April 1996, at pp. 22 ("In order that the justifying protection of Article XX may be extended to it, the measure at issue must not only come under one or another of the particular exceptions – paragraphs (a) to (j) – listed under Article XX; it must also satisfy the requirements imposed by the opening clauses of Article XX. The analysis is, in other words, two-tiered: first, provisional justification by reason of the characterization of the measure…second, further appraisal of the same measure under the introductory clauses of Article XX.") [hereafter, "*US-Gasoline Appellate Body Report*"]; *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services,* WT/DS285/AB/R, 7 April 2005, at para. 292 ("Article XIV of the GATS, like Article XX of the GATT 1994, contemplates a 'two-tier analysis' of a measure that a Member seeks to justify under that provision. A panel should first determine whether the challenged measure falls within the scope of one of the paragraphs of Article XIV. This requires that the challenged measure address the particular interest specified in that paragraph and there be a sufficient nexus between the measure and the interest protected. The required nexus – or 'degree of connection' – between the measure and the interest is specified in the language of the paragraphs themselves, through the use of terms such as 'relating to' and 'necessary to'. Where the challenged measure has been found to fall within one of the paragraphs of Article XIV, a panel should then consider whether that measure satisfies the requirements of the chapeau of Article XIV.") [hereafter, *"US-Gambling Appellate Body Report"*].

[49] *China-Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products,* WT/DS363/R, 12 August 2009, at para. 7.759, p. 281 ("…The panel

the nature of the balancing test to ascertain the necessity of the challenged measure under the "public morals" exception:

> "…As we noted, the Appellate Body has explained in several disputes that a necessity analysis involves a process of 'weighing and balancing' a series of factors, including the importance of the objective, the contribution of the measure to that objective, and the trade-restrictiveness of the measure. The Appellate Body has further explained that, in most cases, a comparison between the challenged measure and possible alternatives should then be undertaken. As the Appellate Body has stated, 'it is on the basis of this 'weighing and balancing' and comparison of measures, taking into account the interests or values at stake, that a panel determines whether a measure is 'necessary' or, alternatively, whether another, WTO-consistent measures is 'reasonably available'. Such an analysis, the Appellate Body has observed, involves a 'holistic' weighing and balancing exercise 'that involves putting all the variables of the equation together and evaluating them in relation to each other after having examined them individually, in order to reach an overall judgment.…A measure's contribution is thus only one component of the necessity calculus under Article XX. This means that whether a measure is 'necessary' cannot be determined by the level of contribution alone, but will depend on the manner in which the other factors of the necessity analysis, including a consideration of potential alternative measures, inform the analysis. It will also depend on the nature, quantity, and quality of evidence, and whether a panel's analysis is performed in quantitative or qualitative terms. Indeed, the very utility of examining the interaction between the various factors of the necessity analysis, and conducting a comparison with potential alternative measures, is that it provides a means of testing these factors as part of a holistic weighing and balancing exercise, whether quantitative or qualitative in nature. The flexibility of such an exercise does not allow for the setting of pre-determined thresholds in respect of any particular factor. If the level of contribution alone cannot determine whether a measure is necessary or not, we do not see that mandating in advance a pre-determined threshold

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in *US-Gambling,* in an interpretation not questioned by the Appellate Body, found that 'the term 'public morals' denotes standards of right and wrong conduct maintained by or on behalf of a community or nation'. The panel went on to note that 'the content of these concepts for Members can vary in time and space, depending upon a range of factors, including prevailing social, cultural, ethical and religious values…Members, in applying this and other similar societal concepts, 'should be given some scope to define and apply for themselves the concepts of 'public morals'…in their respective territories, according to their own systems and scales of values.").

level of contribution would be instructive or warranted in a necessity analysis…".[50]

While tribunals have been quite deferential towards the WTO Member's assertion of the content of "public morals", they nevertheless tend to be stringent when assessing whether the challenged domestic measure indeed makes a 'material contribution' to the protection of such public morals.[51] Where a complaining party identifies an alternative measure that, in its view, the responding WTO Member should have taken, the responding WTO Member thereafter assumes the burden of showing why the proposed alternative is not 'reasonably available' in light of the interests or values being pursued and the party's desired level of protection.[52] The application of the GATT Article XX or GATS Article XIV chapeau requirements (e.g. 'arbitrary discrimination') is also interpreted with particularity, depending on the nature of the specific enumerated exception that the WTO member invokes as a defense.[53] In *EU-Seal Products,* the Appellate Body affirmed that the chapeau to GATT Article XX refers to the "manner in which a measure… is applied", and accordingly, it would be relevant to "consider the

[50] *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products,* WT/DS400/AB/R, WT/DS401/AB/R, 22 May 2014, at paras. 5.214 and 5.215, at pp. 152-153 [hereafter, "*EU-Seal Products, Appellate Body Report"*].

[51] *China-Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products,* WT/DSR63/AB/R, 21 December 2009, paras. 263-269, although note para. 294 ("…the Panel simply stated that limiting the number of import entities 'can make a material contribution' to the protection of public morals in China. Yet, the Panel neither addressed quantitative projections nor provided qualitative reasoning based on evidence before it to support that finding…For these reasons we disagree with the Panel's finding that China had met its burden of proof regarding the contribution of the State plan requirement to the protection of public morals in China.") [hereafter, "*China – Audiovisual Publications Appellate Body Report"*.]; *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services,* WT/DS285/AB/R, 7 April 2005, at paras. 296-299, 304-306 [hereafter, "*US-Gambling Appellate Body Report"*].

[52] *China – Audiovisual Publications Appellate Body Report*, at paras. 319-332; *US-Gambling Appellate Body Report,* paras. 307-311, 317 ("In our view, the Panel's 'necessity' analysis was flawed because it did not focus on an alternative measure that was reasonably available to the United States to achieve the stated objectives regarding the protection of public morals or the maintenance of public order. Engaging in consultations with Antigua, with a view to arriving at a negotiated settlement that achieves the same objectives as the challenged United States' measures, was not an appropriate alternative for the Panel to consider because consultations are by definition a process, the results of which are uncertain and therefore not capable of comparison with the measures at issue in this case.").

[53] *Canada-Measures Relating to Exports of Wheat and Treatment of Imported Grain,* WT/DS276/AB/R, 30 August 2004, at paras. 109-110 [hereafter, *"Canada-Wheat Appellate Body Report"*]; *United States – Import Prohibition of Certain Shrimp and Shrimp Products,* WT/DS58/AB/R, 12 October 1998, para. 120 [hereafter, *"US-Shrimp Appellate Body Report"*].

design, architecture, and revealing structure of a measure in order to establish whether the measure, in its actual or expected application, constitutes a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail. This involves a consideration of both 'substantive and procedural requirements' under the measure at issue."[54] Applying this understanding of the chapeau requirements, the Appellate Body found that various features of the EU Seal Regime constituted arbitrary or unjustifiable discrimination between countries where the same conditions prevail.[55]

Tribunals have also observed deference when it comes to a WTO Member's definition of environmental concerns within the purview of measures necessary for the protection of human, animal, or plant life or health under GATT Article XX(b) and GATS Article XIV(b), or measures relating to the conservation of exhaustible natural resources under GATT Article XX(g).[56] In matters of evidence to prove these environmental exceptions, tribunals retain a "margin of discretion in assessing the value

[54] *EU-Seal Products Appellate Body Report,* para. 5.302.

[55] *EU-Seal Products Appellate Body Report,* para. 5.338 ("…First, we found that the European Union did not show that the manner in which the EU Seal Regime treats seal products derived from IC hunts as compared to seal products derived from 'commercial' hunts can be reconciled with the objective of addressing EU public moral concerns regarding seal welfare. Second, we found considerable ambiguity in the 'subsistence' and 'partial use' criteria of the IC exception. Given the ambiguity of these criteria and the broad discretion that the recognized bodies consequently enjoy in applying them, seal products derived from what should in fact be properly characterized as 'commercial' hunts could potentially enter the EU market under the IC exception. We did not consider that the European Union has sufficiently explained how such instances can be prevented in the application of the IC exception. Finally, we were not persuaded that the European Union has made 'comparable efforts' to facilitate the access of the Canadian Inuit to the IC exception as it did with respect to the Greenland Inuit. We also noted that setting up a 'recognized body' that fulfills all the requirements of Article 6 of the Implementing Regulation may entail significant burdens in some instances.").

[56] *United States – Standards for Reformulated and Conventional Gasoline,* WT/DS2/R, 29 January 1996, para. 7.1 ("…Under the General Agreement, WTO Members were free to set their own environmental objectives, but they were bound to implement these objectives through measures consistent with its provisions, notably those on the relative treatment of domestic and imported products.") [hereafter, *"US-Gasoline Panel Report"*]; *US –Gasoline Appellate Body Report,* , p. 30 ("…Indeed, in the preamble to the WTO Agreement and in the Decision on Trade and Environment, there is specific acknowledgment to be found about the importance of coordinating policies on trade and the environment. WTO Members have a large measure of autonomy to determine their own policies on the environment (including its relationship with trade), their environmental objectives and the environmental legislation they enact and implement. So far as concerns the WTO, that autonomy is circumscribed only by the need to respect the requirements of the General Agreement and the other covered agreements.").

of evidence, and the weight to be ascribed to that evidence".[57] While tribunals observe deference towards how WTO Members identify and define their environmental objectives and targeted levels of environmental protection, the measures that they design to advance these objectives and meet these targets remain subject to scrutiny. Thus, when invoking the exceptions under GATT Article XX(b) or GATS Article XIV(b), the WTO Member has to satisfy the test of "necessity",[58] which involves scrutiny of the challenged measure's contribution to the achievement of the WTO Member's environmental objective, looking at the "genuine relationship of ends and means between the objective pursued and the measure at issue. The selection of a methodology to assess a measure's contribution is a function of the nature of the risk, the objective pursued, and the level of protection sought. It ultimately also depends on the nature, quantity, and quality of evidence existing at the time the analysis is made."[59] In *EC-Asbestos*, the Appellate Body further stressed that "there is no requirement under Article XX(b) of the GATT 1994 to quantify, as such, the risk to human life or health. A risk may be evaluated in quantitative or qualitative terms….it is undisputed that WTO Members have the right to determine the level of protection of health that they consider appropriate in a given situation."[60] Along with the test of necessity, the WTO Member has to show that there are no reasonably available alternatives to achieve the desired level of health protection.[61] Various factors would have to be considered in determining whether alternative measures are indeed 'reasonably available' to protect human health: 1) besides the difficulty of implementation of the challenged measure, it would also be important to

[57] *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products,* WT/DS135/AB/R, 12 March 2001, para. 161 [hereafter, *"EC-Asbestos Appellate Body Report"*].

[58] *See* Benn McGrady, *Necessity Exceptions in WTO Law: Retreaded Tyres, Regulatory Purpose and Cumulative Regulatory Measures,* 12 Journal of International Economic Law 1 (2009), pp. 153-173. For the view that 'no real balancing is ever performed', and that the process of construing the necessity requirement is 'arguably less value-neutral than the quasi-judicial bodies claim it to be', *see* Filippo Fontanelli, *Necessity Killed the GATT – Article XX GATT and the Misleading Rhetoric about 'Weighing and Balancing',* 5 European Journal of Legal Studies 2 (Autumn/Winter 2012/13), pp. 36-56.

[59] *Brazil – Measures Affecting Imports of Retreaded Tyres,* WT/DS332/AB/R, 3 December 2007, para. 145 [hereafter, *"Brazil – Retreaded Tyres Appellate Body Report"*].

[60] *EC-Asbestos, Appellate Body Report,* at paras. 167-168, p. 61.

[61] *US- Gasoline Appellate Body Report* pp. 14-22.

see if the responding Member "could reasonably be expected to employ [the alternative measure] to achieve its health policy objectives";[62] 2) whether the alternative measure "contributes to the realization of the end pursued…[particularly] the preservation of human life and health";[63] and 3) "whether there is an alternative measure that would achieve the same end and that is less restrictive of trade than a prohibition".[64] The materiality of the contribution of the measure to protecting human life and health could be shown quantitatively or qualitatively.[65]

A similar necessity test is applied in relation to the environmental exception in GATT Article XX(g) on measures "relating to the conservation of exhaustible natural resources, if such measures are made effective in conjunction with restrictions on domestic production or consumption."[66] In *US-Shrimp,* the Appellate Body declared that this exception was not limited to mineral or non-living resources, but rather, also extended to living species that "are in certain circumstances indeed susceptible of depletion, exhaustion and extinction, frequently because of human activities".[67] The

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[62] *EC-Asbestos Appellate Body Report,* at para. 170, p. 62, *citing Thailand-Restrictions on Importation of and Internal Taxes on Cigarettes,* para. 75.

[63] *EC-Asbestos, Appellate Body Report,* at para. 172, pp. 62-63, *citing Korea-Beef* para. 166.

[64] *EC-Asbestos, Appellate Body Report,* at para. 172, p. 63.

[65] *Brazil – Retreaded Tyres Appellate Body Report*, at para. 151 ("…In order to justify an import ban under Article XX(b), a panel must be satisfied that it brings about a material contribution to the achievement of its objective. Such a demonstration can of course be made by resorting to evidence or data, pertaining to the past or the present, that establish that the import ban at issue makes a material contribution to the protection of public health or environmental objectives pursued. This is not, however, the only type of demonstration that could establish such a contribution. Thus, a panel might conclude that an import ban is necessary on the basis of a demonstration that the import ban at issue is apt to produce a material contribution to the achievement of its objective. *This demonstration could consist of quantitative projections in the future, or qualitative reasoning based on a set of hypotheses that are tested and supported by sufficient evidence.*"). (Italics added.)

[66] *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes,* DS10/R-37S/200, Report of the Panel, 7 November 1990, at p. 21 ("The Panel could see no reason why under Article XX the meaning of the term 'necessary' under paragraph (d) should not be the same as in paragraph (b). In both paragraphs the same term was used and the same objective intended: to allow contracting parties to impose trade restrictive measures inconsistent with the General Agreement to pursue overriding public policy goals to the extent that such inconsistencies were unavoidable…") [hereafter, *"Thai-Cigarettes Panel Report"*].

[67] *United States – Import Prohibition of Certain Shrimp and Shrimp Products,* WT/DS58/AB/R, 12 October 1998, at para. 128. [hereafter, *"US-Shrimp Appellate Body Report"*].

Appellate Body further clarified that the term "natural resources" in GATT Article XX(g) was "not static in its content or reference but is rather by definition, evolutionary."[68] Moreover, the trade-restrictive measure under GATT Article XX(g) also contemplates "even-handedness in the imposition of restrictions", in that counterpart restrictions should have also been placed on domestically produced like products for the same conservationist reasons.[69]

Despite the seeming doctrinal smoothness of the balancing methodology as articulated by the Appellate Body and Panels, it should nonetheless be stressed that balancing under the jurisprudentially developed tests for GATT Article XX and GATS Article XIV exceptions is by no means a mathematically precise task. Donald Regan rightly points out the logical contradiction between saying that a WTO Member is entitled to choose its own legitimate domestic goal and the level of protection to achieve such goal, while at the same time subjecting the Member's choice to a balancing test that exogenously compares the challenged measure with any other less trade-restrictive 'reasonably available' alternative – thus contradicting the choice of the WTO Member as to the level of protection it desires.[70] However, contradiction exists only if one presupposes that the WTO Member's choices are *unbounded* in the first place, and if one chooses to forget that GATT Article XX and GATS Article XIV are also public policy calibration provisions by nature. In developing these jurisprudential tests, however, what the Appellate Body and the Panels actually signal to WTO Members is that they will observe a measure of deference or respect for *what* a WTO Member identifies as its public policy objective or defines as its public policy priority in relation to the specific exception invoked in GATT Article XX and GATS Article XIV, but such deference or respect is not absolute. The Appellate Body and Panels do not deprive themselves of the power to scrutinize the design of the measure *as it relates* to the achievement of the

[68] *US – Shrimp Appellate Body Report,* para. 130.

[69] *US – Gasoline Appellate Body Report,* pp. 20-21; *China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum,* WT/DS431/AB/R, WT/DS432/AB/R, WT/DS433/AB/R, 7 August 2014, paras. 5.242 to 5.252.

[70] Donald H. Regan, *The meaning of 'necessary' in GATT Article XX and GATS Article XIV: the myth of cost-benefit balancing,* 6 World Trade Review 3 (2007), pp. 347-369.

public policy objective asserted by the WTO Member. There is nothing illogical about accepting that a WTO Member has chosen a particular public policy objective, while also testing if the challenged measure as designed is indeed tailored to meet the stated objective. A WTO Member's 'desired level of protection' of public health, environmental conservation, and other non-trade public policies is not synonymous with the means that the WTO Member may employ to reach that desired level of protection.

In my view, a more pressing point of critique against the jurisprudential tests set by the Appellate Body and the Panels, is the sheer amorphousness of these legal tests, which, throughout WTO jurisprudence has oscillated – and often in an opaque manner with undisclosed reasons for the preferences between tests – between a "least trade restrictiveness", a "reasonableness test", a "proportionality test", or some combination of these concepts.[71] The inconsistent legal tests may account for the difficulty WTO members experience in attempting to establish a successful defense under GATT Article XX or GATS Article XIV – most recently, the Appellate Body reversed the Panel's findings in *EU-Seal Products* in regard to the chapeau requirements of GATT Article XX, "on the basis that the Panel applied an incorrect legal test."[72] The Appellate Body and the Panels could ensure better consistency in their interpretive practices if there were fewer instances of judicial crafting of what ought to be, by now, settled criteria in the application of GATT Article XX and GATS Article XIV general exceptions. Oscillation between various forms of tests and criteria does not lend any reassurance of predictability in interpretation should other as-yet untested specific exceptions in GATT Article XX and GATS Article XIV be invoked as defenses in the future.

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[71] *See* Massimiliano Montini, *The Necessity Principle as an Instrument to Balance Trade and the Protection of the Environment,* pp. 135-156, at pp. 153-154, in FRANCESCO FRANCIONI (ED.), ENVIRONMENT, HUMAN RIGHTS AND INTERNATIONAL TRADE (Hart Publishing, 2001).

[72] *EU – Seal Products Appellate Body Report,* para. 6.1(d)(i). Note that a citizens' advocacy paper reports that the GATT Article XX defense "fails in 97 percent of cases". *See* http://www.citizen.org/documents/general-exception.pdf (last accessed 1 October 2014). As of this writing there has only been one occasion where a GATT Article XX exception was successfully established by a responding WTO Member and upheld by the Appellate Body. See *EC-Asbestos Appellate Body Report,* para. 192(f).

2. Balance of payments measures under Article XII and Article XVIII:B of GATT 1994 and Article XII:1 GATS

WTO Members also retain regulatory freedom to implement ordinarily trade-restrictive measures, in order to temporarily safeguard their external financial positions and/or to support the implementation of their economic development programmes. GATT Article XII permits a Member to "restrict the quantity or value of merchandise permitted to be imported" in order to "safeguard its external financial position and its balance of payments".[73] Import restrictions under this provision should not exceed those necessary "to forestall the imminent threat of, or to stop, a serious decline in its monetary reserves" or "in the case of a contracting party with very low monetary reserves, to achieve a reasonable rate of increase in its reserves".[74] Members implementing domestic policies under this provision should "pay due regard to the need for maintaining or restoring equilibrium in their balance of payments on a sound and lasting basis and to the desirability of avoiding an uneconomic employment of productive resources…it is desirable to adopt measures which expand rather than contract international trade."[75] Quantitative restrictions imposed under this provision are subject to limitations, and requirements of notification, consultation, and review.[76] GATT Article XVIII:B (on Governmental Assistance to Economic Development) authorizes similar import restrictions taken by a "contracting party, the economy of which can only support low standards of living and is in the early stages of development"[77], for the dual purposes of

[73] GATT Article XII:1.

[74] GATT Article XII:2(a).

[75] GATT Article XII:3(a).

[76] GATT Article XII:4 and XII:5.

[77] GATT Article XVIII:4(a). *See Interpretative Notes from Annex I Ad Article XVIII* on paragraphs 1 and 4 at http://www.wto.org/english/res_e/booksp_e/gatt_ai_e/art18_e.pdf (last accessed 1 January 2014), stating that "[w]hen they consider whether the economy of a contracting party 'can only support low standards of living', the Contracting Parties shall take into consideration the normal position of that economy and shall not base their determination on exceptional circumstances such as those which may result from the temporary existence of exceptionally favourable conditions for the staple export product or products of such contracting party", and that the phrase 'early stages of development' is not meant to apply only to contracting parties which have just started their economic development, but also to contracting parties the economies of which are undergoing a process of industrialization to correct an excessive dependence on primary production.".

"safeguard[ing] its external financial position *and* to ensure a level of reserves adequate for the implementation of its programme of economic development."[78] The import restrictions authorized under GATT Article XVIII:B are also subject to similar notification, consultation, and review requirements and limitations.[79]

GATS Article XII:1 (Restrictions to Safeguard the Balance-of-Payments), on the other hand, provides that "[i]n the event of serious balance-of-payments and external financial difficulties or threat thereof, a Member may adopt or maintain restrictions on trade in services on which it has undertaken specific commitments, including on payments or transfers for transactions related to such commitments. It is recognized that particular pressures on the balance of payments of a Member in the process of economic development or economic transition may necessitate the use of restrictions to ensure, *inter alia,* the maintenance of a level of financial reserves adequate for the implementation of its programme of economic development or economic transition."[80] The permitted restrictions should not be discriminatory; should be consistent with the Articles of Agreement of the International Monetary Fund; avoid unnecessary damage to the commercial, economic and financial interests of any other Member; shall not exceed those necessary to deal with the emergency; and be temporary and phased out progressively as the situation improves.[81] Members can give priority to the supply of services that are "more essential to their economic or development programmes", so long as the restrictions are not adopted or maintained to protect a particular service sector.[82] The restrictions taken under GATS Article XII:1 are also subject to notification, consultation, and review procedures.[83]

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[78] GATT Article XVIII:B(9).

[79] GATT Article XVIII:B(10) to (12).

[80] GATS Article XII:1.

[81] GATS Article XII:2.

[82] GATS Article XII:3

[83] GATS Article XII:4 to XII:6.

None of the foregoing balance-of-payments measures (quantitative or import restrictions as well as restrictions of trade in services) indicate a method for determining the adequacy of reserves (or conversely, the scope and extent of restrictions) necessary for the Member's economic development programming. This matter was partly addressed in *India-Quantitative Restrictions,* where India sought to justify quantitative restrictions on imports of agricultural, textile and industrial products through Article XVIII:B of GATT 1994.[84] India argued that it was reasonable "to require a direct, and therefore, clear and foreseeable causal link between the removal of the balance-of-payments restrictions and the recurrence of balance-of-payments difficulties because the indirect consequences of a removal of restrictions on the external financial position are difficult to trace and quantify";[85] and accordingly, it was erroneous for the WTO panel to have required India "to use macroeconomic and other development policy instruments to meet balance-of-payments problems caused by the immediate removal of its balance-of-payments restrictions."[86] India maintained that the proviso to Article XVIII:11 of GATT 1994 (e.g. "Provided that no contracting party shall be required to withdraw or modify restrictions on the ground that a change in its development policy would render unnecessary the restrictions which it is applying under this Section."[87]) and the corresponding provision in Article XII:3(d) "make it clear that the balance-of-payments provisions permit the imposition of restrictions, even if the Member has policy instruments at its disposal that could render the restrictions unnecessary. It is up to each Member to choose among those policy instruments, taking into account, not only the economic efficiency considerations on which the IMF bases its policy advice, but also its structural, institutional, and political constraints."[88] According to India, the International Monetary Fund (IMF) "never stated that India could remove all restrictions at once,

[84] *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products,* WT/DS90/AB/R, 23 August 1999 [hereafter, "*India-Quantitative Restrictions Appellate Body Report*"].

[85] *India – Quantitative Restrictions Appellate Body Report,* para. 33.

[86] *India – Quantitative Restrictions Appellate Body Report,* para. 34.

[87] *India – Quantitative Restrictions Appellate Body Report*, para. 111.

[88] *India – Quantitative Restrictions Appellate Body Report,* para. 35.

maintain its existing policies, *and* face no balance-of-payments difficulties."[89] The Appellate Body rejected India's contentions, finding, among others, that the IMF's statement (e.g. that "the external situation can be managed using macro-economic policy instruments alone…Quantitative restrictions (QRs) are not needed for balance-of-payments commitments and should be removed over a relatively short period of time…"[90]) did not imply any prescribed change in India's development policy,[91] since "the use of macroeconomic policy instruments is not related to any particular development policy, but is resorted to by all Members regardless of the type of development policy they pursue."[92] Thus, it would appear from *India – Quantitative Restrictions* that the Appellate Body gives a determinative weight to IMF findings that a Member's import restrictions are unnecessary to meet its balance-of-payments difficulties. There is, as yet, no discernible method or legal criteria independently developed by the Appellate Body for 'balancing' the WTO Member's asserted objective of addressing a balance of payments emergency or implementing an economic development programme, with the WTO Member's quantitative restrictions.

3. SPS measures in Article 2.2 of the SPS Agreement

The WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement)[93] regulates WTO Members' measures for protecting human, animal or plant life or health from certain risks. An SPS measure is any measure that is applied:

> "(a) to protect animal or plant life or health within the territory of the Member from risks arising from the entry, establishment or spread of pests, diseases, disease-carrying organisms or disease-causing organisms;
>
> (b) to protect human or animal life or health within the territory of the

[89] *India – Quantitative Restrictions Appellate Body Report*, para. 37.

[90] *India – Quantitative Restrictions Appellate Body Report*, para. 123.

[91] *India – Quantitative Restrictions Appellate Body Report*, para. 130.

[92] *India – Quantitative Restrictions Appellate Body Report,* para. 126.

[93] WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), full text at http://www.wto.org/english/tratop_e/sps_e/spsagr_e.htm (last accessed 1 January 2014) [hereafter, "SPS Agreement"].

> Member from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs;
>
> (c) to protect human life or health within the territory of the Member from risks arising from diseases carried by animals, plants or products thereof, or from the entry, establishment or spread of pests; or
>
> (d) to prevent or limit other damage within the territory of the Member from the entry, establishment or spread of pests.
>
> Sanitary or phytosanitary measures include all relevant laws, decrees, regulations, requirements and procedures including, *inter alia*, end product criteria; processes and production methods; testing, inspection, certification and approval procedures; quarantine treatments including relevant requirements associated with the transport of animals or plants, or with the materials necessary for their survival during transport; provisions on relevant statistical methods, sampling procedures and methods of risk assessment; and packaging and labelling requirements directly related to food safety."[94]

SPS measures, in essence, illustrate the WTO Member's freedom to regulate to safeguard public health concerns. Article 2.2 of the SPS Agreement explicitly obligates Members to "ensure that any sanitary or phytosanitary measure is applied *only to the extent necessary to protect human, animal or plant life or health,* is based on scientific principles and is not maintained without sufficient scientific evidence",[95] and where such measures conform to the SPS Agreement, they are "presumed to be in accordance with the obligations of the Members under the provisions of GATT 1994 which relate to the use of sanitary or phytosanitary measures, in particular the provisions of Article XX(b)."[96] SPS measures have to be based on an "assessment, as appropriate to the circumstances, of the risks to human, animal or plant life or health, taking into account risk assessment techniques developed by the relevant international organizations".[97] With respect to sources of information for the assessment of risks, the Members should "take into account available scientific evidence; relevant processes and production methods;

[94] SPS Agreement, Annex A, Section 1.

[95] SPS Agreement, Article 2.2.

[96] SPS Agreement, Article 2.4.

[97] SPS Agreement, Article 5.1.

relevant inspection, sampling and testing methods; prevalence of specific diseases or pests; existence of pest – or disease – free areas; relevant ecological and environmental conditions; and quarantine or other treatment."[98] When assessing the Member's SPS measure in relation to the risk to animal or plant life or health and the appropriate level of sanitary or phytosanitary protection from such risk, Member "shall take into account as relevant economic factors: the potential damage in terms of loss of production or sales in the event of the entry, establishment or spread of a pest or disease; the costs of control or eradication in the territory of the importing Member; and the relative cost-effectiveness of alternative approaches to limiting risks."[99]

WTO jurisprudence has not yet articulated the legal test for determining how an SPS measure is "necessary to protect human, animal or plant life or health" under Article 2.2 of the SPS Agreement, although it has been observed that Article 5.6 of the SPS Agreement builds on Article 2.2.[100] Article 5.6 of the SPS Agreement states:

> "Without prejudice to paragraph 2 of Article 3, when establishing or maintaining sanitary or phytosanitary measures to achieve the appropriate level of sanitary or phytosanitary protection, Measures shall ensure that such measures are not more trade restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection, taking into account technical and economic feasibility."[101]

The footnote to Article 5.6 states that "[f]or purpose of paragraph 6 of Article 5, a measure is not more trade-restrictive than required unless there is another measure, *reasonably* available taking into account technical and economic feasibility, that achieves the appropriate level of sanitary or phytosanitary protection and is significantly less restrictive to trade."[102] The Appellate Body affirmed the interpretation of this footnote by the WTO panel in *Australia-Salmon* as the basis for a cumulative test of the

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[98] SPS Agreement, Article 5.2.

[99] SPS Agreement, Article 5.3.

[100] VAN DEN BOSSCHE AND ZDOUC, pp. 905 in relation to pp. 923-926.

[101] SPS Agreement, Article 5.6.

[102] SPS Agreement, Footnote 3 in relation to Article 5.6. Italics added.

reasonableness of an alternative measure: 1) the alternative measure should be "reasonably available taking into account technical and economic feasibility"; 2) it should "achieve the Member's appropriate level of sanitary and phytosanitary protection"; and 3) is "significantly less restrictive to trade than the sanitary measure contested".[103] The characterization of "reasonableness" in the first element of the test, taking into account "technical and economic feasibility", as well as the determination of "appropriateness" of the level of SPS protection sought by the Member in the third element, has not, as yet, been subjected by the Appellate Body or Panels to any substantive criteria.

4. Technical regulations under Article 2.2 of the TBT Agreement

States also retain regulatory freedom to impose technical regulations for legitimate public policy objectives. The Agreement on Technical Barriers to Trade (TBT Agreement) regulates WTO Members' technical regulations, defined as a "document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labeling requirements as they apply to a product, process or production method."[104] According to the Appellate Body in *EC-Asbestos,* product characteristics "include, not only features and qualities intrinsic to the product itself, but also related 'characteristics', such as the means of identification, the presentation and the appearance of a product";[105] compliance with product characteristics is "mandatory";[106] and the technical regulation should apply to an identifiable product or group of products.[107] Article 2.1. of the TBT Agreement indicates the non-discrimination

[103] *Australia – Measures Affecting Importation of Salmon,* WT/DS18/AB/R, 6 November 1998, para. 194.

[104] Agreement on Technical Barriers to Trade, full text at http://www.wto.org/english/docs_e/legal_e/17-tbt_e.htm (last accessed 1 January 2014), at Annex 1, paragraph 1. [hereafter, "TBT Agreement"].

[105] *EC-Asbestos Appellate Body Report,* para. 67.

[106] *EC-Asbestos Appellate Body Report,* para. 68.

[107] *EC-Asbestos Appellate Body Report,* para. 70.

requirements for technical regulations,[108] while Article 2.2 of the TBT Agreement regulates WTO Members' technical regulations in relation to their legitimate public objectives:

> "Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfill a legitimate objective, taking account of the risks non-fulfillment would create. Such legitimate objectives are, *inter alia: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment*. In assessing such risks, relevant elements of consideration are, *inter alia:* available scientific and technical information, related processing technology or intended end-uses of products."[109]

Technical regulations are not of an indefinite duration – they should not be maintained "if the circumstances or objectives giving rise to their adoption no longer exist or if the changed circumstances or objectives can be addressed in a less trade-restrictive manner."[110] Unlike the explicit provision in Article 2.4 of the SPS Agreement, compliance with the TBT Agreement does not give rise to a presumption that a technical barrier to trade is also consistent with GATT rules.[111]The Appellate Body in *US – Clove Cigarettes* stressed that the "object and purpose of the TBT Agreement is to strike a balance between, on the one hand, the objective of trade liberalization and, on the other hand, Member's right to regulate….Article 2.1. should not be interpreted as prohibiting

[108] TBT Agreement, Article 2.1 ("Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country.").

[109] TBT Agreement, Article 2.2. Italics added. On the normative genealogy of Article 2.2 of the TBT Agreement from GATT, *see* Simon Lester and William Stemberg, *The GATT Origins of TBT Agreement Articles 2.1 and 2.2,* 17 Journal of International Economic Law 1 (2014), pp.215-232.

[110] TBT Agreement, Article 2.3.

[111] Christiane Wolff, *Regulating Trade in GMOs: Biotechnology and the WTO,* pp. 217-234, at p. 223 ("The relationship between the TBT Agreement and the GATT 1994 is less clear. In the preamble, WTO Members state their desire to further the objective of GATT 1994, but there is no presumption of consistency with GATT for measures that comply with the TBT Agreement.") in RICARDO MELENDEZ-ORTIZ AND VICENTE SANCHEZ (EDS.), TRADING IN GENES: DEVELOPMENT PERSPECTIVES ON BIOTECHNOLOGY, TRADE AND SUSTAINABILITY (Earthscan, 2005).

any detrimental impact on competitive opportunities for imports in cases where such detrimental impact on imports stems *exclusively* from legitimate regulatory distinctions."[112] To determine whether the detrimental impact on imports stems exclusively from a regulatory distinction rather than reflecting discrimination against the group of imported products, the Appellate Body mandated panels to "carefully scrutinize the particular circumstances of the case, that is, the design, architecture, revealing structure, operation, and application of the technical regulation at issue, and, in particular, whether that technical regulation is even-handed, in order to determine whether it discriminates against the group of imported products."[113] As such, the particular cause of the detrimental impact is significant for purposes of establishing a violation of Article 2.1 of the TBT Agreement – if the detrimental impact stems exclusively from a "legitimate regulatory distinction" then there is no such violation.[114] However, it should also be borne in mind that for detrimental impacts from regulatory distinctions to be "legitimate", such distinctions must be applied in an even-handed manner, as stressed by the Appellate Body in *US – COOL*: "where a regulatory distinction is not designed and applied in an even-handed manner – because, for example, it is designed or applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination – that distinction cannot be considered 'legitimate', and thus the detrimental impact will reflect discrimination prohibited under Article 2.1."[115] The even-handedness of a legitimate regulatory distinction can be shown from the manner by which the challenged technical regulation responds to the public risks subject of the regulatory distinction.[116]

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[112] *United States – Measures Affecting the Production and Sale of Clove Cigarettes,* WT/DS406/AB/R, 4 April 2012, at para. 174. Italics added. [hereafter, *"US – Clove Cigarettes Appellate Body Report"*].

[113] *US – Clove Cigarettes Appellate Body Report,* para. 182.

[114] *US – Clove Cigarettes Appellate Body Report,* para. 216.

[115] *United States – Certain Country of Origin Labelling (COOL) Requirements,* WT/DS384/AB/R, WT/DS386/AB/R, 29 June 2012, at para. 271.

[116] *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products,* WT/DS381/AB/R, 16 May 2012, at para. 297 ("…we conclude that the United States has not demonstrated that the difference in labeling conditions for tuna products containing tuna caught by setting on dolphins in the ETP, on the one hand, and for tuna products containing tuna caught by other fishing methods outside the ETP, on the other hand, is 'calibrated' to the risks to dolphins arising from different fishing methods in different areas of the ocean. It follows from this that the United States has not demonstrated that the

5. Article 8.1 in relation to Article 7 of the TRIPS Agreement

Article 7 of the TRIPS Agreement defines the balancing objectives of the TRIPS Agreement: "The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, *to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations*."[117] Article 8.1 of the TRIPS Agreement provides that "Members may, in formulating or amending their laws and regulations, adopt *measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development*, provided that such measures are consistent with the provisions of this Agreement."[118] Article 8.1 in relation to Article 7 of the TRIPS Agreement have not yet been squarely adjudicated or interpreted by the Appellate Body, but these provisions were repeatedly referred to in *Canada – Patent Protection of Pharmaceutical Products* to demonstrate the "public interest" dimension of TRIPS that could assist in interpreting exceptions under Article 30 of the TRIPS Agreement.[119] Read alongside Article 7, Article 8.1 does *not* appear to create the effect of an exception under the TRIPS Agreement, but rather operates as a principle that affirms that Members' domestic measures can protect specific public interests in ways that do not violate the TRIPS Agreement.[120] As can be seen from the plain texts of Articles 7 and 8.1, what is

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detrimental impact of the US measure on Mexican tuna products stems exclusively from a legitimate regulatory distinction…") [hereafter, "*US – Tuna II (Mexico) Appellate Body Report*].

[117] Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), Article 7. Italics added.

[118] TRIPS Agreement, Article 8.1. Italics added.

[119] *Canada – Patent Protection of Pharmaceutical Products,* WT/DS114/R, Panel Report, 17 March 2000, at http://www.wto.org/english/tratop_e/dispu_e/7428d.pdf (last accessed 1 January 2014), paras. 4.10(d), 4.30(a), among others.

[120] *See* Sisule F. Musungu, *The TRIPS Agreement and Public Health,* pp. 421-470, at p. 431 in CARLOS M. CORREA AND ABDULQAWI YUSUF (EDS.), INTELLECTUAL PROPERTY AND INTERNATIONAL TRADE: THE TRIPS AGREEMENT (Kluwer Law International, 2008) ("Article 8 therefore expressly grants permission to WTO Members to introduce measures that are necessary to protect public health among other public policy objectives including measures to prevent the abuse of the exclusive rights conferred by patents and to foster

contemplated from Members' domestic actions or measures that vindicate public values is a *balancing* with other values protected under the TRIPS Agreement, such as innovation, research and development. The concluding proviso within Article 8.1 of the TRIPS Agreement explicitly requires that the Member's domestic measures taken for public interest protection be "consistent with the provisions of this Agreement." It was for this reason that Canada did not directly invoke Article 8.1 of the TRIPS Agreement as an independent defense in *Canada – Patent Protection of Pharmaceutical Products,* but merely as a contextual principle to emphasize that public health and public interest values form part of the spectrum of values that ought to inform the interpretation of exceptions to patents authorized under Article 30 of the TRIPS Agreement.[121] At best, Article 8.1 of the TRIPS Agreement has been argued to have an evidentiary effect of a presumption of consistency with TRIPS:

> "The constraint in Article 8.1, as it was finally adopted, is that the measures they adopt should not violate the terms of the agreement. The UNCTAD IPRs Resource Book suggests that 'measures adopted by Members to address public health, nutrition and matters of vital socio-economic importance should be *presumed to be consistent with TRIPS, and that any Member seeking to challenge the exercise of discretion should bear the burden of proving inconsistency*....This approach presumes that the sequence of examination begins with whether the measures are of the kind envisioned, and if they are, then it goes on to address the issue of whether they are inconsistent…Under such an approach, there therefore exists a difference in scope between Article 30 and Article 8. Thus, where a measure is aimed specifically to 'protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development' then Article 8 would create a presumption that the measure is consistent, which must be rebutted by the complainant…Article 8 would thus shift the burden for public interest measures whereas all other measures would be directly addressed by Articles 30 and 31…This approach however only

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innovation and R&D as well as the transfer of technology in the pharmaceutical sector…Article 8 should be read as establishing the primacy of public health considerations, both in terms of innovation, R&D, and transfer of technology and access to medicines in the formulation and amendment of laws to implement TRIPS.").

[121] TRIPS Agreement, Article 30 ("Members may provide limited exceptions to the exclusive rights conferred by a patent, provided that such exceptions do not unreasonably conflict with a normal exploitation of a patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties.").

> allows Article 8.1 to have a burden shifting role in certain situations….[it] does not negate the fact that compliance with Article 8.1 would remain dependent on either not violating a right granted by a provision or by coming within the boundaries of an exception or limitation enumerated elsewhere in the TRIPS Agreement. There would still be no substantive effect to the first half of Article 8.1."[122]

As worded, Article 8.1 of the TRIPS Agreement requires the Member to establish that the challenged measure meet two elements: first, that the measure is indeed necessary to promote the public interest in sectors of vital importance; and second, that the measure remains consistent with TRIPS.[123] Whether the Appellate Body and Panels will propose "reasonableness" or "rational relationship" tests between the objective of promoting public interest and the TRIPS-consistency of the challenged measure remains a matter to be anticipated.

6. Provisions on special and differential treatment (S&D)

There are numerous provisions on special and differential treatment (S&D) for developing countries and least developed countries (LDCs) in the WTO agreements, but to date none of them have been interpreted in a concrete WTO dispute. While SDT provisions are known to afford a degree of flexibility for developing countries and LDCs, the WTO Appellate Body and panels have not yet had an occasion to interpret these provisions, whether as positive obligations, as some form of interpretive defense when a developing country or LDC imposes ordinarily trade-restrictive measures, or as a deferential or flexible standard of review.[124] The 2001 WTO Ministerial Conference in

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[122] Dalindyebo Shabalala, *Challenges for technology transfer in the climate change arena: what interactions with the TRIPS Agreement?,* pp. 507-560, at pp. 530-531 in GEERT VAN CALSTER AND DENISE PREVOST (EDS.), RESEARCH HANDBOOK ON ENVIRONMENT, HEALTH AND THE WTO (Edward Elgar Publishing, 2013). Italics added.

[123] *See* PING XIONG, AN INTERNATIONAL LAW PERSPECTIVE ON THE PROTECTION OF HUMAN RIGHTS IN THE TRIPS AGREEMENT: AN INTERPRETATION OF THE TRIPS AGREEMENT IN RELATION TO THE RIGHT TO HEALTH (Martinus Nijhoff Publishers, 2012), at pp. 153-154.

[124] The argument has been made that the S&D principle could operate as a "broader principle" for interpreting obligations under the WTO agreements, as well as in relation to the inherent jurisdiction of the Appellate Body with respect to procedural aspects of dispute settlement. Andrew D. Mitchell, *A legal principle of special and differential treatment for WTO disputes,* 5 World Trade Review 3 (2006), pp. 445-469. *See also* Frank J. Garcia, *Beyond Special and Differential Treatment,* 27 Boston College International and Comparative Law Review (2004), pp. 291-317.

Doha declared that provisions for special and differential treatment are an "integral part of the WTO Agreements", and in turn, ordered the review of such provisions "with a view to strengthening them and making them more precise, effective and operational".[125] The WTO Secretariat has since conducted a comprehensive review of the S&D provisions throughout the WTO agreements and the decisions of the WTO political organs.[126] S&D provisions were classified according to six categories: 1) provisions aimed at increasing the trade opportunities of developing country Members; 2) provisions under which WTO Members should safeguard the interests of developing country Members; 3) flexibility of commitments, of action, and use of policy instruments; 4) transitional time periods; 5) technical assistance; and 6) provisions relating to least developed country (LDC) Members.[127] A developing country or LDC Member's obligations as a State Party to the ICESCR can help substantiate and provide fuller information on how a Member could fall well within the standards that often trigger S&D flexibility, such as "economic development programming needs" in the balance-of-payments provisions previously discussed under GATT Article XVIII:B. In GATT Article XVIII:7(a), a Member can seek negotiations to modify or withdraw concessions "in order to promote the establishment of a particular industry with a view to raising the general standard of living of its people".[128] No legal criteria or jurisprudential tests have been developed to date as to the S&D provisions.

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[125] WTO Doha Ministerial Declaration, WT/MIN(01)/DEC/1, 20 November 2001, para. 44, full text at http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm#special (last accessed 1 January 2014). *See also* Decision Adopted by the General Council, WT/l/579, 1 August 2004, at http://www.wto.org/english/tratop_e/dda_e/draft_text_gc_dg_31july04_e.htm#sd (last accessed 1 January 2014) (instructing the Committee on Trade and Development in Special Session to "expeditiously complete the review of all the outstanding Agreement-specific proposals and report to the General Council, with clear recommendations for a decision, by July 2005. The Council further instructs the Committee, within the parameters of the Doha mandate, to address all other outstanding work, including on the cross-cutting issues, the monitoring mechanism and the incorporation of S&D treatment into the architecture of WTO rules, as referred to in TN/CTD/7 and report, as appropriate, to the General Council.")

[126] Note by the WTO Secretariat, Committee on Trade and Development, *Special and Differential Treatment Provisions in WTO Agreements and Decisions,* WT/COMTD/W/196, 14 June 2013, at http://www.wto.org/english/tratop_e/devel_e/dev_special_differential_provisions_e.htm (last accessed 1 January 2014) [hereafter, "WTO Secretariat SDT Note"].

[127] WTO Secretariat SDT Note, pp. 3-4.

[128] GATT Article XVIII:7(a) ("7. (a) If a contracting party coming within the scope of paragraph 4 (a) of

As seen from the foregoing, the DSU's adoption of the Appellate Body and Panel reports indicates that interpretive development of public policy calibration provisions result in different approaches to balancing trade and non-trade public policies. Much depends on what public policy provisions a responding WTO Member invokes at the DSU in responding to a fellow WTO Member's complaint. As far as general exceptions under GATT Article XX or GATS Article XIV are concerned, such provisions have not been empirically proven as realistically successful defenses for responding WTO Members. While the Appellate Body and Panels are generally conscious of the importance of balancing, the proliferation of jurisprudential tests to undertake balancing makes it difficult and unpredictable to rely on public policy calibration provisions in the WTO agreements as legal defenses.

B. Public Policy in the Trade Policy Review Mechanism (TPRM)

A 2007 study averred that the contemporary political processes of negotiations, trade policy reviews, and WTO waiver decisions and Ministerial Conference discussions and practices already reflect the reality that "WTO members increasingly seek to reconcile their trade and human rights objectives,"[129] in particular revealing that: 1) accession applications frequently include questions on rule of law and the compliance

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this Article considers it desirable, in order to promote the establishment of a particular industry with a view to raising the general standard of living of its people, to modify or withdraw a concession included in the appropriate Schedule annexed to this Agreement, it shall notify the CONTRACTING PARTIES to this effect and enter into negotiations with any contracting party with which such concession was initially negotiated, and with any other contracting party determined by the CONTRACTING PARTIES to have a substantial interest therein. If agreement is reached between such contracting parties concerned, they shall be free to modify or withdraw concessions under the appropriate Schedules to this Agreement in order to give effect to such agreement, including any compensatory adjustments involved."). See also GATT Article XVIII:13 ("If a contracting party coming within the scope of paragraph 4(a) of this Article finds that governmental assistance is required to promote the establishment of a particular industry with a view to raising the general standard of living of its people, but that no measure consistent with the other provisions of this Agreement is practicable to achieve that objective, it may have recourse to the provisions and procedures set out in this Section.").

[129] Susan Ariel Aaronson, *Seeping in slowly: how human rights concerns are penetrating the WTO,* 6 World Trade Review 3 (2007), pp. 1-37.

with human rights by the applicant States;[130] 2) the WTO had already issued its first waiver specifically to protect human rights, e.g. the Kimberley Process Certification Scheme to prevent trading in conflict diamonds;[131] 3) human rights concerns were increasingly being litigated in the dispute settlement system through GATT Article XX exceptions;[132] 4) trade policy reviews conducted by the TPRB systematically engage questions of social and environmental impacts of, and human rights considerations in, Member States' trade policies;[133] and 5) trade negotiations under the Doha Round increasingly reflect the prioritization of human rights obligations as the premise of the global development agenda.[134] Other scholars confirm various aspects of this evolving phenomenon of accommodation and coordination of human rights in the political organs and processes of the WTO system.[135]

The TPRM remains a work in progress in relation to systematically obtaining information on WTO Members' trade and non-trade public policies. The TPRM is a dialogic process between the WTO and its individual Members involving an assessment of the latter's domestic trade policies in relation to WTO commitments. Its declared purpose is "to contribute to improved adherence by all Members to rules, disciplines and commitments made under the Multilateral Trade Agreements and, where applicable, the Plurilateral Trade Agreements, and hence to the smoother functioning of the multilateral trading system, by achieving greater transparency in, and understanding of, the trade policies and practices of Members. Accordingly, the review mechanism enables the

[130] Id. at pp. 12-15.

[131] Id. at p. 16.

[132] Id. at pp. 18-22.

[133] Id. at pp. 22-26.

[134] Id. at pp. 27-32.

[135] *See* Marie-Claire Cordonier Segger, *Effective Implementation of Intersecting Public International Law Regimes: Environment, Development, and Trade Law,* pp. 213-258, at 231-247 in TERUO KOMORI AND KAREL WELLENS (EDS.), PUBLIC INTEREST RULES OF INTERNATIONAL LAW: TOWARDS EFFECTIVE IMPLEMENTATION (Ashgate, 2009); Christopher Butler, *Human Rights and the World Trade Organization: The Right to Essential Medicines and the TRIPS Agreement,* 5 University of Pennsylvania Journal of International Law and Policy 1 (2007); Abadir M. Ibrahim, *International Trade and Human Rights: An Unfinished Debate,* 14 German Law Journal 1 (2013), 322-338, at 334-336.

regular collective appreciation and evaluation of the full range of individual Members' trade policies and practices and their impact on the functioning of the multilateral trading system. It is not, however, intended to serve as a basis for the enforcement of specific obligations under the Agreements or for dispute settlement procedures, or to impose new policy commitments on Members."[136] While the assessment in the TPRM takes into consideration "the background of the wider economic and developmental needs, policies and objectives of the Member concerned, as well as of its external environment", its main function is "to examine the impact of a Member's trade policies and practices on the multilateral trading system."[137] The Trade Policy Review Body (TPRB) of the WTO conducts the programme of reviews and actual sessions of review.[138] Despite the breadth of the subject-matter that could be covered under the TPRM as a matter of considering the "developmental needs, policies, and objectives of the Member concerned", in practice as observed by Michael Trebilcock, Robert Howse, and Antonia Eliason, "these policies are not evaluated as to their impact on human rights or compliance with other international commitments. Democracy, the rule of law, human rights and the protection of labour rights have generally been overlooked, although there recently have been references to 'social stability'."[139]

Recent trade policy review reports of the WTO Secretariat do reflect some institutional awareness of the impacts of trade policies on income inequalities and social protection, although the trade policy reviews still do not require any disclosure by the WTO Member of its international social protection commitments and the status of its compliance with such commitments, especially in regard to the WTO Members' international obligations (as reflected under the International Covenant on Economic, Social and Cultural Rights, for example) on the rights to work and favourable conditions

[136] Annex 3 to the WTO Agreement, Trade Policy Review Mechanism, para. A(i).

[137] Id. at para. A(ii).

[138] For details on the trade policy review sessions conducted by the TPRB, see M. Benzing, *Trade Policy Review Mechanism,* pp. 619-634 in WOLFRUM, STOLL, & KAISER 2006.

[139] MICHAEL TREBILCOCK, ROBERT HOWSE, AND ANTONIA ELIASON, THE REGULATION OF INTERNATIONAL TRADE (4th edition, Routledge, 2013), at p. 750.

of work and the enjoyment of the highest attainable standard of health, social security, and education. The WTO Secretariat report for the second Trade Policy Review of Panama (a State Party to the ICESCR[140]) specifically noted that "there remain considerable social and regional inequalities and a significant shortage of skilled labour…It would also be wise to reassess, and where appropriate, rationalize the incentive schemes in order to narrow the gap between the most vigorous economic zones and sectors and the rest of the economy, and to allocate more resources to social programmes, including improvements in the quality of education in order to meet the demand for skilled labour on which sustainable economic growth depends."[141] The same report also noted Panama's environmental commitments in other treaties such as the Cartagena Protocol on Biosafety to the Convention on Biological Diversity.[142] Brazil's Sixth Trade Policy Review, on the other hand, reported that its sustained economic growth from trade enabled it to reduce poverty and income inequality.[143] The WTO Secretariat report for the fifth Trade Policy Review of China[144] referred to China's domestic measures to protect state security, public morals, and environmental concerns, and international commitments, but made no specific mention of China's duties as a State Party to the ICESCR: "Import licensing, restrictions and prohibitions are maintained on grounds of state security; public morality, human, animal and plant health; environmental protection; balance of payment reasons; and to comply with international commitments.

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[140] Ratified the ICESCR on 8 March 1977. *See* https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en (last accessed 1 January 2014).

[141] WTO Report by the Secretariat to the Trade Policy Review Body, *Second Trade Policy Review of Panama,* WT/TPR/S/301, 18 June 2014, at http://www.wto.org/english/tratop_e/tpr_e/s301_e.pdf (last accessed 1 July 2014), at para. 2, p. 7.

[142] Id. at para. 3.139, at p. 65.

[143] WTO Report by the Secretariat to the Trade Policy Review Body, *Sixth Trade Policy Review of Brazil,* WT/TPR/S/283, 17 May 2013, at http://www.wto.org/english/tratop_e/tpr_e/s283_e.pdf , at para. 3, p. 8. Brazil acceded to the ICESCR on 24 January 1992. *See* https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en (last accessed 1 January 2014).

[144] China ratified the ICESCR on 27 March 2001. *See* https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en (last accessed 1 January 2014).

China uses both automatic and non-automatic licensing. Goods subject to any of the restrictions are listed in Catalogues issued by the relevant agencies. However, these lists can be adjusted as necessary, and imports of goods that are not included in the Catalogue can be restricted or prohibited on a temporary basis by the relevant authorities."[145] India[146] likewise indicated that its import restrictions may be imposed on the grounds of "health, safety, moral and security reasons, and for self-sufficiency and balance-of-payments reasons. On occasion, India links the use of trade policy instruments to domestic policy considerations. For instance, import restrictions and licensing requirements are relaxed when imports are necessary to alleviate inflation or supply shortages. State trading is also used as a policy tool to ensure, *inter alia,* a 'fair' return to farmers, food security, the supply of fertilizer to farmers, and the functioning of the domestic price support system…India grants direct and indirect assistance to various sectors…the states also provide additional subsidies, especially for basic services such as education and health, electricity, and water. Price controls, which apply to some commodities, are aimed at providing subsidies to farmers and a population under the poverty line, and to ensure 'reasonable price' of quality drugs."[147] Indonesia[148] also cites similar reasons as grounds for the authority of the Ministry of Trade to prohibit exports: "a national security or public interest threat (including social, cultural and moral reasons); protection of intellectual property rights; protection of human life and health; protection of the environment and ecology; and signature and ratification of international treaties or

[145] WTO Report by the Secretariat to the Trade Policy Review Body, *Fifth Trade Policy Review of China,* WT/TPR/S/300, 27 May 2014, at http://www.wto.org/english/tratop_e/tpr_e/s300_e.pdf (last accessed 1 July 2014), at para. 19, p.11.

[146] India acceded to the ICESCR on 10 April 1979. *See* https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en (last accessed 1 January 2014).

[147] WTO Report by the Secretariat to the Trade Policy Review Board, *Fifth Trade Policy Review of India,* WT/TPR/S/249, 10 August 2011, at http://www.wto.org/english/tratop_e/tpr_e/tp349_e.htm (last accessed 1 January 2014), at paras. 15 and 19, p. xii.

[148] Indonesia acceded to the ICESCR on 23 February 2006. *See* https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en (last accessed 1 January 2014).

agreements by the Government."[149] None of these reports, however, articulate the WTO Member's continuing duties as a State Party to the ICESCR and the status of social protection in their respective countries which they report in the periodic review before the Committee on Economic, Social and Cultural Rights.

Arguably the European Union demonstrates the most remarkable trade policy review practices in regard to reflecting economic, social and cultural rights as part of its trade policy-making. The European Union stressed that its trade policy "is required to address developmental, environmental, and social objectives, and contribute to the objectives set out in the Treaty on the European Union, including development and consolidation of democracy and the rule of law, and respect of human rights",[150] and for this reason the European Commission "carries out impact-assessment analysis to support its decision-making for all proposals with significant direct impact, including in the trade policy area. The impact-assessment process assesses different policy options by comparing both potential benefits and costs in economic, social and environmental terms. The system relies on stakeholder consultations, and impact-assessment reports are published once the Commission's decision has been taken. In the case of trade negotiations, the Commission carries out 'trade sustainability impact assessments' (SIAs) to analyze the economic, environmental and social impact of the EU trade agreements for the EU and its trading partners. SIAs inform negotiations and are independent studies conducted by external consultants, involving comprehensive consultation of stakeholders to ensure a high degree of transparency and taking account of the knowledge and concerns of relevant interest groups both in the EU and in the trading partner. The Commission is committed to better assessing the impact of trade initiative including carrying out ex-post analysis of agreement implementation."[151] In contrast, other major

[149] WTO Report by the Secretariat to the Trade Policy Review Body, *Sixth Trade Policy Review of Indonesia,* WT/TPR/S/278, 6 March 2013, at http://www.wto.org/english/tratop_e/tpr_e/s278_e.pdf (last accessed 1 January 2014), at para. 3.77, at p. 55.

[150] WTO Report by the Secretariat to the Trade Policy Review Body, *Eleventh Trade Policy Review of the European Union,* WT/TPR/S/284, 28 May 2013, at http://www.wto.org/english/tratop_e/tpr_e/s284_e.pdf (last accessed 1 January 2014), at para. 2.12, at p. 29.

[151] Id. at para. 2.15, p. 29.

players in the trading system do not appear to have taken a similar route of embedding human rights compliance in trade policy reviews. The most recent Trade Policy Review for the United States (a signatory but not a State Party to the ICESCR), the Trade Policy Review for Japan (a State Party to the ICESCR), and the Trade Policy Review for Canada, all did not indicate any impacts of trade policies, and are virtually silent on issues of domestic income inequality, social and environmental protection.[152]

The ultimate effectiveness of the WTO's TPRM as a surveillance mechanism as a "managerial", "compliance pull", or "peer review" process[153] depends on the extent to which the process is used by the WTO Members to fully unveil critical issues in the public policy objectives behind their regulatory measures. Apart from the examining the technical requirements of trade commitments in the WTO agreements, WTO Members who are States Parties to the ICESCR could themselves initiate the periodic dialogue with the WTO on the very same public policies that undergird their exercise of regulatory freedom.

C. Public Policy in WTO Trade Negotiations

Where the WTO Member who is, for example, also one of the 162 State Parties to the International Covenant on Economic, Social and Cultural Rights (ICESCR), cannot avail of the legal calibration afforded by broad provisions in the WTO agreements that affirm regulatory freedom to protect public policies, it is not prohibited from seeking to

[152] WTO Report by the Secretariat to the Trade Policy Review Body, *Eleventh Trade Policy Review of the United States,* WT/TPR/S/275, 13 November 2012, at http://www.wto.org/english/tratop_e/tpr_e/tp375_e.htm (last accessed 1 January 2014); WTO Report by the Secretariat to the Trade Policy Review Body, *Eleventh Trade Policy Review of Japan,* WT/TPR/S/276, 15 January 2013, at http://www.wto.org/english/tratop_e/tpr_e/tp376_e.htm (last accessed 1 January 2014); WTO Report by the Secretariat to the Trade Policy Review Body, WT/TPR/S/246, 4 May 2011, at http://www.wto.org/english/tratop_e/tpr_e/tp346_e.htm (last accessed 1 January 2014).

[153] *See* SUNGJOON CHO, FREE MARKETS AND SOCIAL REGULATION: A REFORM AGENDA OF THE GLOBAL TRADING SYSTEM (Kluwer Law International, 2003), at pp. 160-161 ("Although the TPRM, in carrying out these policy reviews, engages in the evaluation of Member's regulations and policies for 'consistency' with the WTO system, it is a managerial, rather than 'enforcement' mechanism. In other words, it basically amounts to a 'peer review' process.").

obtain such flexibility in complying with trade commitments through decisions of the WTO political organs.[154] The Ministerial Conference of the WTO – the institution's supreme decision-making body – has the power to adopt authoritative interpretations under Article IX:2 of the WTO Agreement,[155] the power to adopt amendment decisions under Article X:1 of the WTO Agreement,[156] and the power to issue waivers of WTO commitments under Article IX:3 of the WTO Agreement.[157]

[154] *See* Isabel Feichtner, *The Waiver Power of the WTO: Opening the WTO for Political Debate on the Reconciliation of Competing Interests,* 20 European Journal of International Law 3 (2009), pp. 615-645, at p. 618 [hereafter, "Feichtner EJIL 2009"].

[155] WTO Agreement, Article IX:2 ("The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements. In the case of an interpretation of a Multilateral Trade Agreement in Annex 1, they shall exercise their authority on the basis of a recommendation by the Council overseeing the functioning of that Agreement. The decision to adopt an interpretation shall be taken by a three-fourths majority of the Members. This paragraph shall not be used in a manner that would undermine the amendment provisions in Article X.").

[156] WTO Agreement, Article X:1 ("Any Member of the WTO may initiate a proposal to amend the provisions of this Agreement or the Multilateral Trade Agreements in Annex 1 by submitting such proposal to the Ministerial Conference. The Councils listed in paragraph 5 of Article IV may also submit to the Ministerial Conference proposals to amend the provisions of the corresponding Multilateral Trade Agreements in Annex 1 the functioning of which they oversee. Unless the Ministerial Conference decides on a longer period, for a period of 90 days after the proposal has been tabled formally at the Ministerial Conference any decision taken by the Ministerial Conference to submit the proposed amendment to the Members for acceptance shall be taken by consensus. Unless the provisions of paragraphs 2, 5, or 6 apply, that decision shall specify whether the provisions of paragraphs 3 or 4 shall apply. If consensus is reached, the Ministerial Conference shall forthwith submit the proposed amendment to the Members for acceptance. If consensus is not reached at a meeting of the Ministerial Conference within the established period, the Ministerial Conference shall decide by a two-thirds majority of the Members whether to submit the proposed amendment to the Members for acceptance. Except as provided in paragraphs 2, 5 and 6, the provisions of paragraph 3 shall apply to the proposed amendment, unless the Ministerial Conference decides by a three-fourths majority of the Members that the provisions of paragraph 4 shall apply.")

[157] WTO Agreement, Article IX:3 ["In exceptional circumstances, the Ministerial Conference may decide to waive an obligation imposed on a Member by this Agreement or any of the Multilateral Trade Agreements, provided that any such decision shall be taken by three fourths of the Members unless otherwise provided for in this paragraph. (a) A request for a waiver concerning this Agreement shall be submitted to the Ministerial Conference for consideration pursuant to the practice of decision-making by consensus. The Ministerial Conference shall establish a time-period, which shall not exceed 90 days, to consider the request. If consensus is not reached during the time-period, any decision to grant a waiver shall be taken by three fourths of the Members. (b) A request for a waiver concerning the Multilateral Trade Agreements in Annexes 1A or 1B or 1C and their annexes shall be submitted initially to the Council for Trade in Goods, the Council for Trade in Services or the Council for TRIPS, respectively, for consideration during a time-period which shall not exceed 90 days. At the end of the time-period, the relevant Council shall submit a report to the Ministerial Conference."].

The power to adopt authoritative interpretations of the WTO covered agreements lies exclusively with the Ministerial Conference and the General Council.[158] While there have been attempts to invoke this power,[159] to date the required vote has not yet been obtained for the Ministerial Conference and the General Council to adopt an authoritative interpretation of any provision of the WTO covered agreements, partly owing to the difficulties of mustering the required three-fourths majority to enact such an authoritative interpretation, the fact that Members have been able to operate within the WTO system (especially the Dispute Settlement Understanding or DSU) without having to resort to rallying political machinery at the Ministerial Conference to muster the required vote, and also out of reluctance due to the uncertain consequences of an authoritative interpretation on dispute settlement.[160] Accordingly, while on sheer numbers alone WTO Members who are States Parties to the ICESCR might well be able to muster the required three-fourths majority to obtain authoritative interpretations of WTO provisions that may implicate their ICESCR obligations,[161] it may not be necessarily the prudent decision for them to do so, given the ripple consequences of an authoritative interpretation of WTO provisions throughout the entire system, especially on pending and future WTO disputes.[162]

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[158] *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India,* WT/DS33/AB/R, 25 April 1997, pp. 19-20.

[159] *See* Communication from the European Communities, *Request for an Authoritative Interpretation Pursuant to Article IX:2 of the Marrakesh Agreement of the World Trade Organization,* WT/GC/W/133, 25 January 1999 (on the interpretation of Articles 3.7, 21.5, 22.2, 22.6, 22.7, and 23 of the DSU).

[160] *See* Claus-Dieter Ehlermann and Lothar Ehring, *The Authoritative Interpretation under Article IX:2 of the Agreement Establishing the World Trade Organization: Current Law, Practice and Possible Improvements,* 8 Journal of International Economic Law 4 (December 2005), pp. 803-824.

[161] *See* Caroline Dommen, *Safeguarding the Legitimacy of the Multilateral Trading System: The Role of Human Rights Law,* pp. 121-132, at p. 131 in ABBOTT, BREINING-KAUFMANN, AND COTTIER 2006.

[162] *See* JOOST PAUWELYN, CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW (Cambridge University Press, 2003), at p.113 ("…If, in the authoritative interpretation, both disputing parties agree to change the law retroactively so as to apply it also to their dispute, the judicial decision, in so far as it relies on the old law, would lose its practical effect: if the complainant had won the dispute on the basis of the 'old law', that party, having agreed to the 'new law', would no longer seek…the implementation of the judicial decision; if, in contrast, the defendant had won the original dispute, the complainant would need to seek a new panel decision for it to see the 'new law' applied to its case…").

For similar reasons, political support for an amendment any of the WTO covered agreements may be difficult to obtain.[163] In practice, taking decisions by voting at the WTO – instead of the usual consensus decision-making process[164] – rarely occurs in the WTO system.[165] The first amendment proposed and recommended for a WTO covered agreement is the amendment of the TRIPS Agreement that would make the 2003 waiver decision[166] for essential medicines permanent and built into the TRIPS Agreement.[167] WTO Members have a deadline of 31 December 2015 to have a two-thirds majority approve the amendment.[168] For Members that formally accept the amendment, they will take effect and replace the 2003 waiver decision for those Members. For the remaining members that do not accept the amendment, the waiver will continue to apply until the Member accepts the amendment and it takes effect.[169]

Finally, WTO Members who are States Parties to the ICESCR may also seek to fulfill duties to respect, protect, and fulfill ICESCR rights through methods of international cooperation, by mustering the required three-fourths majority of the

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[163] William J. Davey, *Institutional Framework,* pp. 51-88, at p. 70 in ARTHUR E. APPLETON AND MICHAEL G. PLUMMER (EDS.), THE WORLD TRADE ORGANIZATION: LEGAL, ECONOMIC AND POLITICAL ANALYSIS, VOLUME I (Springer, 2007).

[164] MITSUO MATSUSHITA, THOMAS J. SCHOENBAUM AND PETROS C. MAVROIDIS, THE WORLD TRADE ORGANIZATION: LAW, PRACTICE, AND POLICY (Oxford University Press, 2006), at p. 12 ("…consensus differs from unanimity. In consensus decision-making, the minority will normally go along with the majority unless it has a serious objection. The majority will, in turn, not ramrod decisions through by vote but will deal with the objections of the minority. The consensus decision-making process takes a great deal of time. Voting occurs in the WTO only when a decision cannot be taken by consensus. In the Ministerial Conference and the General Council, decisions are taken by 'a majority of the votes cast' unless otherwise specified in the relevant WTO agreement. Each Member has one vote…").

[165] VAN DEN BOSSCHE AND ZDOUC, p. 142.

[166] 2003 General Council Waiver Decision, at http://www.wto.org/english/tratop_e/trips_e/implem_para6_e.htm (last accessed 1 January 2014).

[167] *See* WTO General Council Decision of 6 December 2005, Amendment of the TRIPS Agreement, WT/l/641, 8 December 2005, at http://www.wto.org/english/tratop_e/trips_e/wtl641_e.htm (last accessed 1 January 2014).

[168] *See* WTO General Council Decision of 26 November 2013, Amendment of the TRIPS Agreement – Fourth Extension of the Period for the Acceptance by Members of the Protocol Amending the TRIPS Agreement, WT/L/899, 27 November 2013, at http://www.wto.org/english/tratop_e/trips_e/amendment_e.htm (last accessed 1 January 2014).

[169] Id. at http://www.wto.org/english/tratop_e/trips_e/amendment_e.htm (last accessed 1 January 2014).

Members to wield the waiver decision powers of the Ministerial Conference. Some of the more recent waiver decisions of the Ministerial Conference include the 14 December 2001 Waiver Decision on the ACP (African, Carribean, and Pacific states)-EC (European Communities) Partnership Agreement,[170] the 2003 Waiver Decision Concerning the Kimberley Process Certification Scheme for Rough Diamonds (in regard to restrictions on trade in diamonds from conflict zones),[171] the 2002 Waiver Decision exempting LDCs from having to provide exclusive marketing rights for any new drugs in the period when they do not provide patent protection,[172] as well as the 2003 waiver decision for essential medicines in relation to the TRIPS Agreement. Waiver decisions can be differentiated between those that "are granted for concretely defined measures or situations…to coordinate WTO law with other international legal regimes", and those adopted "to legalize abstractly defined measures for all or groups of members…includ[ing] the 1971 waivers to legalize preferential tariff treatment by developed contracting parties under the Generalized System of Preferences and among developing countries, which were both succeeded by the Enabling Clause of 1999…[and] the 1999 waiver to enable developing country members to maintain trade preferences for products from least developed countries", among others.[173] The 2003 waiver decision on essential medicines is one such decision exemplifying compliance with duties of the States Parties to the ICESCR to respect, protect, and fulfill ICESCR rights, specifically Article 12 of the ICESCR on the right to enjoy the highest attainable standard of health. However, much as securing sufficient political leverage and support for the required majority vote would not be easy

[170] WTO General Council Decision of 14 November 2001, European Communities – the ACP-EC Partnership Agreement, WT/MIN(01)/15, 14 November 2001, at http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_acp_ec_agre_e.htm (last accessed 1 January 2014).

[171] *See* Waiver Concerning Kimberley Process Certification Scheme for Rough Diamonds, Communication from Australia, Brazil, Canada, Israel, Japan, Korea, Philippines, Sierra Leone, Thailand, United Arab Emirates and United States, G/C/W/432/Rev.1, 24 February 2003, at http://www.wto.org/english/news_e/news03_e/goods_council_26fev03_e.htm (last accessed 1 January 2014).

[172] Full text of the decision and waiver at http://www.wto.org/english/news_e/pres02_e/pr301_e.htm#texts_decisions (last accessed 1 January 2014).

[173] Feichtner EJIL 2009, at p. 621.

for approving authoritative interpretations or amending provisions of the WTO agreements, obtaining a waiver decision as a means for realizing ICESCR rights is likewise not always a politically feasible option for WTO Members who are States Parties to the ICESCR.

Perhaps an equally, if not more, strategic route for WTO Members who are States Parties to the ICESCR to ensure that WTO decision-making fully takes into account the realization of ICESCR rights would be in wielding the agenda-setting power in the WTO, where developing countries, and particularly emerging powers such as Brazil, India, and China have started to take a more active role, especially on food and agriculture negotiations.[174] The Singapore Ministerial Meeting in 1996 witnessed political tussles between the United States (which preferred to launch a narrow trade agenda at the Seattle Ministerial Meeting), and the European Union (which "wanted to include a large number of topics including the environment, labor, trade remedies, investment and competition"), while developing countries preferred to emphasize "agriculture, trade in manufactures and tropical products, implementation issues relating to the Uruguay Round agreements, issues related to debt, technical assistance and capacity-building, and the reform of the decision-making procedures."[175] The stalled Doha Development Agenda reflects increasing tensions in the relationship between trade and key aspects of economic, social and cultural rights that are intrinsic to development. The Doha Ministerial Declaration affirmed the Members' commitment to the objective of sustainable development, and stressing the balance between trade and social protection, in that "the aims of upholding and safeguarding an open and non-discriminatory multilateral trading system, and acting for the protection of the environment and the promotion of sustainable development can and must be mutually supportive…recogniz[ing] that under WTO rules no country should be prevented from taking measures for the protection of human, animal or plant life or health, or of the environment at the levels it considers appropriate, subject to the requirement that they are not applied in a manner which would constitute a means of

[174] *See* Brendan Vickers, *The Role of the BRICS in the WTO: System-Supporters or Change Agents in Multilateral Trade?,* pp. 254-274, at p. 261 in NARLIKAR, DAUNTON, AND STERN 2012.

[175] SONIA E. ROLLAND, DEVELOPMENT AT THE WTO (Oxford University Press, 2012), at p. 91.

arbitrary or unjustifiable discrimination where the same conditions prevail, or a disguised restriction on international trade, and are otherwise in accordance with the provisions of the WTO Agreements."[176] Areas identified under the Work Programme in the Doha Ministerial Declaration all involve crucial issues of economic, social and cultural rights – from special and differential treatment for developing countries in agricultural and non-agricultural products; the protection of biodiversity and indigenous knowledge and access to essential medicines in relation to the TRIPS agreement; obtaining a development-based policy analysis of the relationship between trade and investment; technical assistance and transparency with respect to issues involving the interaction of trade and competition policy as well as government procurement matters; trade facilitation special needs of developing country Members and LDC Members; negotiations on the relationship between existing WTO rules and specific trade obligations set out in multilateral environmental agreements; recommendations on trade, debt, and finance; and targeted technical assistance for LDCs.[177] There is no better time for WTO Members who are States Parties to the ICESCR draw upon their obligations to respect, protect, and fulfill ICESCR rights to inform the content of their negotiations than in the present Doha Development Round.[178]

As seen from the foregoing subsections, there are segmented efforts at achieving 'balance' between trade and non-trade public policy objectives between the three core functional pillars of the WTO and the counterpart institutions that oversee such functions. The following section identifies some dissonances between the voices that get to weigh in on these balancing processes, and those often excluded from public policy decision-making at the WTO.

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[176] WTO Ministerial Declaration, Doha, WT/MIN(01)/DEC/1, 14 November 2001, para. 6, at http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm#special (last accessed 1 January 2014).

[177] Id. at paras. 13 to 44.

[178] *See* Andreas Blüthner, *Trade and human rights at work: Next round, please…? Regulatory and cooperationist approaches in the context of the Doha Round,* pp. 355 et seq. in HARALD HOHMANN (ED.), AGREEING AND IMPLEMENTING THE DOHA ROUND OF THE WTO (Cambridge University Press, 2008).

II. The Public Policy Institutional Deficits at the WTO: Who Undertakes 'Balancing'?

WTO rules are contained in around sixty agreements, annexes, decisions, and understandings, mostly negotiated and concluded during the 1986-1994 Uruguay Round, which also includes the 1994 Marrakesh Agreement Establishing the WTO, and landmark multilateral agreements in trade in goods, trade in services, intellectual property, dispute settlement, and government trade policy review.[179] These agreements can be categorized according to: 1) "broad principles" (e.g. the General Agreement on Tariffs and Trade, the General Agreement on Trade in Services, and the Agreement on Trade-Related Aspects of Intellectual Property Rights); 2) "extra agreements and annexes dealing with the special requirements of specific sectors or issues"; and 3) "detailed and lengthy schedules (or lists) of commitments made by individual countries allowing specific foreign products or service providers access to their markets".[180] Apart from the WTO agreements, other sources of WTO law (alternatively dubbed as soft law[181] in the WTO) that may "clarify or define the law applicable between WTO Members"[182] include: the WTO dispute settlement reports, the acts of WTO bodies, agreements concluded in the context of the WTO, customary international law, general principles of law, other international agreements, subsequent practice of WTO Members, teachings of the most

[179] *See* Navigational Guide to the WTO Agreements, available at http://www.wto.org/english/thewto_e/whatis_e/tif_e/argm1_e.htm (last accessed 10 January 2013).

[180] Id. at footnote 179.

[181] Mary Footer identifies soft law instruments in the WTO as "the resolutions adopted by the organisation's institutional bodies. These include not only ministerial declarations and decisions but also the decisions of the various councils and committees, which may embody understandings, guidelines, notes produced by the WTO Secretariat at the request of the members, Chairman's statements and so on. While they are not intended to be legally binding they may nevertheless have practical effect and may prove legally relevant….[soft law in the WTO] has proven to be particularly useful where there is broad lack of agreement or a lack of coordination among WTO members, where an issue is highly contestable or where cooperation gives rise to distributive conflicts." *See* Mary E. Footer, *The (Re)turn to 'Soft Law' in Reconciling the Antinomies in WTO Law,* 11 Melbourne Journal of International Law (2010), 241-276, at 247-248.

[182] PETER VAN DEN BOSSCHE, THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: TEXT, CASES AND MATERIALS (2nd ed., Cambridge University Press, 2008), at 53 [hereafter, "VAN DEN BOSSCHE"].

highly qualified publicists, and the negotiating history.[183] WTO Members accept the multilateral agreements in the system as a "single undertaking…justified as necessary to prevent the kind of free-riding that was possible in the disjoint legal order of the pre-Uruguay Round GATT."[184] While it remains much debated if this approach indeed achieves complete uniformity of WTO rules, it is nevertheless acknowledged that the single undertaking approach significantly contributes towards increasing the consistency of the content, scope, and application of these rules within the WTO membership.[185]

Rule-making occurs from a combination of the processes of negotiating treaties at the WTO pursuant to Article III:2 of the WTO Agreement,[186] as well as from the 'secondary legislation', functional rules, and particularized decisions of the WTO political organs issued to implement the covered multilateral agreements within the WTO system.[187] The institutional structure of the WTO and its key political organs is laid out in Article IV of the WTO Agreement: the Ministerial Conference (composed of all Member States meeting at least once every two years); the General Council, which conducts the day to day functions of the Ministerial Conference when the latter is not in session, and also acts as the Trade Policy Review Body (TPRB) and the Dispute Settlement Body (DSB); the three sectoral councils (Council for Trade in Goods, Council for Trade in Services, Council for TRIPS) which oversee the implementation of the GATT, GATS, and TRIPS; other specialized councils, committees, and groups as created

[183] Id. at footnote 55. *See also* JOOST PAUWELYN, CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW (Cambridge University Press, 2003), at pp. 40-52 [hereafter, "PAUWELYN 2003"].

[184] Nicholas Lamp, *Democracy in the WTO – the Limits of the Legitimacy Debate,* pp. 143-172, at p. 166 in JANA HERTWIG AND SYLVIA MAUS (EDS.), GLOBAL RISKS: CONSTRUCTING THE WORLD ORDER THROUGH LAW, POLITICS, AND ECONOMICS (Peter Lang, 2010).

[185] Craig VanGrasstek and Pierre Sauve, *The Consistency of WTO Rules: Can the Single Undertaking Be Squared with Variable Geometry?,* 9 Journal of International Economic Law 4 (2006), pp. 837-864.

[186] Thomas Cottier, *A Two-Tier Approach to WTO Decision-Making,* in DEBRA P. STEGER (ED.), REDESIGNING THE WORLD TRADE ORGANIZATION FOR THE TWENTY-FIRST CENTURY (Wilfrid Laurer University Press, 2009), at p. 49, full text available at http://www10.iadb.org/intal/intalcdi/PE/2010/05075.pdf (last accessed 1 January 2014).

[187] Id. at footnote 59, at p. 51. Armin von Bogdandy, *Law and Politics in the WTO – Strategies to Cope with a Deficient Relationship,* 5 Max Planck Yearbook of United Nations Law (2001), pp. 609-674, at pp. 625-644.

by the Ministerial Conference (such as the Trade Negotiations committee, Committee on Trade and Development, etc.).[188] The WTO Secretariat discharges "exclusively international" responsibilities and administrative duties to implement instructions solely from the WTO.[189] These political organs of the WTO collectively discharge the WTO's core functions under Article III of the WTO Agreement:[190] 1) the facilitation of the implementation, administration, and operation of the WTO Agreement, the multilateral and plurilateral trade agreements; 2) providing the forum for negotiations of new agreements among its Members concerning their multilateral trade relations; 3) administer the Dispute Settlement Understanding (DSU); 4) administer the Trade Policy Review Mechanism (TPRM); and 5) coordinate with other global economic institutions such as the International Monetary Fund, the World Bank, and affiliated agencies.

Apart from these formal political organs, WTO rule-makers also appear in varied forms. WTO Member States conduct trade negotiations "in a context of flexible, interest-driven coalitions. They may belong to more than one grouping, depending on their interests."[191] Depending on the negotiation agenda for a given round,[192] formal and informal coalitions could be as durable or ephemeral as those for developing country Members, the least developed country (LDC) Members, the European Union and its Member States, the Association of Southeast Asian Nations (ASEAN), the Group of Latin America and Caribbean Countries (GRULAC), the African, Caribbean and Pacific

[188] Article IV of the WTO Agreement, available at http://www.wto.org/english/docs_e/legal_e/04-wto_e.htm (last accessed 1 January 2014).

[189] Article VI of the WTO Agreement, available at http://www.wto.org/english/docs_e/legal_e/04-wto_e.htm (last accessed 1 January 2014).

[190] *See* full text of WTO Article III (Functions of the WTO) at http://www.wto.org/english/docs_e/legal_e/04-wto_e.htm (last accessed 1 January 2014).

[191] Thomas Cottier, *A Two-Tier Approach to WTO Decision-Making,* in DEBRA P. STEGER (ED.), REDESIGNING THE WORLD TRADE ORGANIZATION FOR THE TWENTY-FIRST CENTURY (Wilfrid Laurer University Press, 2009), p. 46, full text available at http://www10.iadb.org/intal/intalcdi/PE/2010/05075.pdf (last accessed 1 January 2014).

[192] For a proposal to delineate 'clubs' to which WTO members could additionally subscribe based on their interests and the core mission of the WTO, *see* Robert Z. Lawrence, *Rulemaking Amid Growing Diversity: A Club-of-Clubs Approach to WTO Reform and New Issue Selection,* 9 International Economic Law 4 (2006), pp. 823-835.

Group (ACP), the G-20, and the 'Quad' at the Uruguay Round (the four largest trading entities – the European Communities, the United States, Japan, and Canada), as well as those entities with Observer status, such as intergovernmental international organizations (the United Nations, the World Bank, UNCTAD, among others).[193] WTO decisions are issued through negative consensus,[194] with trade negotiations and other key decisions often facilitated through the 'green room' meetings between major WTO powers and select Members whose interests are most implicated in the particular meeting.[195] In any event, it should be clear that the legislative process does not take place in isolation from the executive implementation of WTO rules, as indeed, "the WTO Agreement is not meant to institutionalize any autonomous political process."[196]

The WTO also provides for guidelines in its engagement with non-governmental organizations, although this is largely limited to transparency and public information concerns, since the "Members have pointed to the special character of the WTO, which is both a legally binding intergovernmental treaty of rights and obligations among its Members and a forum for negotiations. As a result of extensive discussions, there is currently a broadly held view that it would not be possible for NGOs to be directly involved in the work of the WTO or its meetings."[197] In practice, however, NGOs have been able to strategically engage the WTO throughout various areas of trade policy-making and agenda-setting.[198] Since the inception of the WTO Guidelines, NGOs have

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[193] PETER VAN DEN BOSSCHE AND WERNER ZDOUC, THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION (Cambridge University Press, 2013), pp. 107-109.

[194] *See* Jaime Tijmes-lhl, *Consensus and majority voting in the WTO,* 8 World Trade Review 3 (July 2009), pp. 417-437.

[195] Id. at footnote 194, at pp. 144-149.

[196] Armin von Bogdandy, *Law and Politics in the WTO – Strategies to Cope with a Deficient Relationship,* 5 Max Planck Yearbook of United Nations Law (2001), pp. 609-674, at p. 614.

[197] WTO Guidelines for arrangements on relations with Non-Governmental Organizations, Decision adopted by the General Council, 18 July 1996, at para. VI, full text at http://www.wto.org/english/forums_e/ngo_e/guide_e.htm (last accessed 1 January 2014).

[198] Seema Sapra, *The WTO System of Trade Governance: The Stale NGO Debate and the Appropriate Role for Non-State Actors,* 11 Oregon Review of International Law (2009), 71-108, at 105 ("…NGOs already play an important role informally and have a significant agenda-setting impact…[n]ow that NGOs are already actively involved in trade negotiations, the more important question might no longer be whether

been able to observe plenary sessions and ministerial conferences, obtain information on trade issues, and strategically push their particular advocacies on WTO member States, such as those on enforcing labour rights, protecting the right to health and enabling access to essential medicines through compulsory licensing as an exception to TRIPS obligations.[199] To the extent that NGOs have been able to incrementally influence the content of interpretations of WTO norms thus far, they are still regarded as marginal players in WTO rulemaking.[200]

Despite the robust profusion of WTO rulemaking and sources of rules, it is noteworthy in the design and nature of rulemaking at the WTO that there are institutionalized opportunities for the centralized creation and interpretation of WTO rules. The General Council – the highest political decision-making body of the WTO – also assumes other functions that critically bear upon WTO rulemaking. When it acts as the Trade Policy Review Mechanism (TPRM), it can review trade policies and domestic regulations of the WTO Members for consistency with WTO rules.[201] The General Council also wears an adjudicative hat when it acts as the Dispute Settlement Body (DSB) in adopting reports of dispute settlement panels and the Appellate Body.[202] The DSB does not only adopt panel and Appellate Body reports, but is also tasked to maintain surveillance of the implementation of rulings and recommendations, authorize suspension

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NGOs should participate, but what influence do NGOs have and how is it being exercised."); Julio A. Lacarte, *Transparency, Public Debate and Participation by NGOs in the WTO: A WTO Perspective,* 7 Journal of International Economic Law 3 (2004), 683-686; JL Dunoff, *The Misguided Debate over NGO Participation at the WTO,* 1 Journal of International Economic Law 3 (1998), 433-456; Steve Charnovitz, *Participation of Nongovernmental Organizations in the World Trade Organization,* 17 University of Pennsylvania Journal of International Economic Law (1996) 331; Daniel C. Esty, *Non-Governmental Organizations at the World Trade Organization: Cooperation, Competition, or Exclusion,* 1 Journal of International Economic Law (1998) 123-147.

[199] *See* Shamima Ahmed, *Impact of NGOs on International Organizations: Complexities and Considerations,* 36 Brooklyn Journal of International Law 817 (2010-2011), at 827-828.

[200] *See* Peter van den Bossche, *NGO Involvement at the WTO: A Comparative Perspective,* 11 Journal of International Economic Law 4 (2008), pp. 717-749.

[201] Pieter Jan Kuijper, *Some institutional issues presently before the WTO,* pp. 81-110, at p. 83 in DANIEL M. KENNEDY AND JAMES D. SOUTHWICK (EDS.), THE POLITICAL ECONOMY OF INTERNATIONAL TRADE LAW: ESSAYS IN HONOR OF ROBERT E. HUDEC (Cambridge University Press, 2002).

[202] On the multi-functional nature of the General Council, *see* VAN DEN BOSSCHE at 225.

of concessions and other obligations under the WTO covered agreements, and to inform the relevant WTO Councils and Committees of related developments arising from disputes under the WTO covered agreements.[203] As an acknowledged "political institution",[204] the DSB has an enviable record on enforcing compliance with WTO dispute settlement rulings.[205] While the legislative process at the WTO primarily occurs through Member States' trade negotiations, other sources of rules (such as Ministerial Conference and/or the General Council decisions, standards set by designated technical bodies or agencies in the WTO covered agreements) may thus also involve rule-makers beyond the primary political organs of the WTO.[206] The WTO system appears conducive to harmonization largely because the common political institutions –the Ministerial Conference and the General Council – retain authority to issue decisions on the authoritative interpretation of the WTO covered agreements. This does not necessarily mean, however, that there is any focused, systematic, or dedicated parliamentary oversight process over WTO rulemaking.[207] The system does not encapsulate a perfect closed version of legislation under classic separation of powers theory.[208] Rather, the doctrine of delegation[209] in the modern regulatory state should appear to be more

[203] DSU, Annex 2 of the WTO Agreement, Arts. 2(1) and 2(2).

[204] WOLFRUM, STOLL, & KAISER 2006, at 279.

[205] Bruce Wilson, *Compliance by WTO Members with Adverse WTO Dispute Settlement Rulings: The Record to Date,* 10 Journal of International Economic Law 2 (2007), 397-403.

[206] *See* Marion Jansen, *Defining the Borders of the WTO Agenda,* pp. 161-183, in AMRITA NARLIKAR, MARTIN DAUNTON, AND ROBERT M. STERN (EDS.), THE OXFORD HANDBOOK ON THE WORLD TRADE ORGANIZATION (Oxford University Press, 2012).

[207] Gregory Shaffer, *Parliamentary Oversight of WTO Rule-Making: The Political, Normative, and Practical Contexts,* 7 Journal of International Economic Law 3 (2004), pp. 629-654.

[208] To recall, under separation of powers "the legislative power includes the power, through the enactment of laws, to specify the ends and means of public policy, but it does not include the executive power to administer and enforce those laws or the judicial power to resolve cases arising under them." RICHARD E. LEVY, THE POWER TO LEGISLATE (Greenwood Publishing, 2006), at p. 138.

[209] HANS KELSEN, GENERAL THEORY OF LAW AND STATE, at pp. 269 ("The concept of 'separation of powers' designates a principle of political organization….there are not three but two basic functions of the State: creation and application (execution) of law, and these functions are not coordinated but sub- and supra-ordinated. Further, it is not possible to define boundary lines separating these functions from each other, since the distinction between creation and application of law – underlying the dualism of legislative and executive power (in the broadest sense) – has only a relative character, most acts of State being at the same time law-creating and law-applying acts.").

applicable in assessing how institutional, formal, and informal rule-makers at the WTO deploy their authority based on the consent of States to the WTO covered agreements. The application of this doctrine as a basis for assessing public authority at the WTO would, perhaps, be appropriate when one considers the 'constitutionalizing' consequences of the WTO covered agreements on the 'international legislative process' on trade, and its concomitant impacts on domestic law-making.[210]

While States author the treaty standards and norms governing global trade, in practice, the implementation of these standards also trigger considerable rulemaking by other political institutions, such as, for trade law, the WTO General Council and Ministerial Conference, the sectoral Councils, the universe of standard-setting agencies and technical bodies involved in the SPS, TBT, TRIPS, GATT, GATS, Agriculture, and other WTO covered agreements.[211] The same functional reasons for delegation – the need for agency expertise; the lack of time and resources for States to directly undertake, monitor, and coordinate rulemaking; as well as the value of removing implementation decisions from more political forums –[212] may also be applied to explain the proliferation of rule-makers and rule-making beyond States' formulation of treaty standards in the world trade system. To the extent that non-delegation doctrine also makes itself amenable to critiques of public participation in the regulatory process,[213] and also is

[210] *See among others* GAIL ELIZABETH EVANS, LAWMAKING UNDER THE TRADE CONSTITUTION: A STUDY IN LEGISLATING BY THE WORLD TRADE ORGANIZATION (Kluwer Law International, 2000), at pp. 193-243; JOHN H. BARTON, JUDITH L.GOLDSTEIN, TIMOTHY E. JOSLING, AND RICHARD H. STEINBERG, THE EVOLUTION OF THE TRADE REGIME: POLITICS, LAW, AND ECONOMICS OF THE GATT AND THE WTO (Princeton University Press, 2010), pp. 61-90; John H. Jackson, *The WTO 'constitution' and proposed reforms: seven 'mantras' revisited,* 4 Journal of International Economic Law 1 (2001), pp. 67-78.

[211] One scholar refers to a generalized model of "multilevel regulatory governance", where "the capacity of each level to carry out the regulatory function must be verified. It must be based on the comparative advantage of each level. There needs to be coordination between different levels of government before the transfer of power. This would lead to an ongoing process of a dynamic separation of powers. The key element in the new situation is coherence. In the absence of coherence there is a risk of contradictory rules, excessive regulation or regulatory gaps…". Brigid Gavin, *Reconciling Regionalism and Multilateralism: Towards Multilevel Trade Governance,* at pp. 59-73, at pp. 64-65 in PHILIPPE DE LOMBAERDE (ED.), MULTILATERALISM, REGIONALISM, AND BILATERALISM IN TRADE AND INVESTMENT (Springer, 2007).

[212] Id. at footnote 211, at p. 673.

[213] Id. at footnote 211, at p. 680.

subject to some form of judicial review,[214] one can alsotest the legitimacy of trade rulemaking. In any event, the fundamental public policy institutional deficits at the WTO demonstrably arise from a lack of institutional coordination across the three functional pillars on how to approach WTO Members' trade and non-trade public policy objectives. Members have the foremost voice at the WTO but not all Members are heard equally in the real corridors of power and decision-making at the WTO.[215] Balancing trade and non-trade public policy objectives require complex informational interfaces from the widest possible sources – governmental, non-governmental, international, and local – and yet there is no well-established and cohesive method yet established by the WTO Secretariat to systemically consult all stakeholders that may be concerned with respect to different environmental, social, labor, cultural, and developmental public policies.[216] Institutional coordination of Members' trade and non-trade public policy objectives cannot be achieved without establishing the necessary information architecture to elicit relevant information from the WTO Membership, international specialized agencies at the United Nations, non-governmental organizations, citizens, groups and other constituencies that are ordinarily consulted in a public policy and regulatory management process.[217]

[214] Id. at footnote 211, at p. 682.

[215] *See* JOHN WARREN HEAD, LOSING THE GLOBAL DEVELOPMENT WAR (Brill, 2008), at p. 251; Yong-Shik Lee, *World Trade Organization and Developing Countries: Reform Proposal,* pp. 105-129 in YONG-SHIK LEE, GARY HORLICK, WON-MOG CHOI, AND TOMER BROUDE (EDS.), LAW AND DEVELOPMENT PERSPECTIVE ON INTERNATIONAL TRADE LAW (Cambridge University Press, 2011).

[216] *See* CHRISTIANE R. CONRAD, PROCESSES AND PRODUCTION METHODS IN WTO LAW: INTERFACING TRADE AND SOCIAL GOALS (Cambridge University Press, 2011), at pp. 471-472.

[217] SEE ORGANISATION FOR ECONOMIC COOPERATION AND DEVELOPMENT (OECD), CITIZENS AS PARTNERS: INFORMATION, CONSULTATION, AND PUBLIC PARTICIPATION IN POLICY-MAKING (OECD 2001); Elizabeth Smythe, *Democracy, development, and the WTO's legitimacy challenge: assessing the Doha Development Round,* pp. 205-226 in DONNA LEE AND RORDEN WILKINSON (EDS.), THE WTO AFTER HONG KONG: PROGRESS IN, AND PROSPECTS FOR, THE DOHA DEVELOPMENT ROUND (Routledge, 2013).

CONCLUSION: ACTUALIZING THE 'PRINCIPLES OF COOPERATION AND COORDINATION' - THE WTO AS THE FORUM FOR INTERNATIONAL PUBLIC POLICY

India's failure to ratify the Protocol to the TFA signals the most significant tipping point in the stalled Doha Round on the tensions on Members' expectations of flexibility from WTO commitments for non-trade public policy commitments. Lack of institutional coordination on the ongoing dialogue and decision-making in the standard-setting, trade policy review, and dispute settlement functional pillars of the WTO comes at the price of abrupt 'defections' from WTO compliance by those who perceive that the WTO is an inappropriate (if not paralyzed) forum for balancing trade and non-trade public policy objectives. As a World Bank publication presciently observed:

> "Perceptions of inequities in the WTO decision-making system implicitly call into question other facets of governance, specifically, the failure to balance the costs and benefits arising from trade negotiations. The end result has been an absence of 'ownership' of many agreements, and a general suspicion of the WTO…To be sure, the WTO is not an international organization intended to 'govern' the global economy, or even international trade relations, as a whole. It does, however, perform some functions of governance at the international level by providing a forum for trade rule-making (legislative function); protecting trade opportunities; fostering transparency in the trading system; and enforcing rules through a dispute settlement system (judicial function). In addition, there are other functions not attributed formally to the WTO that are subject to an intense international debate as to whether they should be put under its purview. Examples include the supply of international public goods and the subjection of markets to social objectives. Given the scope of the recent questioning on WTO governance, efforts to pursue new trade negotiations on a comprehensive basis will probably have to go hand in hand with a streamlining of the decisionmaking process that pays due attention to the requirements of efficiency and legitimacy. Unless these worries are addressed, new negotiations will add to the frustration."[218]

The international law principle of cooperation[219] – often applied in circumstances involving States' common interests in managing shared resources and mitigating environmental risks – is especially significant to the process of balancing trade and non-

[218] Diana Tussie and Miguel F. Lengyel, *Developing Countries: Turning Participation into Influence,* pp. 485-493, at p. 491, in BERNARD HOEKMAN, AADITYA MATTOO, AND PHILIP ENGLISH (EDS.), DEVELOPMENT, TRADE, AND THE WTO: A HANDBOOK (World Bank, 2002).

[219] *See Lake Lanoux arbitration (Spain v. France),* 24 I.L.R. 101 (1957); *Nuclear Tests Cases (New Zealand v. France),* ICJ Reports (1974), at 457.

trade public policies. Article XVI:4 of the WTO Agreement imposes the duty upon WTO Members to bring their national laws into conformity with WTO law, but, as seen in Parts II and III, the substance of such WTO law insofar as trade and non-trade policies is hardly made up of bright-line rules. If WTO Members are expected to harmonize domestic regulatory measures with WTO law as a matter of international obligation, then the balancing process for trade and non-trade public policies must itself be transparently and consistently undertaken in all three of the WTO's functional pillars – dispute settlement, trade policy review, and trade negotiations – to feasibly enable WTO Members to substantiate and internalize conformity with WTO law in their respective public policy management processes. In order to achieve optimal cooperation within the WTO system to arrive at the sustainable policy flexibility originally envisaged in the Preamble to the Marrakesh Agreement and the numerous public policy calibration provisions in the WTO agreements, institutional coordination premised on equal informational access and contribution by Members and other public policy stakeholders will be critical. Coordination and cooperation should be embraced as fundamental and foundational principles WTO law, stemming from the teleological purpose and original design towards balancing trade and non-trade public policy objectives that were built into the WTO agreements themselves through the public policy calibration provisions, and the assumption of legislative, executive, and judicial functions dispersed across WTO organs. The crystal lesson from India's refusal to ratify the Protocol to the TFA and around fourteen years of stalled negotiations at the Doha Development Round is that balance between trade and non-trade public policy objectives – the development dimension avowed in the WTO – is the ultimate object and purpose of the WTO Agreements.[220] The piecemeal, dispersed, and incremental approach to the balancing process thus far comes at a high price for the entire WTO system, its participants, and the envisaged beneficiaries of global multilateral trade. As perceptions of illegitimacy remain unaddressed in the WTO, we risk dooming the WTO to irrelevance.

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[220] *See* ASIF H. QURESHI, INTERPRETING WTO AGREEMENTS: PROBLEMS AND PERSPECTIVES (Cambridge University Press, 2006), at pp. 114-159.

Discussion Paper on "Balancing National Public Policy and Free Trade"

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One of the frequently occurring topics as regards WTO agreements, its dispute settlement, and ongoing negotiations and policy-making in the WTO is the relationship between the principles of the world trading system and policies aimed at objectives which are commonly referred to as "non-trade values", such as environment, health and safety, culture, labour, and human rights.

While WTO agreements remain relatively silent about non-trade values, in *academia* and in practice we have witnessed a number of discussions as to tensions between trade and non-trade values and their possible solutions. However, it seems there is no consensus within the WTO and among its Members, of how these issues can be approached harmoniously in light of WTO legal system and beyond. Then, how would we be able to find a 'correct' balance between these two?

Current judicial approaches to address possible conflicts

To this discussant's belief, it has been mostly and primarily WTO adjudicating bodies, not WTO Members themselves, that have consistently struggled to harmonize trade and non-trade values. It comes as a surprise given that the World Trade Organization and its previous GATT 1947 have been considered rather symbolic icons of "Member-driven" organizations in international arena.

Yet, on the very same note due credits must be given to WTO panels and Appellate Body, because they are actually "getting the job done" to keep the entire WTO system going. WTO Agreements were negotiated and drafted during Uruguay Round and entered into force in 1995. Today many things have changed, and for WTO Members many societal values have changed, too. For example, today climate change is posing serious challenges before us. By the end of 2015 in the Conference of the Parties in Paris, we are expecting a new legal regime with all carbon-emitting developed and de-

veloping countries participating in addressing the climate change issue. But what if a WTO Member which is also a party to this new climate change regime – pursuant to its commitments under the latter – imposes CO_2 reduction obligations on certain products and eventually it results in a national treatment violation against imported products from other WTO Members? This is just one example that the WTO has to come up with solutions, in order to avoid in the immediate future any unnecessary, counter-productive conflicts between trade and non-trade values.

The best optical way to solve this problem would be through legislative means – through adoption of decisions at WTO Ministerial Conference or General Council. Yet, at this point WTO Members are seemingly unable to reach any consensus that way, while their preferences for non-trade values have risen more and more evidently on the surface. In this sense today's judicial activism by WTO panels and Appellate Body is more than justified, is more necessary than ever in the history of GATT/WTO, and deserves due credits and proper appraisals.

Yet, despite WTO adjudicating bodies' judicial efforts, another question still remains: *How exactly*, then, should panels and Appellate Body exercise their functions to solve this tension? WTO adjudicating bodies can only apply 'WTO law' to a WTO case (it can also use other rules of public international law, but cannot actually *apply* them to the case. Rather, it can only be used to 'interpret WTO law'). Therefore the best option panels and Appellate Body have is to interpret relevant provisions of WTO Agreement in a manner that best takes into account those non-trade values to the fullest extent possible.

Indeed, as can be seen in recent developments of jurisprudence in TBT and SCM Agreements, panels and Appellate Body have chosen to approach the matter by way of interpreting WTO Agreements in a more *flexible* way, taking into account — although cautiously — more and more 'legitimate' non-trade values raised by WTO Members. Interestingly it has become more frequent that panels or the Appellate Body mentions WTO Members' "legitimate" concerns or considerations in their reports.

In addition, the Appellate Body findings in *US-Shrimp* should be revisited. In that case the Appellate Body interpreted the term "exhaustible natural resources" of Article XX(g) GATT with reference to the United Nations Conventions on the Law of the Sea (UNCLOS), the Convention on Trade in Endangered Species of Wild Fauna and Flora (CITES), Agenda 21, and a resolution adopted in conjunction with the Convention on the Conservation of Migratory Species of Wild Animals (CMS). Also, the Appellate Body first ever recognized that the 'evolutionary interpretation' can be utilized in interpreting

WTO Agreements. This discussant believes that these interpretative tools can be of significant importance in preventing possible conflicts between trade and non-trade values.

Legal issues to be addressed in the future

These jurisprudential developments in some Agreements are more than welcome. However, there still remain many legal problems to be addressed. I would like to lay out some of the examples:

Firstly, there are a number of exception clauses across the WTO Agreements - including Article XX GATT, Article XIV GATS, and Article 73 TRIPS, to name a few. These exceptions specifically refer to some of non-trade values, and are intended to legitimize non-trade related deviations from principal trade rules, including MFN and national treatment. It has been suggested that WTO adjudicating bodies should take more flexible approaches in interpreting these exceptions. For example, if with a genuine purpose of mitigating climate change a WTO Member imposes a disproportionate level of CO_2 reduction obligations on steel and paper respectively (in a manner that fits most optimally for that country) and it results in a national treatment violation against imported steel products, would such measures be able to be justified under Article XX GATT? Could it be considered not "arbitrary" under the current case law? Further, as regards 'necessity' jurisprudence, would the weighing and balancing test as established by the Appellate Body in *Korea-Various Measures on Beef* be able to be applied in a sufficiently flexible manner to give legitimate considerations to all non-trade values?

Secondly, at some point the issue of cross-invocability should be fully addressed by WTO adjudicating bodies. As the aftermath of *Canada-Feed-in Tariff Program* case there have been a number of academic discussions as to the possibility for GATT Article XX exceptions to be applied to other WTO Agreements. While Article XX exceptions can be a significant breakthrough to legitimize non-trade values under WTO law, there is no textual basis to support such an argument. Again, the best optical way is that WTO Members amend Article XX through legislative means; but given the current situation, it would most likely be up to the Appellate Body to decide on this issue. Where the Appellate Body finds Article XX cross-invocable, it would need to come up with sufficiently convincing and legally sound logics to support such applicability.

Lastly, it should be stressed that the interpretative principle of 'in dubio mitius', which is also called "restrictive interpretation", can also play a role in preventing conflicts between trade and non-trade values. According to this principle the interpreter

should choose the meaning which is the least restrictive on the sovereignty of the parties, if the term to be interpreted has a number of different meanings. In other words, this interpretative tool depends on deference to national regulatory autonomy, and enables the WTO adjudicating bodies to use an interpretation which leaves more space to national autonomy if the terms in question are ambiguous. In this way, I believe at least the *minimum* amount of conflicts can be avoided.

Conclusion

While the judicial methods and techniques discussed here can help avoiding possible conflicts, at the end of the day I believe it is desirable that not only WTO panels and Appellate Body but more importantly, WTO Members themselves show more active and cooperative attitude and willingness for harmonization of trade and non-trade values under the WTO legal system.

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Mega-RTAs under the WTO Law

By

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I. INTRODUCTION

The world trading system is undergoing transformations as global value chains (GVCs) play a more significant role in the world economy.[1] In response to the rise of GVCs, which is characterized by manufacturing process using globally sourced intermediate inputs,[2] WTO members are entering into mega-regional trade agreements (RTAs).[3] The mega-RTAs are defined as those RTAs between countries with a significant share in the world trade.[4] Examples of the proposed mega-RTAs are Trans-Pacific Partnership Agreement (TPP)[5] and the Transatlantic Trade and Investment Partnership (TTIP) between the EU and the US.[6]

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[1] GVC participation in all G20 countries has increased between 1995 and 2009. Between 30% and 60% of G20 countries' exports are imported intermediate inputs. See OECD, WTO, UNCTAD, 'Implication of Global value chains for trade, investment, development and jobs', 6 August 2013, Prepared for G-20 Leaders Summit, Saint Petersburg (Russian Federation), September 2013, at 8, available at http://unctad.org/en/PublicationsLibrary/unctad_oecd_wto_2013d1_en.pdf (visited 1 July 2014).

[2] GVC is characterized by the production of goods and services 'wherever the necessary skills and materials are available at competitive cost and quality.' Ibid, at 3.

[3] The term RTA refers to free-trade areas and customs unions (CUs) under GATT Article XXIV. We exclude from our study preferential trade agreements under the Enabling Clause.

[4] See 'Mega-regional Trade Agreements Game-Changers or Costly Distraction for the World Trading System?', Global Agenda Council on Trade & Foreign Direct Investment, World Economic Forum, July 2014, at 6.

[5] As of October 2014, the negotiating parties of the TPP are Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States, and Vietnam, Joint Statement at the TPP Ministers Meeting in Singapore, USTR, available at http://www.ustr.gov/about-us/press-office/press-releases/2014/May/Joint-Statement-at-the-TPP-Ministers-Meeting-in-Singapore (visited 1 October 2014).

[6] The proposed TTIP is the free trade agreement between the EU and the US. See Fact Sheet: Transatlantic Trade and Investment Partnership (TTIP), available at http://www.ustr.gov/ttip (visited 18 September 2014). Another example of a mega-RTA is the Regional Comprehensive Economic Partnership (RCEP) in Asia and the Transatlantic Trade and Investment Partnership (TTIP). The negotiating parties of the RCEP are the 10 ASEAN Member States and Australia, China, India, Japan, the Republic of Korea and New Zealand. See Joint Media Statement, The Second RCEP Ministerial Meeting, 27 August 2014, Nay Pyi Taw, Myanmar, available at http://www.asean.org/news/asean-statement-communiques (visited 18 September 2014).

The mega-RTAs such as the TPP result in overlapping RTAs where the parties of the RTAs are in preferential trading relations with each other through more than one RTAs. A notable example of overlapping RTAs is the proposed TPP and NAFTA. If the TPP were enacted, the TPP and the NAFTA would constitute overlapping RTAs as the three NAFTA members – US, Canada, and Mexico – are the overlapping parties to both NAFTA and the TPP.[7] In the case of the TTIP, overlapping RTAs would not result when the TTIP is enacted. Nevertheless, with the possible later accession of Canada and Mexico to the TTIP, the possibility of NAFTA and TTIP forming overlapping RTAs remains.[8]

Another significant development in the evolution of RTAs is the cross-cumulation arrangements in the rules of origin of RTAs. A cross-cumulation arrangement achieves the same trade effect of a mega-RTA without formally creating a mega-RTA.[9] A cross-cumulation clause in the rules of origin of RTAs allows inputs from third parties to be treated as if they are inputs from the RTA parties. Thus, a cross-cumulation arrangement creates a new preferential trading relationship between the parties participating in the arrangement, forming a *de facto* mega-RTA.

Both a mega-RTA and a cross-cumulation arrangement facilitate the trade in intermediate inputs between the trading partners, in the process, facilitating the trade in final goods. Despite the difference between the two approaches, a cross-cumulation arrangement achieves the same effect as creating mega-RTAs by including third countries in the preferential trading arrangement. Mega-RTAs and cross-cumulation arrangements are different manifestation of the evolving nature of enlarged RTAs in the face of the GVC economy.

In this paper, we focus on the trade in goods part of mega-RTAs and cross-cumulation arrangements in order to examine their compatibility with the WTO law. We begin by explaining how overlapping RTAs may be created as a result of forming mega-RTAs. Then, we provide an overview of the overlapping RTAs that would be created by the enactment of the TPP. In the following section, we examine the origin and development of a cross-cumulation arrangements and show that they are *de*

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[7] In addition, a separate set of overlapping RTAs would be created as all three NAFTA parties become parties to both the TPP and bilateral RTAs with other TPP members. As of 2014, the US is a party to bilateral RTAs with TPP members such as Singapore, Peru, Chile, and Australia.

[8] It is reported that Canada and Mexico already expressed interest in joining the TTIP. See Michelle Egan, 'Including Canada and Mexico in an EU-US free trade agreement would create a genuine transatlantic market that would deliver significant economic benefits', EUROPP Blog, 10 September 2013, available at http://bit.ly/1e8ZSb0 (visited 23 October 2014).

[9] See Maria Donner Abreu, 'Preferential Rules of Origin in Regional Trade agreements', Staff Working Paper ERSD-2013-05. World Trade Organization, at 9.

facto mega-RTAs. Then, we compare mega-RTAs with cross-cumulation arrangements with respect to their legal conformity with the WTO law. In conclusion, we provide some suggestions about the future of mega-RTAs under the WTO system.

II. MEGA-RTAS UNDER GVCS

A. Overview of Overlapping RTAs

Mega-RTAs tends to be formed between a few countries with a significant share of the world economy. Because of the economic size of a mega-RTA, the enactment of a mega-RTA tends to result in formation of overlapping RTAs. We study the nature of a mega-RTA by examining its consequence on the trading system, the resulting overlapping RTAs. We begin with overlapping free-trade areas and proceed to examine overlapping customs union (CU).

1. *Overlapping Free-Trade Areas*

When WTO members belong to a number of RTAs, it is possible that some countries may jointly become parties to at least two RTAs. In this paper, if at least two countries are jointly parties to other RTAs, the RTAs are defined as overlapping RTAs and the parties are referred to as overlapping

parties.[10] Overlapping RTAs that are in force today are found in RTAs between the ASEAN[11] and its RTA partners. By way of illustration, the ASEAN countries and Japan are parties to the ASEAN – Japan FTA, while they are also parties to the bilateral RTAs between an individual ASEAN member country and Japan.[12] The bilateral RTAs between Japan and an individual ASEAN country are Japan – Singapore FTA, Japan – Thailand FTA, Japan – Indonesia FTA, Japan – Philippines FTA, and Japan – Vietnam FTA.[13] Thus, individual bilateral RTAs between Japan and an ASEAN country on the one

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[10] Overlapping RTAs are previously defined in a more general form as RTAs where the same country is a party to all the RTAs. For example, since the US is a party to both NAFTA and the US – Israel FTA, the two RTAs are overlapping RTAs under this definition. See Anne O. Krueger, 'Problems with Overlapping Free Trade Areas', in Takatoshi Ito and Anne O. Krueger (eds), *Regionalism versus Multilateral Trade Arrangements*, (Chicago, Illinois, University of Chicago Press, 1997) vol. 6, 9-24 at 9.

[11] The ASEAN countries are parties to the ASEAN Free Trade Area (AFTA). The AFTA provides for the preferential trade liberalization between the member countries of the ASEAN, forming an RTA under the Enabling Clause. To facilitate our analysis, we only included RTAs under GATT Article XXIV in our analysis of overlapping RTAs. The AFTA agreement, notified under the Enabling Clause, entered into force 28 January 1992 with the following new members: Brunei Darussalam, Cambodia, Lao People's Democratic Republic, Myanmar, and Viet Nam. See Framework Agreements on Enhancing ASEAN Economic Cooperation Singapore, 28 January 1992, and Agreement on the Common Effective Preferential Tariff Scheme (CEPT) for the ASEAN Free Trade Area, available at http://www.asean.org/communities/asean-economic-community/category/asean-trade-in-goods-agreement (visited 6 June 2013) and see also Basic Information, AFTA, available at http://rtais.wto.org/UI/PublicAllRTAList.aspx (visited 27 April 2013).

[12] Agreement on Comprehensive Economic Cooperative Economic Partnership Among Japan and Member States of the Association of Southeast Asian Nations (ASEAN – Japan FTA), available at http://www.mofa.go.jp/policy/economy/fta/asean/agreement.pdf (visited 1 May 2013).

[13] The Agreement between Japan and Singapore for a New-age Economic Partnership (Japan – Singapore) entered into force 30 November 2002; the Agreement between Japan and the Kingdom of Thailand for an Economic Partnership (Japan – Thailand FTA) entered into force 1 November 2007; the Agreement between Japan and Indonesia for Economic Partnership (Japan – Indonesia FTA) entered into force 1 July 2008; the Agreement between Japan and the Republic of Philippines for an Economic Partnership (Japan – Philippines FTA) entered into force 11 December 2008; the Agreement between Japan and the Socialist Republic of Vietnam for an Economic Partnership (Japan – Vietnam FTA) entered into force 1 October 2009. The list of all RTAs notified to the WTO can be found in WTO's RTA database, available at http://rtais.wto.org/UI/PublicAllRTAList.aspx (visited, 27 April 2013).

hand and the ASEAN – Japan FTA on the other hand would constitute overlapping RTAs. The overlapping parties are Japan and the ASEAN country.

In addition to the ASEAN – Japan FTA, the ASEAN entered into RTAs under GATT Article XXIV with a partner country or countries: the ASEAN – Australia – New Zealand FTA and the ASEAN – Korea FTA.[14] For a pair of ASEAN countries participating in the above RTAs, each RTA provides a separate route for preferential trade between the ASEAN parties.

For example, the ASEAN – Japan FTA provides that 'each Party shall … eliminate or reduce its customs duties on originating goods of the other Parties', where the term 'Parties' is defined as 'Japan and those ASEAN Members States for which this Agreement has entered into force collectively.'[15] Therefore, under the RTA, an ASEAN party must accord preferential tariff treatment to the originating goods from Japan and the ASEAN parties. In other words, the export to an ASEAN party from another ASEAN party, even if the product is not exported from Japan, would receive preferential treatment under the ASEAN – Japan FTA, provided that the product qualifies as an originating good of the other Parties. Similarly, the other RTAs between the ASEAN and its partners provide separate routes for preferential trade liberalization between pairs of ASEAN countries, resulting in overlapping RTAs.

Table 1: Overlapping RTAs in Asia

Overlapping Parties	**RTA 1**	**RTA2**	**RTA 3**	**NAFTA**	**TPP**
[Between two NAFTA members*]				NAFTA	TPP
[Between two ASEAN Members**]	ASEAN – Australia – NZ***	ASEAN – Japan	ASEAN – Korea		
Brunei, Malaysia	ASEAN – Australia – NZ	ASEAN – Japan	ASEAN – Korea		TPP
Brunei, Singapore	ASEAN – Australia – NZ	ASEAN – Japan	ASEAN – Korea		TPP
Brunei, Vietnam	ASEAN – Australia – NZ	ASEAN – Japan	ASEAN – Korea		TPP
Malaysia, Singapore	ASEAN – Australia – NZ	ASEAN – Japan	ASEAN – Korea		TPP
Malaysia, Vietnam	ASEAN – Australia – NZ	ASEAN – Japan	ASEAN – Korea		TPP
Singapore, Vietnam	ASEAN – Australia – NZ	ASEAN – Japan	ASEAN – Korea		TPP
Australia, Brunei	ASEAN - Australia - NZ				TPP
Australia, Malaysia	Malaysia - Australia	ASEAN - Australia - NZ			TPP

[14] The ASEAN – Korea FTA is notified to the WTO under both GATT Article XXIV and the Enabling Clause. For Korea's notification and the ASEAN countries' notification, see WTO Document, Notification of Regional Trade Agreement, WT/REG287/N/1, 8 July 2010; WTO Document, WT/COMTD/N/33, 8 July 2010.

[15] See paragraph 1 of Article 16 of the ASEAN – Japan FTA, above n 12.

Australia, Singapore	Singapore - Australia	ASEAN - Australia - NZ	TPP
Australia, Thailand	Thailand - Australia	ASEAN - Australia - NZ	
Australia, US	US - Australia		TPP
Brunei, Japan	Brunei - Japan	ASEAN - Japan	TPP
Brunei, New Zealand	ASEAN - Australia - NZ		TPP
Canada, Chile	Canada - Chile		TPP
Canada, Peru	Canada - Peru		TPP
US, Peru	US - Peru		TPP
Chile, Malaysia	Chile - Malaysia		TPP
Chile, Mexico	Chile - Mexico		TPP
Chile, US	US - Chile		TPP
Indonesia, Japan	Japan - Indonesia	ASEAN - Japan	
Japan, Malaysia	Japan - Malaysia	ASEAN - Japan	TPP
Japan, Mexico	Japan - Mexico		TPP
Japan, Philippines	Japan - Philippines	ASEAN - Japan	
Japan, Singapore	Japan – Singapore	ASEAN – Japan	TPP
Japan, Thailand	Japan - Thailand	ASEAN –Japan	
Japan, Viet Nam	Japan – Viet Nam	ASEAN –Japan	TPP
Korea, Singapore	Korea - Singapore	ASEAN - Korea	
NZ, Malaysia	NZ - Malaysia	ASEAN - Australia - NZ	TPP
NZ, Singapore	NZ - Singapore	ASEAN - Australia - NZ	TPP
NZ, Thailand	Thailand - NZ	ASEAN - Australia - NZ	
Peru, Singapore	Peru - Singapore		TPP
Peru, US	US - Peru		TPP
Singapore, US	US - Singapore		TPP

*NAFTA Members are Canada, Mexico, and the U.S.

**ASEAN Members are Brunei Darussalam (Brunei), Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand, and Vietnam.

***NZ stands for New Zealand.

RTAs by the ASEAN and its bilateral RTA partners illustrates overlapping RTAs but they are not overlapping RTAs created as a result of forming a mega-RTA. However, with the formation of the proposed Trans-Pacific Partnership (TPP) – a mega-RTA, the number of overlapping RTAs will significantly increase in the world trading system as shown in Table 1. As of 2014, the TPP negotiation includes Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the U.S. and Vietnam.[16] It is worth noting that all three members of the NAFTA – the U.S, Canada, and Mexico – are negotiating countries of the TPP agreement. In addition, four ASEAN

[16] See 'The Joint Statement at the TPP Ministers Meeting in Singapore', 18~20 May 2014, available at http://www.ustr.gov/tpp (visited 18 August 2014).

countries including Brunei Darussalam, Malaysia, Singapore, and Vietnam are participants in the TPP negotiation. Since these countries are parties to existing RTAs, more instances of overlapping RTAs would be created as a result of the TPP. The most conspicuous example of the overlapping RTAs resulting from the formation of the TPP would be the NAFTA and the TPP agreement, to which all three NAFTA countries would become overlapping parties.

2. *Overlapping CUs*

The overlapping RTAs in the above examples are all 'free-trade areas' under GATT Article XXIV. Our observation shows that parties to a CU may also together belong to another CU. For example, the EU and the Customs Union Between Turkey and the European Community (EU – Turkey CU) share the EU members as the overlapping parties.[17] The natural question is whether the two CUs can be considered overlapping RTAs as defined before.

To give an answer to the above question, we need to examine the scope of preferential trade liberalization under the EU – Turkey CU. The CU provides that '[i]mport or export customs duties and charges having equivalent effect shall be wholly abolished between the Community and Turkey on the date of entry into force of the Decision.'[18] The tariff elimination in the EU – Turkey CU applies to only goods that are 'wholly or partially obtained or produced from products coming from third countries which are in free circulation in the Community or in Turkey' and that are 'coming from third countries and in free circulation in the Community or in Turkey.'[19] However, it does not provide for elimination

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[17] The Customs Union between Turkey and the European Community, entered into force on 1 January 1996 following the Decision No 1/95 of the EC – Turkey Association Council of 22 December 1995 on implementing the final phase of the Customs Union (EU – Turkey CU), Official Journal of the European Communities, Volume 39, L35, 13 February 1996, pp. 1-47. See also WTO Document, CUSTOMS UNION BETWEEN TURKEY AND THE EUROPEAN COMMUNITY, Communication from the Parties to the Customs Union, WT/REC/N/1, 22 December 1995.

[18] See Article 4 of the EC – Turkey CU.

[19] See, paragraph 1 and 2 of Article 3 of the EU – Turkey CU, above n **오류! 책갈피가 정의되어 있지 않습니다.**

of duties on the trade of goods between the EU members. Notwithstanding the fact that the EU as a CU and the EU – Turkey CU had overlapping parties, the two CUs do not result in two separate preferential trading arrangements for goods traded between the members of the EU. For goods traded between the EU members, the preferential market access is provided solely by the EU. [20]

The example of the EU and the EU – Turkey CU illustrates the fact that CUs may not constitute overlapping RTAs even though there exist overlapping parties to some CUs. When a CU as a whole enters into a separate CU with a WTO member, the newly created CU and the existing CU inherently may not be considered as overlapping RTAs, because the pre-existing CU by definition adopts a uniform external commercial policy vis-à-vis third parties and the trade between the parties of the pre-existing CU is outside the scope of the new CU.

B. **Evolving Rules of Origin in Overlapping RTAs**

GVCs are characterized as 'unbundling' of production driven by the revolution in Information and Communication Technology (ICT).[21] Production stages of manufacturing, which previously occurred near each other, are now taking place in geographically dispersed locations. However, under the GVCs economy, production processes were dispersed globally, not necessarily confined to the territories of the parties of a bilateral RTA. Thus, the existing RTAs could not accord preferential treatment to some imports, because manufacturing processes increasingly involved globally dispersed production chains through which inputs from third countries were channelled into manufacturing of a final product.

To meet the demands of the preferential trade under the GVC economy, a new RTA with an enlarged membership that includes third countries are created. The RTA with an enlarged membership includes at least two countries that are also parties to the existing RTA, thus forming overlapping RTAs

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[20] Article 30 to 35 of the Treaty on the Functioning of the European Union provides elimination of tariffs and prohibits quantitative restriction on all goods traded between the parties of the EU, signed by the EU member states on 13 December 2007, and entered into force on 1 December 2009, Official Journal of the European Union, 30 March 2010, C 83/60 to C83/61.

[21] Richard Baldwin, 'Global supply chains: why they emerged, why they matter, and where they are going', in Deborah K. Elms and Patrick Low (eds), *Global value chains in a changing world* (Geneva: Word Trade Organization, 2013) 13-59 at 17.

with the existing RTA.[22] Now, some imports, which previously did not qualify as an originating good under an existing RTA, may now qualify for preferential treatment under the enlarged RTA.

The scope of qualifying imports in the enlarged RTA is likely to be greater than the pre-existing RTA that overlaps with it even if rules of origin assumed to be identical in the two RTAs. The difference can be attributed to the operation of a cumulation clause, which are provided in all RTAs with some variations. We illustrate the operation of a cumulation clause in the following. Suppose there are two RTAs with overlapping parties: a bilateral RTA between countries A and B, the A-B FTA and a plurialteral RTA, the A-B-C FTA. Some products may qualify as originating goods under both the A-B FTA and the A-B-C FTA. However, some products may only qualify as originating goods under the A-B FTA because the materials based on processing or value added that take place in country C are not considered as originating materials under a cumulation clause of the A-B FTA.

Under a cumulation clause of preferential rules of origin in an RTA, only the materials imported from the parties will be considered as originating materials from the territories of the RTA party where the final processing of the product is done.[23] Therefore, under the cumulation clause of the A-B FTA, the third party materials imported from C and incorporated in the final product will not be considered as originating materials. In contrast, under the A-B-C FTA, even materials imported from C and incorporated in the final product produced in countries A or B will be considered as originating materials through the operation of the cumulation clause provided in the RTA. The materials that would otherwise not qualify as originating materials under the bilateral RTA between country A and B are now considered originating materials under the enlarged RTA with the additional party C because the the A-B-C FTA allows materials produced within the territories of all three parties as originating materials.[24] The trade of intermediate inputs from C in the production of final goods in country A or B is facilitated through the operation of a cumulation clause under the A-B-C FTA.

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[22] The EU asked during the consideration of the Japan – Vietnam FTA '[w]hat are the main benefits that the Japan – Viet Nam FTA provides over those generated by the ASEAN – Japan FTA?' See WTO Document, WT/REG275/2, 10 June 2011, Economic Partnership Agreement Between Japan and Vietnam (Goods and Services), Questions and Replies.

[23] The rules of origin in RTAs always include cumulation clauses. An example is

[24] The illustration assumes that product specific rules of origin and applicable preferential tariffs under two overlapping RTAs are the same.

The operation of cumulation clauses in bilateral and plurialteral RTAs have given rise to the expanded definition of an originating good. Under the expanded definition, a qualifying good is simply an originating good or a good originating from the entire parties of the RTA without having an association with a particular party.[25] The definition of an originating good defined as originating from everywhere in the RTA territories accords well with the nature of production processes that are dispersed in the territories of an RTA, thus facilitating economic integration between the parties of the RTA.

Examples of the expanded notion of an originating good are found in recent bilateral RTAs. For example, the KORUS FTA provides that 'each Party shall progressively eliminate its customs duties on *originating goods* in accordance' with the tariff concession schedule of the party (emphasis added).[26] The provision contrasts with U.S.'s earlier bilateral RTA, the US – Singapore FTA, which provides that 'each Party shall progressively eliminate its customs duties on *originating goods of the other Party*' in accordance with the tariff elimination schedule.[27] The definition of an originating good in the KORUS FTA reflect the changing pattern of the international trade where goods are 'now from "everywhere", rather than …, from "somewhere."'[28]

An implication of the broadened definition is that an originating good under a plurilateral RTA with more than two parties requires non-discrimination between imports as long as imports are 'originating goods'. An importing party cannot discriminate between goods imported from different

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[25] In earlier formulations, an RTA party was required to eliminate customs duties on '*originating goods of the other Party*' (emphasis added). See paragraph 1 of Article 2.2 of the United States – Singapore Free Trade Agreement (US – Singapore FTA), available at http://www.ustr.gov/trade-agreements/free-trade-agreements/singapore-fta (visited 18 August 2014).

[26] See paragraph 1 of Article 2.3 of the KORUS FTA, entered into force March 15 2012, available at http://www.ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text (visited 18 August 2014). Although NAFTA was enacted earlier, it similarly requires elimination of duties and ORRC on 'originating goods', possibly because NAFTA was a plurilateral RTA. Ibid, paragraph 2 of Article 302 of the NAFTA.

[27] See paragraph 1 of Article 2.2 of the US – Singapore FTA, entered into force 1 January 2004, available at http://www.ustr.gov/trade-agreements/free-trade-agreements/singapore-fta/final-text (visited 14 October 2013).

[28] See OECD, WTO, UNCTAD, above n 1.

parties of NAFTA with respect to elimination of duties and ORRC because an import is not associated with a particular party.[29]

C. Expanded Trading Opportunity under Overlapping RTAs

Preferential trading opportunity is enlarged as a product qualifies for preferential treatment in multiple RTAs. The enlargement of preferential trading opportunity under overlapping RTAs can be illustrated in the following example of the ASEAN – Japan FTA, which overlaps with the bilateral RTA between Japan and individual ASEAN countries. Under the ASEAN – Japan FTA, materials originating in Japan that are incorporated in the product produced in ASEAN countries would be deemed as 'originating materials'.[30] As a result, some products for which processing were done in any ASEAN countries with materials from Japan would be conferred originating status under the Japan – ASEAN RTA. At the same time, the product may qualify as an originating good under the bilateral RTA between Japan and an individual ASEAN country such as the Japan – Viet Nam FTA. The two RTAs together provide greater trading opportunity for exporters between Japan and Viet Nam than either of them alone.[31]

Faced with a range of overlapping RTAs under which an export product may qualify as an originating good, the exporter will choose the RTA that eliminates duties over more tariff lines.

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[29] See paragraph 2 of Article 302 of the NAFTA, entered into force 1 January 1994, available at http://www.ustr.gov/trade-agreements/free-trade-agreements/north-american-free-trade-agreement-nafta (visited 28 November 2013).

[30] The treatment of materials originating from Japan as 'originating materials' when incorporated into the products manufactured in ASEAN countries is made possible by the cumulation clause, which provides that '[o]riginating materials of a Party used in the production of a good in another Party shall be considered as originating materials of that Party where the working or processing of the good has taken place.' See Article 29, ASEAN – Japan FTA, above n 12. See Article 23(h) for originating materials.

[31] A delegation from the EU asked what is the benefit that the Japan – Vietnam FTA provides over those provided by the Japan - ASEAN FTA during the examination of the Japan –Vietnam FTA in the Committee on Regional Trade Agreements (CRTA) held on 8 June 2011. The parties explained that in the Japan- Vietnam FTA, 'there are some tariff lines whose duty is more liberalized' than in the Japan-ASEAN FTA. See WTO Document, Economic Partnership Agreement between Japan and Viet Nam (Goods and Services), Questions and Replies, WT/REG275/2, 10 June 2011.

However, this decision would be complicated by the fact that the exporter must take into account the difference in non-tariff barriers to trade between the overlapping RTAs. [32] For example, exporters must take into account the difference in safeguard measures across overlapping RTAs. However, the decision must be taken under imperfect information because the likelihood that an import will face a safeguard measure varies across RTAs in accordance with the varying rules and procedures provided under the overlapping RTAs.

The variation in emergency measures across overlapping RTAs can be illustrated by the bilateral safeguard provisions under the Japan – Singapore FTA and the ASEAN – Japan FTA. The bilateral safeguard clause in the Japan – Singapore FTA provides that the parties may adopt safeguard measures only during the 'transition period'. [33] The transition period is defined as 10 years following the enactment of the RTA.[34] In contrast, the safeguard clause in the ASEAN – Japan FTA does not provide a time limitation on the use of safeguard measures, thus allowing the importing party to take a bilateral safeguard measure even after the tariff elimination or reduction process has been completed.[35] As a result, the risk of facing a bilateral safeguard measures 10 years after the enactment of the agreement under the ASEAN – Japan FTA is positive, whereas under the Japan – Singapore FTA, it is non-existent. Assuming that an export qualifies under both RTAs, an exporter must evaluate the overall

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[32] An overlapping RTA may provide additional market access liberalization that was not provided in an existing RTA between the same parties. The Japan – Viet Nam FTA provides a chapter on intellectual property rights, whereas the ASEAN – Japan FTA does not provide one. Chapter 9 of the Japan – Viet Nam FTA, entitled Intellectual Property, provides for intellectual property obligations between the two parties, whereas Article 53 of the ASEAN – Japan FTA, intellectual property is referred to as one of the fields of economic cooperation between the parties. See above n 13 and n 12.

[33] See paragraph 1 of Article 18 of the Japan – Singapore FTA, available at http://www.mofa.go.jp/region/asia-paci/singapore/jsepa-1.pdf (visited 4 May 2013). The agreement came into force on 30 November 2002. See Overview of the Japan – Singapore FTA at http://www.fta.gov.sg/fta_jsepa.asp?hl=7 (visited 3 February 2014). The agreement was amended by Protocol Amending the Implementing Agreement between the Government of Japan and the Government of the Republic of Singapore Pursuant to Article 7 of the Agreement between Japan and the Republic of Singapore for a New-Age Economic Partnership, entered into force on 19 March 2007, available at http://www.fta.gov.sg/fta_jsepa.asp?hl=7 (visited 3 February 2014).

[34] Ibid, Article 11(d) of the Japan – Singapore FTA for the definition of 'transition period'.

[35] See also Article 20 of the Japan –ASEAN FTA, above n 12.

risk of being subject to the bilateral safeguard measures under the RTAs in view of other difference in the rules.

III. CROSS-CUMULATION ARRANGEMENT UNDER GVC

A. Overview of Cross-Cumulation Arrangements

In parallel with the emergence of overlapping RTAs, the EU developed cross-cumulation arrangements in the rules of origin of RTAs with its partner countries to adjust to the demands of the growing GVC economy.[36] A cross-cumulation arrangement requires at least three participating countries in the arrangement. Each country is in a bilateral RTA relation with another country in the arrangement. A cross-cumulation allows materials originating from any country participating in the arrangement to be considered as originating materials under the RTA between two or more parties in the arrangement, provided that the material meets the rules of origin of the bilateral RTA between the exporting and importing country of the material.[37] A distinctive feature of a cross-cumulation arrangement is that the imported materials from all the countries included in the arrangement in cluding non-parties to the RTA will be treated as originating materials in determining whether the final good is qualified for preferential treatment as an originating good.

A cross-cumulation clause usually requires that a country participating in the arrangement enters into bilateral RTAs respectively with all other parties in the arrangement. As a condition for treating materials from non-parties as originating materials, a cross-cumulation clause requires that that the materials qualify as originating under the RTA between the exporting party and the non-party.[38] If a cross-cumulation clause additionally requires that all the bilateral RTAs in the arrangement share

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[36] See above n 9.

[37] See Ticon Development Consulting, 'Cross-Cumulation in Free Trade Agreements, Opportunities, Potential and Challenges', Study on behalf of the State Secretariat for Economic Affairs, SECO, Grundlagen der Wirtschaftspolitik Nr. 21, Berne 2013, at 30.

[38] See Article 3.6 of the Canada – Israel FTA, entered into force 1 January 1997, available at Foreign Affairs, Trade and Development Canada, http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/israel/toc-tdm.aspx?lang=eng (visited 3 April 2014).

common rules of origin, it is also referred to as diagonal cumulation.[39] Under a diagonal cumulation clause, materials from a non-party would be treated as originating materials if they meet the common rules of origin provided in the bilateral RTA between exporting party and the non-party.[40] A notable example of a diagonal cumulation arrangement is the Pan-Euro Mediterranean (Pan-Euro-Med) cumulation system, which is adopted by the EU with its RTA partners. It requires all parties participating in the arrangement to have concluded RTAs with each other and share nearly identical rules of origin provisions. The arrangement, as of 2014, involves all member states of the EU, the EFTA (Iceland, Liechtenstein, Norway and Switzerland) parties, Turkey, and Mediterranean countries, and Faroe Islands.[41]

To illustrate a cross-cumulation arrangement, suppose country A, B, and C respectively concludes bilateral RTAs with each other: the A-B FTA, the B-C FTA, and the A-C FTA. Now Country A produces a product from materials from country C.[42] The material is an originating material under the A-C FTA. The product made from this material is then exported from country A to country B under the A-B FTA. Under the cross-cumulation clause provided in the A-B FTA, the material from country C would be considered as originating material for the purpose of determining the origin of the final product exported from country A to B under the A-B FTA. Since C is not a party to the A-B FTA, the material exported from C would be considered entirely non-originating material in the absence of the cross-cumulation clause.

The cross-cumulation clauses will be provided in the bilateral RTAs between all the pairs of the countries that are participating in the arrangement. Therefore, the materials originating under any

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[39] The term 'cross-cumulation' often refers to diagonal cumulation which does not require the countries participating in the arrangement to have common rules of origin provisions. See Ticon Development Consulting, above n 37, at 30.

[40] Ibid, at 29.

[41] Mediterranean countries participating in the Pan Euro Mediterranean cumulation system are Algeria, Egypt, Israel, Jordan, Lebanon, Morocco, Syria, Tunisia and the Palestinian Authority of the West Bank and Gaza Strip. See System of Pan-Euro-Mediterranean cumulation, at http://ec.europa.eu/taxation_customs/customs/customs_duties/rules_origin/preferential/article_783_en.htm (visited 1 October 2014).

[42] See the illustration of cross-cumulation, World Custom Organization, at http://www.wcoomd.org/en/topics/origin/instrument-and-tools/comparative-study-on-preferential-rules-of-origin/specific-topics/study-annex/cum-dia.aspx (visited 21 March 2013). Here, the term diagonal cumulation is interchangeably used with the term cross-cumulation.

bilateral RTAs between the participating countries in the arrangement will be treated as originating materials under any other bilateral RTAs between any countries in the arrangement when they are incorporated into the final product. Although the illustration is based on three countries, it can be generalized to an arrangement consisting of any number of countries.

B. Cross-Cumulation Arrangement as *De Facto* mega-RTA

The effect produced by the cross-cumulation clause above is equivalent to that resulting from the formation of the A-B-C RTA, which forms overlapping RTAs with the A-B RTA, the B-C RTA and the A-C RTA. Under the A-B-C RTA, materials originating in any one of the parties will be considered as originating materials when they are incorporated into a final product exported from a party to another party. The equivalent effect will be achieved under a cross-cumulation arrangement, even without forming the A-B-C RTA. The materials originating from any country in the arrangement would be considered as originating materials when they are used as intermediate inputs in the final product traded under the A-B RTA, B-C RTA, or A-C RTA. The result is identical to the effect of forming a plurilateral RTA, the A-B-C RTA with a cumulation clause.

With respect to the trade in final products, the intra-RTA trade liberalization in the respective bilateral RTAs between countries participating in a cross-cumulation clause would be equivalent to the intra-RTA trade liberalization in the A-B-C RTA. A cross-cumulation clause has the effect of recognizing the intermediate inputs as originating materials when they are processed in the countries participating in the arrangement. By facilitating the trade in intermediate materials between the participating countries in the arrangement, the cross-cumulation clause also facilitates the trade in final goods between the countries.

The Pan-Euro-Med cumulation system is an example of a cross-cumulation arrangement creating a *de facto* mega-RTA between countries participating in the arrangement. The Pan-Euro-Med system was based on a network of bilateral protocols on rules of origin between the participants of the system.[43] This network is now in the process of replacement by the Regional Convention on Pan-Euro-

[43]See System of Pan Euro-Mediterranean Cumulation, European Commission, available at http://ec.europa.eu/taxation_customs/customs/customs_duties/rules_origin/preferential/article_783_en.htm (visited 2 October 2014).

Med Preferential Rules of Origin (Regional Protocol).[44] The Regional Protocol aims to achieve 'application of identical rules of origin for the purpose of cumulation of origin for goods traded between all Contracting Parties' to the protocol.[45] However, the Regional Protocol does not provide for elimination of the intra-RTA trade barriers between the parties of the treaty as required by GATT Article XXIV:8 to form an RTA. Instead, the network of bilateral RTAs eliminates the trade barriers between the pairs of the parties to the Regional Protocol. Therefore, the cross-cumulation clauses in the Pan-Euro-Med system result in the same effect as the creation of the putative mega-RTA encompassing all the participants in the Pan-Euro-Med cumulation system.

IV. MEGA-RTAS AND CROSS-CUMULATION ARRANGEMENTS UNDER THE WTO LAW

A. Legality of Mega-RTAs

Mega-RTAs as preferential trade agreements must satisfy the requirements of GATT Article XXIV as they derogate from GATT Article I. Mega-RTAs that result in overlapping RTAs raise potential new issues under GATT Article XXIV because a mega-RTA that overlaps with a pre-existing RTA may undermine the intra-RTA trade in the pre-existing RTA with which it forms overlapping RTAs.

To test whether mega-RTAs are consistent with GATT Article XXIV, we apply the Appellate Body's *Turkey – Textiles* two-prong test.[46] The first prong examines whether the challenged measure takes effect 'upon the formation' of a legitimate RTA that fully meets the Article XXIV:8 and Article XXIV:5 requirements.[47] The second prong of *Turkey – Textiles* requires that the party defending the challenged measure under Article XXIV must demonstrate that the formation of an RTA 'would be prevented if it were not allowed to introduce the measure at issue'.[48] In our case of a mega-RTA, the

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[44] The regional convention on Pan-Euro-Mediterranean Preferential Rules of Origin has been open for signature on 15 June 2011. Ibid.

[45] See preamble of the Regional Protocol, available at available at http://www.efta.int/media/documents/legal-texts/free-trade-relations/montenegro/pem-convention-on-origin.pdf (visited 2 October 2014).

[46] WTO Appellate Body Report, *Turkey – Restrictions on Imports of Textiles and Clothing Products* (*Turkey–Textiles*), WT/DS34/AB/R, adopted 19 November 1999, para. 43.

[47] Ibid, para. 58.

[48] Ibid.

challenged measures are the RTA parties' regulations to eliminate 'duties and other restrictive regulations of commerce' (ORRC).

First, under the first prong of the *Turkey – Textiles* test, the challenged measures should meet the internal requirement under Article XXIV:8 and the external barriers requirement under Article XXIV:5. The former requires that duties and ORRC applicable to the intra-RTA trade should be eliminated in substantially all the trade between the RTA parties. The latter requires that the barriers to trade with third parties should not be raised.

First, under the first prong of *Turkey – Textiles*, the timing requirement would be entirely met because the challenged measures are stipulated in the mega-RTA at the time of its foramtion. Next, under the first prong of *Turkey – Textiles*, the RTAs must meet the internal and the external trade requirements. With respect to the internal trade requirement, we consider two hypothetical free-trade areas that overlap with each other: a bilateral RTA between A and B (A-B FTA) and a mega-RTA that includes another party C (A-B-C FTA). The internal trade requirement under GATT Article XXIV:8(b) for a free-trade area requires that 'duties and other restrictive regulations of commerce … are eliminated on substantially all *the trade between the constituent territories* in products *originating* in such territories' (emphasis added). For the A-B FTA, the scope of the trade that is subject to trade liberalization under Article XXIV:8(b) is the trade between the constituent territories of the RTA in products originating in the territories of the parties of the A-B FTA.

Now consider the A-B-C FTA with more than two parties, the internal trade requirement under Article XXIV:8(b) for this mega-RTA must be met entirely independent of the requirement for the A-B FTA even if those two RTAs constitute overlapping RTAs. For the A-B-C FTA, 'the trade between the constituent territories' in its ordinary meaning would refer to the trade between all pairs of the parties to the RTA. They are the trades between A and B, B and C, and C and A. Of these trades, the subject of tariff elimination under GATT Article XXIV:8(b) is further limited to those products 'originating in such territories', which are the territories of A, B, and C.

A possible issue with respect to the internal trade requirement is the 'redundancy' in preferential trade liberalization required in the A-B FTA and in the A-B-C FTA. A question arises as to whether elimination of the duties and ORRC with respect to 'substantially all the trade' between A and B under the A-B FTA results in elimination of duties and ORRC for the trade between the A-B-C FTA. The redundancy does not arise because the intra-RTA trade liberalization in one RTA operates entirely independent of that under another RTA even if those two RTAs are overlapping RTAs. The imports that are subject to trade liberalization in the A-B FTA and the A-B-C FTA are respectively the products originating in the territories of A and B and the products originating in the territories of A, B, and C.

As discussed before, a recent evolution in the definition of an originating good in RTAs does not associate an originating import with a particular exporting party of an RTA. Moreover, this

definition of an 'originating good' without associating it with a particular party accords with the term in GATT Article XXIV:8(b), which defines the scope of products subject to elimination as 'the trade between the constituent territories in products *originating* in such territories (emphasis added).' Since 'such territories' are plural, the meaning of the term '*originating* in such territories' permits a product that originates in the territories of an RTA.

Next, under the external trade barrier requirement of Article XXIV:5(b) for a free-trade area 'duties and other regulations of commerce' applicable to the trade with third parties shall not be 'higher or more restrictive' than those existing prior to the formation of the free-trade area. Under this requirement, the barriers to trade on imports from third parties shall not rise after the formation of an overlapping free-trade area in comparison to those before the formation of the free-trade area.

To examine overlapping RTAs under GATT Article XXIV, consider hypothetically that the A-B FTA, is formed prior to the A-B-C FTA, a mega-RTA. The two RTAs form overlapping RTAs. Under both RTAs assume that duties and ORRC for all tariffs lines are entirely eliminated to simplify our analysis. Assume also that the rules of origin under the A-B-C FTA and the A-B FTA are entirely the same except for the difference in the operation of the accumulation clauses, which operate bilaterally in the A-B FTA and trilaterally in the A-B-C FTA. In this case, the A-B-C FTA can entirely subsume the A-B FTA as the trade liberalization under the A-B FTA can be entirely accomplished under the A-B-C FTA. Under the A-B-C FTA, products that would not have qualified under the A-B FTA would qualify as originating goods under the A-B-C FTA through the operation of the accumulation clause.

The formation of the A-B-C FTA under the above hypothetical situation result in the trade diversion due to the preferential rules of origin.[49] Since the preferential rules of origin except for the operation of the accumulation clauses in both the A-B FTA and the A-B-C FTA are entirely assumed to be the same and duties and ORRC are entirely eliminated for all tariff lines, the trade diversion effect of the formation of the A-B-C FTA is attributable to the accumulation clause. In particular, manufacturers in countries A and B will now source more intermediate goods from C than from each

[49] The trade diversion effect can be classified in two different types: the trade diversion due to tariff elimination according to Viner and the trade diversion due to rules of origin. The latter trade diversion effect due to preferential rules of origin induces more trade in intermediate materials between RTA parties and less from non-parties. See Jacob Viner, 'The Customs Union Issue', in Jagdish Bhagwati, Pravin Krishna, and Arvind Pangariya (eds), *Trading Blocs, Alternative Approaches to Analyzing Preferential Trade Agreements* (Cambridge, MA: MIT Press, 1999), 105-117 at 108. See Edwin A. Vermulst, 'Rules of Origin as Commercial Policy Instruments-Revisited,' 26(6) Journal of World Trade 61 (1992), at 98. See Anne O. Krueger, 'Are Preferential Trading Arrangements Trade-Liberalizing or Protectionist?', 13(4) The Journal of Economic Perspectives 105 (1999), at 113.

other; manufacturers from countries B and C will source more inputs from A; manufacturers from countries A and C will source more inputs from B. The overall effect is what anticipated by the creation of the A-B-C FTA. The mega-RTA will better serve the need of the GVC economy than the A-B FTA, the B-C FTA and the A-C FTA operating separately.

However, if the A-B-C FTA adopts more restrictive rules of origin than the A-B FTA with which it overlaps, the trade diversion effect due to restrictive rules of origin will induce the sourcing of inputs from country C rather than from countries A and B under the A-B FTA. The trade diversion effect is greater than that caused by the operation of an accumulation clause. The trade diversion is not necessarily an inherent consequence of forming the A-B-C FTA.

As applied to the case of the TPP, if TPP and NAFTA eliminate all duties and ORRC for all tariff lines and both adopt the same rules of origin, the TPP would simply substitute for NAFTA even for the trade between the NAFTA parties. In reality, it is likely that there would be imperfections in the internal trade liberalization in both the TPP and NAFTA. To the extent that NAFTA achieves a greater level internal trade liberalization, NAFTA as an RTA would be more desirable than the TPP for some exporters of goods destined for NAFTA.

Aside from the difference in tariff elimination commitments, the difference in the preferential rules of origin in the TPP and NAFTA adds another layer of complication.[50] For example, suppose a NAFTA country under both NAFTA and TPP provides elimination of tariffs and ORRC for a product. In that case, the exporter will be indifferent between NAFTA and the TPP. The exporter will choose the RTA under which its export product will qualify as an originating good. As anticipated by the parties of the TPP, the TPP will enable a product with low NAFTA value-added or NAFTA local content to qualify as originating good if the inputs from the TPP parties are sufficient to meet the rules of origin under the TPP. However, if the rules of origin applicable to the product under the TPP is more restrictive than that of NAFTA, an additional trade diversion effect would arise due to the restrictive rules of origin. The effect would divert the trade in intermediate inputs from NAFTA parties to other TPP parties. The

[50] Jong Bum Kim and Joongi Kim, 'The Role of Rules of Origin to Provide Discipline to the GATT Article XXIV Exception', 14 Journal of International Economic Law 613 (2011), at 636.

rules of origin for the TPP for that product encourages sourcing of inputs from TPP parties other than the NAFTA countries to a greater degree than what an accumulation clause alone would induce.[51]

The question is whether the restrictive rules of origin in the TPP for the product should be considered as raising the barriers to the trade in the intermediate inputs between the NAFTA countries in violation of GATT Article XXIV:5? In answering this question, the preferential rules of origin as regulations of commerce should be considered as ORC under Article XXIV:5 because they can be used for trade-restrictive purpose.[52] However, the restrictive preferential rules of origin, even if they are considered ORC, are not applied to the trade with countries that are not parties to the TPP; they are applied to the intra-RTA trade between the NAFTA parties.[53] Therefore, the infringement of GATT Article XXIV:5 requirement for the TPP does not arise. In any case, the NAFTA parties is not likely to sign the TPP unless they expect the lowered trade barriers with the TPP parties including other NAFTA countries.

Another feature of the preferential rules of origin that deserves close examination is the cumulation clauses in RTAs, which cause trade diversion effect. An accumulation clause confers originating status to the materials imported from the territories of the RTA, leading to increased trade in intermediate goods between the parties of the RTA. A cumulation clause should be considered as an inherent feature of a RTA because the material inputs from the RTA partner country will be processed to manufacture a final product, which is exported back to the RTA partner country. In sum, a cumulation clause 'facilitate trade between the constituent territories' of a RTA under GATT Article XXIV, thus conforming to the aim of an RTA.[54]

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[51] 'Rules of origin can be very damaging to the trade of third parties if the rules are designed to strongly favour products and parts manufactured within' a free-trade area. See John Jackson, 'Regional Trade Blocs and the GATT', 16(2) World Economy 121 (1993), at 126

[52] If preferential rules of origin are not considered as ORC, it would raise the possibility of even granting preference to even non-signatory countries of a free-trade area with a world-wide trade impact. See John Coyle, 'Rules of Origin As Instruments of Foreign Economic Policy: An Analysis of the Integrated Sourcing Initiative in the U.S.-Singapore Free Trade Agreement', 29 Yale J. Int' L. 545 (2004), at 579.

[53] See Wong Chan and L. Alan Winters, 'How Regional Blocs Affect Excluded Countries: The Price Effects of Mercosur', 92(4) American Economic Review 889 (2002), at 901.

[54] See paragraph 4 of GATT Article XXIV.

B. **Legality of Cross-Cumulation Arrangement**

As discussed previously, a cross-cumulation arrangement substitutes for mega-RTAs. In order to evaluate the merits of a cross-cumulation arrangement as an alternative for concluding a mega-RTA, we ask whether a cross-cumulation clause in the rules of origin in RTAs conforms to the requirements of GATT Article XXIV.

Under a cross-cumulation clause, materials that are originating from the non-parties to an RTA are treated as if they are materials originating from the RTA parties if the materials are imported from the non-parties participating in the cross-cumulation arrangement. The importing RTA party that participates in a cross-cumulation arrangement accords more favourable treatment to the material inputs from the non-parties participating in the cross-cumulation arrangement than to material inputs from countries outside of the arrangement. As a result, the materials imported from other WTO members excluded from the cross-cumulation arrangement are accorded with less favourable treatment, resulting in GATT Article I violation.

The discriminatory treatment based on cross-cumulation clause is not with respect to the treatment of final products but of material inputs. The RTA party participating in the arrangement provides preferential rules of origin to determine whether the exports from its RTA partner qualifies for preferential treatment under the RTA. In the process, the cross-cumulation clauses in the preferential rules of origin in the RTA constitutes 'regulations and requirements affecting internal sales'[55] that creates favour that are granted to the imports of material inputs from the countries participating in the arrangement but not granted to the non-participating countries in violation of GATT Article I.

Now, the question is whether the GATT Article I inconsistency of a cross-cumulation arrangement meets the requirements of the exception under GATT Article XXIV. To fulifill the requirements of the legal defense under GATT Article XXIV, the challenged measures must satisfy the two-prongs test under the Appellate Body decision in *Turkey – Textiles*.[56] The first prong of the test requires that the challenged measure should be taken at the time of the formation of the RTA that

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[55] See paragraph 4 of GATT Article III, which is referred to in paragraph 1 of GATT Article I.

[56] WTO Appellate Body Report, *Turkey – Restriction on Imports of Textiles and Clothing Products* (*Turkey – Textiles*), WT/DS34/AB/R, adopted 19 November 1999, para 58.

satisfies the internal trade liberalization requirement and the external trade barrier requirement.[57] The internal trade liberalization requirement provided in GATT Article XXIV:8 requires elimination of 'duties and other restrictive regulations of commerce' on 'substantially all the trade' between the RTA parties in products originating in the territories of the RTA parties.[58] A cross-cumulation clause reduces the restrictiveness of the preferential rules of origin of an RTA by recognizing materials from designated non-parties as originating materials. Therefore, a cross-cumulation clause does not derogate from the internal trade liberalization requirement under GATT Article XXIV:8.

Next, the external trade requirement under Article XXIV:5 requires that the 'duties and other regulations of commerce' shall not rise or be made more restrictive with respect to the trade with the non-parties after the formation of the RTA that those existing prior to the formation of the RTA.[59] The first issue is whether a cross-cumulation clause should be considered 'other regulations of commerce' under GATT Article XXIV:5. To begin with, a cross-cumulation clause is part of the rules of origin of RTAs. A cross-cumulation clause as part of rules of origin of the RTA cannot be considered a trade-neutral feature of an RTA. It is already deemed 'regulations and requirements affecting the internal sale' under GATT Article I. A cross-cumulation clause specifically regulates the commerce between the parties of the RTA. It also regulates the trade in intermediate inputs between the parties of the RTA and non-parties. Since cross-cumulation clauses are not 'duties', they should be deemed as 'other regulations of commerce' under GATT Article XXIV:5.

The aim of Article XXIV:5 is to prohibit RTAs from raising 'barriers to the trade of other contracting parties' of the RTA. With respect to the trade with the non-parties that are participating in the arrangement, 'other regulations of commerce' have become less restrictive after the formation of the RTA than before the formation of the RTA. However, the barriers to the trade with respect to the imports from excluded non-parties are raised as a result of the formation of the RTAs in comparison to the situation prior to the formation of the RTA. Since non-parties to the RTAs except for those participating in the arrangement are facing more restrictive barriers to the trade as a result of the formation of the RTA, the challenged measure fails Article XXIV:5 requirement.

Now, under the second prong of the *Turkey-Textiles* test, it should be shown that a cross-cumulation clause should be necessary for the formation of an RTA. The best support for the necessity of the cross-cumulation is that the cross-cumulation clause produces trade benefits that are necessary for the formation of the RTA. The trade benefit to the RTA parties from a cross-cumulation clause is

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[57] Ibid.

[58] See GATT Article XXIV:8(a) for a CU and GATT Article XXIV:8(b) for a free-trade area.

[59] See GATT Article XXIV:5(a) for a CU and GATT Article XXIV:5(b) for a free-trade area.

that it facilitates the recognition of the final products traded between the RTA parties as originating goods of the RTA if the product is processed from intermediate inputs imported from non-parties participating in the arrangement. The intra-RTA trade is facilitated because the rules of origin with a cross-cumulation clause is less restrictive to the intra-RTA trade than without it. The 'trade creation' effects to the parties of the RTA through the cross-cumulation clause accrues to the producers of the final products and the exporters of intermediate goods from the non-parties in the arrangement.

However, this trade creation effect is accompanied by 'trade diversion' effect because more costly intermediate goods from the designated non-parties than from other non-parties may be used by producers in the RTA parties.[60] In addition, a cross-cumulation clause would be discriminatory because intermediate goods from the excluded non-parties are less favourably treated than those from the designated non-parties. In contrast to the GATT Article I inconsistency arising from preferential elimination of duties and ORRC between the RTA parties, the GATT Article I infringement arising from a cross-cumulation clause is not an inherent outcome of forming an RTA. As an alternative to adopting cross-cumulation clauses, the existing RTAs may be enlarged in their membership to include third countries as the parties of the RTAs. Therefore, cross-cumulation clauses in the rules of origin of RTAs, therefore, should not be considered as necessary for the formation of the RTAs.

It is possible that the RTA parties may have entered into an arrangement under which the RTA parties may in turn receive the benefits of the cross-cumulation arrangement in another RTA to which the designated non-parties in the former RTA are now parties. The fact that the diagonal cumulation clause in the RTA may have been necessary for other RTAs does not support the case that the challenged measure was necessary for the RTA in question. The *Turkey – Textiles* necessity test ask whether the challenged measure adopted as part of the RTA is necessary for the formation of the RTA in question, independent of the formation of other RTAs. In sum, a diagonal cumulation fails to meet the external trade barrier requirement under Article XXIV:5 of the first prong and fails the necessity test under the second prong of the *Turkey – Textiles* test.

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[60] See Anne O. Krueger, 'Are Preferential Trading Arrangements Trade-Liberalizing or Protectionist?', 13 The Journal of Economic Perspectives 105 (1999), at 113. The trade diversion effect caused by rules of origin should be contrasted with the trade diversion effect resulting from elimination of duties between the RTA parties as required by GATT Article XXIV:8.

V. CONCLUSION

Mega-RTAs and cross-cumulation arrangements are two distinctive features of RTAs, which have evolved to accommodate the demand of the manufacturing process that requires global sourcing of intermediate inputs. Mega-RTAs have the effect of including as the RTA parties those countries from which intermediate goods are sourced. In contrast, a cross-cumulation arrangement in the rules of origin of RTAs allows even intermediate inputs imported from third parties as originating materials. Although the two evolving features of RTAs have the same effect of facilitating the trade in intermediate goods, and in the process the trade in final goods, their legal conformity with the WTO law is not equivalent.

With respect to a mega-RTA, a newly formed mega-RTA that overlaps with a pre-existing RTAs diverts trade away from the parties of the pre-existing RTAs. Nevertheless, a Mega-RTA by itself does not fail the requirements of GATT Article XXIV as the trade diversion effect can be considered an inherent feature of forming RTAs, regardless of whether a newly formed mega-RTA overlaps with pre-existing RTAs. In contrast, cross-cumulation clauses in RTAs fail to conform to the requirements of GATT Article XXIV as they result in a more favourable treatment of intermediate goods from designated non-parties than those from other non-parties. The resulting GATT Article I violation arises in addition to the inherent GATT Article I inconsistency resulting from the intra-RTA trade liberalization as required by GATT Article XXIV:8.

Despite the legal conformity of mega-RTAs with the WTO system, a mega-RTA with the resulting overlapping RTAs raise transaction costs for exporters who must choose an RTA from a set of RTAs with which export products may qualify as originating goods. In addition, mega-RTAs that result in overlapping RTAs burden the importing authorities with the costs of administering complex rules of origin.[61] Therefore, the WTO system as a whole is burdened with the transaction and administrative costs caused by the complexity of overlapping RTAs. A natural path to reforming mega-RTAs is consolidating any pre-existing overlapping RTAs by creating a mega-RTA that substitutes for pre-existing overlapping RTAs.

In contrast, a cross-cumulation arrangement does not create overlapping RTAs but it fails GATT Article XXIV requirements. A cross-cumulation arrangement should be recognized as a *de jure* mega-RTA to bring them into conformity with the WTO law. The conversion can be done by the

[61] The cost to the importing authority may include the administrative cost of verifying the certificates of origin submitted to the authority by the importers. Atsushi Tanaka, 'World Trends in Preferential Origin Certification and Verification', WCO Research Paper No. 20, November 2011, at 18.

creation of a mega-RTA that includes all the countries participating in a cross-cumulation arrangement. The mega-RTA as an alternative to a system of cross-cumulation clauses would bring to light what is a *de facto* RTA between all the parties of the cross-cumulation arrangement. At a minimum, the WTO system through the Committee on Regional Trade Agreement (CRTA) will bring transparency to the *de facto* preferential trading systems that lie outside the scrutiny of the WTO by converting them to *de jure* RTAs.

Equivalence of SPS/TBT Standards and Public Policy Objectives

Yuka Fukunaga

I. Introduction

There is no question that each country has sovereign right to adopt and implement domestic regulations of its choice.However,domestic regulations can be an obstacle to trade if they differ from country to country: a product that complies with a domestic regulation of an exporting country cannot be exported to another country if the product does not comply with a regulation of the latter country which is different from that of the former.Domestic regulations have come to the forefront of trade liberalization in today's world where most tariff barriers have been eliminated or substantially reduced.

Against this background, the Agreement on the Application of Sanitary and Phytosanitary Measures [*hereinafter* SPS Agreement] and the Agreement on Technical Barriers to Trade [*hereinafter* TBT Agreement]provides for harmonization of domestic regulations of WTO Members as one of their core principles. More specifically, Article 3.1 of the SPS Agreement provides that "Members shall base their sanitary or phytosanitary [*hereinafter* SPS] measures on international standards, guidelines or recommendations, where they exist." Similarly, Article 2.4 of the TBT Agreement provides that "[w]here technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulations." Harmonization seeks to remove obstacles to trade by reducing regulatory differences between Members, while it is distinguished from unification because it does not require Members to adopt identical regulations.[1]Harmonization is expected to not only liberalize trade but also enable fair competition and ensure the effectiveness of regulations.[2]

Despite the benefits of harmonization of domestic regulations, there may be circumstances where harmonization does not produce a desirable outcome. Particularly, given the cultural, social and historical diversity of the world, countries may well adopt and implement different domestic regulations to deal with their unique problems within their territories. Even when countries share a common goal such as safety and environmental protection, they often choose to adopt different regulatory methods to achieve that in consideration of cultural, social and historical backgrounds of their

[1]JUNJI NAKAGAWA, INTERNATIONAL HARMONIZATION OF ECONOMIC REGULATION (Yuhikaku, 2008) [*Japanese*], at 122 [translated by Jonathan Bloch &Tara Cannon (Oxford University Press, 2011)].
[2]*Id.*, at 2-4.

respective societies. Harmonization could jeopardize thecountries' legitimate regulatory autonomy to adopt and implementregulations of their choice to achieve their public policy objectives.

In light of such risk, the SPS Agreement and the TBT Agreement explicitly allow an exception for the harmonization in certain circumstances,[3] and provide rules concerning *un*harmonized regulations. Equivalence, which is discussed in this paper, is one of such rules that tackle with remaining differences of domestic regulations in order to make sure that the differences do not create an unnecessary obstacle to trade.According to the principle of equivalence, a country shall accept other countries' regulations that are different from its regulation as equivalent as long as they achieve an objective pursued by its regulation. In other words, the country shall accept the import of a product that complies with an equivalent (although different) regulation of an exporting country.

Equivalence is often seen as an alternative to harmonization. That is, in the case where harmonization is not desirable and therefore differences of domestic regulations remain, equivalence can minimize costs to trade caused by the differences. Equivalence may also be considered as leaving more regulatory autonomy to countries because, unlike harmonization, it does not require countries to change their regulations. In fact, equivalence is praised by an author as "exemplary of new approaches to (transnational) governance and regulation," as it "permit[s] the maintenance of regulatory diversity, while at the same time prompting market integration."[4]

However, this paper argues that equivalence can be seen as an alternative to harmonization only in the sense that it can promote trade liberalization where harmonization cannot do so. Put differently, it points out that the belief that equivalence allows more regulatory autonomy is merely illusion and that equivalence could jeopardize the autonomy of countries to achieve their public policy objectives as much as, or even more than, harmonization does so. For this purpose, Section II of this paper describes the rules under the SPS/TBT Agreements, followed by Section III,which

[3] For example, Article 3.3 of the SPS Agreement provides that "Members may introduce or maintain sanitary or phytosanitary measures which result in a higher level of sanitary or phytosanitary protection than would be achieved by measures based on the relevant international standards, guidelines or recommendations, if there is a scientific justification, or as a consequence of the level of sanitary or phytosanitary protection a Member determines to be appropriate." Article 2.4 of the TBT Agreement allows an exception from the harmonization obligation when relevant international standards "would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued" by Members.

[4] JOANNE SCOTT, THE WTO AGREEMENT ON SANITARY AND PHYTOSANITARY MEASURES: A COMMENTARY (Oxford University Press, 2007), at 163.

examines how equivalence is applied in practice. Section IV concludes with a brief assessment of whethercountries' regulatory autonomy to achieve their public policy objectives is and can be respected by equivalence.

II. Equivalence in the WTO SPS/TBT Agreements

A. SPS Agreement

Equivalence of SPS measures is provided for in Article 4 of the SPS Agreement. According to Article 4.1, "Members shall accept the [SPS] measures of other Members as equivalent, even if these measures differ from their own or from those used by other Members trading in the same product, if the exporting Member objectively demonstrates to the importing Member that its measures achieve the importing Member's appropriate level of [SPS] protection." In addition, Article 4.2 requires Members to, "upon request, enter into consultations with the aim of achieving bilateral and multilateral agreements on recognition of the equivalence of specified sanitary or phytosanitary measures."

The SPS Committee has adopted a Decision on the implementation of Article 4,[5] which is not legally binding, but can be regarded authoritative enough to "expand[] on the Members' own understanding of how Article 4 relates to the rest of the SPS Agreement and how it is to be implemented."[6] According to the Decision, on request of the exporting Member, the importing Member should "explain the objective and rationale of [a relevant SPS] measure", "identify clearly the risks that the relevant measure is intended to address," and "indicate the appropriate level of protection which its [SPS] measure is designed to achieve."[7] On the part of the exporting Member requesting recognition for equivalence, it shall "provide appropriate science-based and technical information to support its objective demonstration that its measure achieves the appropriate level of protection identified by the importing Member," and "provide reasonable access, upon request, to the importing Member for inspection, testing and other relevant procedures for the recognition of equivalence."[8]When the importing Member examines the request, it "should analyze the science-based and technical information provided by the exporting Member on its [SPS] measure with a view to

[5] SPS Committee, Decision on the Implementation of Article 4 of the Agreement on the Application of Sanitary and Phytosanitary Measures: Revision, G/SPS/19/Rev.2 (23 July 2004) [*hereinafter* SPS Equivalence Decision].
[6] Panel Report, *United States – Certain Measures Affecting Imports of Poultry from China*, WT/DS392/R (29 September 2010) [*hereinafter US – Poultry*], para.7.136.
[7] SPS Equivalence Decision, *supra* note 5, para.2.
[8] *Id.*, para.4.

determining whether these measures achieve the level of protection provided by its own relevant [SPS] measure."[9] The Decision further states that "[i]f the exporting Member demonstrates by way of an objective basis of comparison or similar approach established by a relevant international organization that its measure has the same effect in achieving the objective as the importing Member's measure, the importing Member should recognize both measures as equivalent."[10]The Decision is in line with the guidelines adopted by CODEX Alimentarius Commission [11] and the World Organization for Animal Health [*hereinafter* OIE].[12]

In short, under the SPS Agreement and the SPS Equivalence Decision, equivalence may be recognized either unilaterally by an importing Member or in an agreement between Members. An exporting Member seeking recognition for equivalence shall make a request to that effect. The exporting Member also bears the burden to demonstrate that its SPS measure is equivalent to that of the importing Member in the sense that the former achieves the appropriate level of protection pursued by the latter. At the same time, the importing Member has to cooperate with the exporting Member in disseminating information regarding its relevant SPS measure.

B. TBT Agreement

Article 2.7 of the TBT Agreement provides that "Members shall give positive consideration to accepting as equivalent technical regulations of other Members, even if these regulations differ from their own, provided they are satisfied that these regulations adequately fulfil the objectives of their own regulations." A careful reading of the provision suggests that, unlike Article 4 of the SPS Agreement, this provision does not necessarily require Members to "accept" technical regulations of other Members as equivalent, even if the exporting Member objectively demonstrates to the

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[9] *Id.*, para.7.
[10] *Id.*
[11] Guidelines on the Judgment of Equivalence of Sanitary Measures Associated with Food Inspection and Certification Systems, CAC/GL 53-2003.CODEX Alimentarius Commission has also adopted practical guidelines for the development of bilateral or multilateral equivalence agreements. Guidelines for the Development of Equivalence Agreements Regarding Food Import and Export Inspection and Certification Systems, CAC/GL 34-1999.
[12] OIE Terrestrial Animal Health Code, Chapter 5.3. OIE procedures relevant to the Agreement on the Application of Sanitary and Phytosanitary Measures of the World Trade Organization, http://www.oie.int/index.php?id=169&L=0&htmfile=chapitre_procedures_SPS_agreement.htm.

importing Member that its technical regulation adequately fulfill the objectives of the importing Member's regulations. It is suffice for the importing Member to "give positive consideration to accepting as equivalent technical regulations" of the exporting Member.

In addition, Article 6 of the TBT Agreement provides for equivalence regarding results of conformity assessment. Article 6.1 provides that "Members shall ensure, whenever possible, that results of conformity assessment procedures in other Members are accepted, even whenthose procedures differ from their own, provided they are satisfied that those procedures offer an assurance of conformity with applicable technical regulations or standards equivalent to their own procedures."The provision also emphasizes the importance of "prior consultations [that] may be necessary in order to arrive at a mutually satisfactory understanding."Moreover, Article 6.3 provides that "Members are encouraged, at the request of other Members, to be willing to enter into negotiations for the conclusion of agreements for the mutual recognition of results of each other's conformity assessment procedures." While Article 6 does not explicitly require Members to "accept" results of conformity assessment procedures as equivalent even when the procedures offer an assurance of conformity with applicable technical regulations equivalent to their own procedures, it clearly encourages such as acceptance.

The TBT Committee has agreed to "initiate work on developing practical guidelines on how to choose and design efficient and effective mechanisms aimed at strengthening the implementation of the TBT Agreement, including the facilitation of acceptance of conformity assessment results."[13] Nevertheless, such guidelines have not yet been adopted so far.

In short, the TBT Agreement provides for equivalence of two different kinds: equivalence of technical regulations and equivalence of results of conformity assessment procedures. The TBT Agreement explicitly acknowledges that the second kind of equivalence can be recognized either unilaterally by an importing Member or in a mutual recognition agreement [*hereinafter* MRA] between Members. Although the TBT Agreement mentions only a unilateral recognition of equivalence of technical regulations, it does not exclude the possibility that equivalence oftechnical regulations is recognizedbased on an international agreement. The TBT Committee has not yet clarified the allocation of burden of proof between importing and exporting Members in the demonstration of equivalence of technical regulations or that of results of conformity

[13] TBT Committee, Fifth Triennial Review of the Operation and Implementation of the Agreement on Technical Barriers to Trade under Article 15.4, G/TBT/26 (13 November 2009).

assessment procedures.

III. Equivalence in Practice

This Section reviews practice regarding equivalence. First, it reviews unilateral recognition of equivalence as well as recognition of equivalence based on an MRA. Then it examines how equivalence is dealt with by free trade agreements [*hereinafter* FTAs]. Whilemost FTAs include only limited rules regarding SPS and TBT standards, some of the FTAs, particularly so-called "mega" FTAs recently concluded or under negotiation provide (and willprobably provide) rules concerning equivalence.

A. SPS

General

Some countries have legislation to unilaterally (but mostly upon request by exporting countries) recognize equivalence of SPS measures of other countries. In fact, an equivalence determination by the importing country regarding SPS measures of exporting countriesmay be a prerequisit for the importation. For example, the United States laws require an equivalence determination before meat and poultry product can be imported into its territory. In other words, countries are eligible to export these products to the United States only if they are recognized as having meat and poultry inspections systems equivalenct to the United States.[14] Similarly, with regard to inspection and certification systems regarding fishery products, the European Union has adopted the EC Council Directive 91/493/EEC, Article 10 of which provides that "[p]rovisions applied to imports of fishery products from third countries shall be at least equivalent to those governing the production and placing on the market of Community products."[15]

Countries can also conclude a bilateral or multilateral agreement that facilitates the recognition of equivalence. However, only a few agreements have been

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[14] SPS Committee, Equivalence: Submission from the United States, G/SPS/GEN/212 (7 November 2000) [*hereinafter* US SPS Submission], paras.8-11. *See also* United States Department of Agriculture, Equivalence Process, http://www.fsis.usda.gov/wps/portal/fsis/topics/international-affairs/importing-products/equivalence; Panel Report, *US –Poultry*, *supra* note 6.

[15] Council Directive 91/493/EEC of 22 July 1991 laying down the health conditions for the production and the placing on the market of fishery products, http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:31991L0493. *See also* SPS Committee, A Practical Example of Implementation of the Principle of Equivalence: Submission by the European Communities, G/SPS/GEN/304 (12 March 2002).

concluded so far regaridng SPS measures.One of the few examples notified to the SPS Committee is the 1998 Equivalence Agreement on Fish Inspection and Control Systems between Thailand's Department of Fisheries and the Canadian Food Inspection Agency, which aims at "facilitating the trade of fishery products between the two countries, through the reduced rate of inspection at port of entry for the processors on the approved list and mutual auditing to ensure equivalency of inspection and control system."[16] A similar arrangement regarding fish and fishery inspection services among Argentina, Brazil, Chile and Uruguay has also been notified to the SPS Committee.[17]No record is available as to equivalence determinations made under these agreements.There may be other agreements regarding equivalence that are not notified to the SPS Committee. For example, Food Standards Australia New Zealand [*hereinafter* FSANZ], has adopted the FSANZ Guidelines Determining the Equivalence of Food Safety Measures, which outline the procedures, and the information needed, for determining the equivalence of food safety measures.[18] An equivalence determination made in accordance with the Guidelines may result in a variation to the Australia New Zealand Food Standards Code [*hereinafter* FSC], which has been developed by the FSANZ, in cooperation with the Commonwealth, State and Territory Governments and the New Zealand Government.[19]

Free Trade Agreements

Most FTAs simply affirm the rules under the SPS Agreement and do not add any specific rules regarding equivalence.[20]

This is true for the mega FTAs recently concluded by Korea, *i.e.*, the Free Trade Agreement between the United States of America and the Republic of Korea

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[16] SPS Committee, Experience with Recognition of Equivalence: Statement by Thailand at the Meeting of 14-15 March 2001, G/SPS/GEN/242 (6 April 2001).

[17]SPS Committee, Technical Committee on the Health and Hygiene of Fishery Products of Argentina, Brazil, Chile and Uruguay, Equivalence of Inspection Systems: Statement by Brazil at the Meeting of 29 and 30 June 2005, G/SPS/GEN/586 (7 July 2005).

[18] FSANZ, http://www.foodstandards.gov.au/publications/documents/Equivalence%20Determination%20Guidelines_jan04.pdf.

[19]*Id.*

[20] As an exception, the North American Free Trade Agreement [*hereinafter* NAFTA] provides rules concerning equivalence. In particular, Article 714.2(a) of NAFTA provides that each importing Party "shall treat a sanitary or phytosanitary measure adopted or maintained by an exporting Party as equivalent to its own where the exporting Party, in cooperation with the importing Party, provides to the importing Party scientific evidence or other information, in accordance with risk assessment methodologies agreed on by those Parties, to demonstrate objectively … that the exporting Party's measure achieves the importing Party's appropriate level of protection."

[*hereinafter* KORUS FTA] and the Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part [*hereinafter* Korea – EU FTA]. In both FTAs, the Parties simply affirm their existing rights and obligations under the SPS Agreement,[21]while the Korea – EU FTA also adds some rules regarding issues such as transparency, measures linked to animal and plant health, and cooperation on animal welfare.[22]Both FTAs exclude disputes arising under their provisions regarding SPS measures from the scope of the FTA dispute settlement procedures.[23]Thus, no provision in the FTAs explicitly deals with equivalence. That said, a committee on SPS measures established by KORUS FTA is given a broad mandate that could include the facilitation of recognition of equivalence through bilateral technical cooperation and consultation.[24]

Despite the limited equivalence provisions of FTAs so far, a new trend may be emerging inmega FTAs recently concluded or under negotiation.For example, the Comprehensive Economic and Trade Agreement between Canada and the EU [*hereinafter*CETA], signed in September this year, explicitly provides, in Article 7, that "[t]he importing Party shall accept the SPS measures of the exporting Party as equivalent to its own if the exporting Party objectively demonstrates to the importing Party that its measure achieves the importing Party's appropriate level of protection." Annex V of the CETA provides for brief Guidelines for the Determination, Recognition and Maintenance of Equivalence. Moreover, Annex V sets out an extensive list of "a) [t]he areas for which the importing Party recognizes that the measures of the exporting Party are equivalent to its own, and b)[t]he areas for which the importing Party recognizes that the fulfilment of the specified special conditions, combined with the exporting Party's measures, achieve the importing Party's appropriate level of protection."[25]

Equivalence is also one of the most important issues in the Transatlantic Trade and Investment Partnership [*hereinafter*TTIP] negotiations between the European Union and the United States as the two sides have been fighting over multiple SPS

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[21] KORUS FTA, Article 8.2; Korea – EU FTA, Article 5.4.
[22]Korea – EU FTA, Articles. 5.8 & 5.9.
[23] KORUS, Article 8.4; Korea – EU FTA, Article 5.11.
[24]KORUS FTA, Article 8.3.3.
[25] CETA, Article 7. Although to a much limited extent, the Sub-Committee on Sanitary and Phytosanitary Cooperation, established under Article 5.4 of the Economic Partnership Agreement recently signed by Australia and Japan, may facilitate the recognition of equivalence between the two sides. Article 5.4.3 of the Agreement provides that "[t]he Sub-Committee shall coordinate its activities with those of the relevant consultative fora of the Parties, with the objective of avoiding unnecessary duplication and maximising efficiency of efforts of the Parties on SPS measures."

disputes such as *hormones* and *bio-tech products*.[26]The leaked Draft SPS Chapter of the TTIP reveals the possible inclusion of provisions regarding equivalence. More specifically, Article 9.2 of the leaked Draft SPS Chapter provides that "[t]he importing Party shall accept the SPS measures of the exporting Party as equivalent to its own if the exporting Party objectively demonstrates to the importing Party that its measure achieves the importing Party's appropriate level of protection."[27] It also provides that "[e]quivalence may be recognised in relation to an individual measure and/or groups of measures and/or systems applicable to a sector or part of a sector."[28] According to Article 9.4, "[o]nce the importing Party has concluded a positive equivalence determination, the importing Party shall take the necessary legislative and/or administrative measures to implement it without undue delay."[29] It is expected that detailed guidelines for the determination of equivalence will be adopted in the TTIP negotiations.[30]

B. TBT

General

Although Members are not "required" by the TBT Agreement to recognize equivalence of technical regulations of other Members or to accept results of conformity assessment proceduresconducted by other Members, they may unilaterally do so pursuant to their domestic legislation. For example, the Japanese government has unilaterally accredited five foreign conformity assessment bodies from Germany, Taiwan, Hong Kong, and China under the Electrical Appliances and Material Safety Law.[31]The accredited bodies shall conduct a conformity assessment regarding specified electrical appliances and materials pursuant to the Law. In addition, some countries have adopted legislation to recognize equivalence of other countries' regulations regarding a specific product. For

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[26]*See*, *e.g.*, European Commission, State of Play of TTIP negotiations after the 6th round (29 July 2014), para.2.2.
[27] Leaked Draft SPS Chapter of the TTIP, *available at*http://www.iatp.org/files/2014.07_TTIP_SPS_Chapter_0.pdf.
[28]*Id.*
[29]*Id.*
[30]*Cf.* Inside U.S. Trade (July 18, 2014), EU Seeks To Tackle Food Safety 'Equivalency' with TTIP SPS Proposal.
[31] Ministry of Economy, Trade and Industry, List of Accredited Bodies, http://www.meti.go.jp/policy/consumer/seian/denan/kensakikan/kensakikan_list.htm [*Japanese*]. *See also*TBT Committee, Japan's Experience Concerning Cross-Border Designation Systems: Submission by Japan, G/TBT/W/277 (10 July 2007) [*hereinafter* Japan Submission], paras.8-11. The Japanese government has also accredited a conformity assessment body from Singapore under the same law based on the Japan – Singapore Economic Partnership Agreement. *Id.*

example, some developed countries have legislation to unilaterally recognize equivalence of regulations regarding certification of an organic product and, if equivalence is recognized, to accept results of conformity assessment procedures.[32]

Countries can also recognize equivalence of technical regulations of other countries or accept results of conformity assessment procedures conducted by other Members through MRAs.[33]MRAs are said to be not only economically desirable in the sense that they eliminate unnecessary duplication of enforcement of regulations,[34]provide benefits of scale, and give consumers more choices, but also politically ideal in the sense that they avoid centralization of standards and are therefore democratically more legitimate.[35]Mutual recognition is praised by some authors as "a core element of any global governance regime that eschews global government."[36]

A number of bilateral MRAs have been concluded particularly between developed countries. Most MRAs specify products or product categories that fall with

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[32]*See*, *e.g.*, Council Regulation (EC) No 834/2007 of 28 June 2007 on organic production and labelling of organic products and repealing Regulation (EEC) No 2092/91, L 189/1 (20.7.2007); Commission Regulation (EC) No 1235/2008 of 8 December 2008 laying down detailed rules for implementation of Council Regulation (EC) No 834/2007 as regards the arrangements for imports of organic products from third countries, L 334/25 (12.12.2008); Japan's Act on Standardization and Proper Quality Labeling of Agricultural and Forestry Products, Article 15-2. As another example, New Zealand has submitted to the SPS Committee information about its Biosecurity Act 1993, under which exporting countries may propose equivalent SPS measures as a means of meeting New Zealand's biosecurity requirement for imported risk goods. SPS Committee, Experiences in Recognizing Equivalence of Phytosanitary Measures: Submission by New Zealand, G/SPS/GEN/232 (28 February 2001). For more information about the determination of equivalence by WTO Members, *see* SPS Committee, Equivalence: Note by the Secretariat, G/SPS/W/111 (4 July 2011).

[33] According to the classification of the Japanese government, there are two types of MRAs: the Designation Delegation type and the Cross-Border Designation type. In the former, the government delegates its designation and administration authorities to the other party while, in the latter type, the government directly designates and supervises conformity assessment bodies in the other party. Japan Submission, *supra* note 31, para.3.

[34]LUKASZ GRUSZCZYNSKI, REGULATING HEALTH AND ENVIRONMENTAL RISKS UNDER WTO LAW: A CRITICAL ANALYSIS OF THE SPS AGREEMENT (Oxford University Press, 2010), at 263.

[35]Gareth Davies, *Is Mutual Recognition an Alternative to Harmonization?: Lessons on Trade and Tolerance of Diversity from the EU*, *in* Lorand Bartels & Federico Ortino eds., REGIONAL TRADE AGREEMENTS AND THE WTO LEGAL SYSTEM 266 (Oxford University Press, 2006), at 267.

[36] Kalypso Nicolaidis & Gregory Shaffer, *Transnational Mutual Recognition Regimes: Governance without Global Government*, 68 LAW & CONTEMPORARY PROBLEMS 263 (2005), at 263.

their scope of application. For example, Japan and the European Union have concluded an MRA, which applies only to the four designated sectors: 1) Telecommunications Terminal Equipment and Radio Equipment; 2) Electrical Products; 3) Good Laboratory Practice for Chemicals; 4) Good Manufacturing Practice for Medicinal Products.Some MRAscover a specific product. For example, with regard to organic products, the United States has agreed a bilateral equivalency arrangement regarding the certificate of organic products with Canada (effective June 30, 2009), the European Union (effective June 1, 2012), Japan (effective January 1, 2014), and Korea (effective July 1, 2014). Under the agreements, the Parties agree that products produced and handled in conformity with the relevant organic rules of the other party are deemed to have been produced and handled in accordance with their own organic rules.

One of the "most advanced and comprehensive" MRAs is the Trans-Tasman Mutual Recognition Arrangement [*hereinafter* TTMRA] between Australia and New Zealand.[37]The feature of the TTMRA is that it is based on the principle of mutual recognition of equivalence of the respective regulatory regimes instead of traditional mutual recognition of results of conformity assessment procedures.[38] Thus, under the TTMRA, "a good that can be legally sold in New Zealand can be legally sold in Australia and vice versa, regardless of differences in standards or other sale-related regulatory requirements between the jurisdictions."[39]It is noteworthy that while the TTMRA does not explicitly oblige regulatory harmonization, it is said to have "led to more aligned regulatory approaches and greater harmonization."[40]

There arealso multilateral arrangements of mutual recognition. Although geographically limited, the APEC Electrical and Electronic Equipment MRA requires participating APEC Member Economies to mutually accept test reports produced by testing facilities designated by participating economies and also requires a participating importing Member Economy to accept product certificationproduced by certification bodies designated by participating exporting economies.[41]Moreover, the ASEAN signed

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[37] TBT Committee, Regulatory Cooperation between Members: Background Note by the Secretariat, G/TBT/W/340 (7 September 2011), para.17.

[38] TBT Committee, A Menu of Options: New Zealand's Approach to Mutual Recognition Arrangements (MRAs) and Regulatory Cooperation Arrangements: Submission by New Zealand, G/TBT/W/295 (30 October 2008) [*hereinafter* New Zealand Submission], paras.12, 15.

[39] *Id.*

[40] New Zealand Submission, *supra* note 38, para.17.

[41]APEC Electrical and Electronic Equipment Mutual Recognition Arrangement (EEMRA), http://www.apec.org/Groups/Committee-on-Trade-and-Investment/Sub-Committee-on-Standards-and-Conformance/apec_eemra.aspx.

in 2002 the MRA on Electrical and Electronic Equipment, which "eliminates re-testing and re-certification and provides market certainty and reduces time and costs to market," and then in 2005, it went on to sign the Agreement on the ASEAN Harmonized Electrical and Electronic Equipment [*hereinafter*EEE] Regulatory Regime.[42] With respect to motor vehicles and parts, Agreement concerning the Adoption of Uniform Technical Prescriptions for Wheeled Vehicles, Equipment and Parts which can be fitted and/or be used on Wheeled Vehicles and the Conditions for Reciprocal Recognition of Approvals Granted on the Basis of these Prescriptions [*hereinafter* 1958 Agreement] and Agreement concerning the Establishing of Global Technical Regulations for Wheeled Vehicles, Equipment and Parts which can be Fitted and/or be used on Wheeled Vehicles [*hereinafter* 1998 Agreement] have been adopted. Besides, efforts to harmonize automotive regulations and promote mutual recognition thereof have been continued at the United Nations World Forum for Harmonization of Vehicle Regulations (UN/ECE/WP29) [*hereinafter* WP.29].

Multilateral arrangements can also be made among conformity assessment bodies. For example, the International Laboratory Accreditation Co-operation [*hereinafter* ILAC] and the International Accreditation Forum [*hereinafter* IAF] are global networks of 140 accreditation bodies and organizations involved in conformity assessment activities, and their Multilateral Mutual Recognition Arrangements recognize competent and equally reliable conformity assessment activities world-wide.[43]

Free Trade Agreements

It is common that FTAs provide for mutual recognition of equivalence of technical regulations and acceptance of results of conformity assessment procedures. Recently, some FTAs include rules concerning harmonization of regulations between the Parties together with rules concerning equivalence.[44]

For example, in KORUS FTA andthe Korea – EU FTA, the Parties first affirm

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[42] TBT Committee, Fifth Triennial Review of the Agreement on Technical Barriers to Trade: Communication from Singapore, G/TBT/W/312 (8 June 2009), paras.10-11.
[43] TBT Committee, Benefits of the ILAC & IAF Multilateral Mutual Recognition Arrangements, G/TBT/GEN/117 (28 June 2011). *See also* TBT Committee, The Use of the ILAC MRA and IAF MLA by Central Government Bodies: The Experience of the United States, G/TBT/W/349 (13 March 2012).
[44] For example, the TPP and TTIP agreements may include a chapter of regulatory coherence. For TPP, see the following leaked document. Trans-Pacific Partnership (TPP), Regulatory Coherence, *available at* http://www.citizenstrade.org/ctc/wp-content/uploads/2011/10/TransPacificRegulatoryCoherence.pdf. For TTIP, *see*, *e.g.*, Inside U.S. Trade (June 6, 2014), U.S., EU to Table Text on TTIP 'Horizontal' Regulatory Cooperation in July.

their existing rights and obligations under the TBT Agreement.[45]Then, both FTAs require that the Parties "strengthen their cooperation in the field of standards, technical regulations and conformity assessment procedures."[46] More specifically, recognizing the importance of facilitating the acceptance of the results of conformityassessment procedures, the Parties in both FTAs undertake to exchange information on this matter.[47]In addition, KORUS FTA provides that "[e]ach Party shall take steps to implement Phase II of the APEC Mutual Recognition Arrangement for Conformity Assessment of Telecommunications Equipment (1998) with respect to the other Party as soon as possible." What is most noteworthy are the rules of the FTAs concerning motor vehicles and parts. For example, Article 9.7.1 of KORUS FTA provides that "[t]he Parties shall 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." Similarly, Article 2.1 of Annex 2-C to the Korea – EU FTA requires the Parties to "participate actively in the development of regulations in WP.29 and shall cooperate for the adoption, without undue delay, of new regulations by WP.29."[48] These rules are expected to facilitate not only mutual recognition of equivalence but also harmonization of regulations regarding motor vehicles and parts between the Parties. Moreover, the FTAs' requirements for enhanced transparency in the development of technical regulations could promote harmonization of technical regulations in general.

The European Union and the United States have been engaged in talks on regulatory cooperation through a wide range of channels including the MRA between the two sides,[49]and theTTIP negotiations are expected to expand such regulatory cooperation between them.A limited leaked information about the TTIP negotiations suggests that the TTIP agreement would include some rules regarding equivalence. For example, auto industries of both sides have been making efforts to include in the TTIP agreement equivalency rules regarding passenger vehicles safety standards and engine pollutant emissions standards.[50]In addition, a leaked position paper of the European

[45]KORUS FTA, Article 9.1; Korea – EU FTA, Article 4.1.
[46]KORUS FTA, Article 9.4; Korea – EU FTA, Article 4.3.
[47]KORUS FTA, Article 9.5.1; Korea – EU FTA, Article 4.6.
[48]*Cf.* Boris Rigod, *Trade in Goods under the EU – Korea FTA: Market Access and Regulatory Measures*, *in* James Harrison ed., THE EUROPEAN UNION AND SOUTH KOREA: THE LEGAL FRAMEWORK FOR STRENGTHENING TRADE, ECONOMIC AND POLITICAL RELATIONS 66 (Edinburgh University Press, 2013), at 81-83.
[49] TBT Committee, Summary Report of the TBT Workshop on Good Regulatory Practice 18-19 March 2008: Note by the Secretariat, G/TBT/W/287 (6 June 2008), paras.82-88.
[50] World Trade Online, Daily News (July 17, 2014), EU Auto Manufacturers Expand TTIP Regulatory Push Into Emissions.

Union suggests that the TTIP negotiations are seeking to improve mutual recognition of Good Management Practices (GMP) processes regarding pharmaceuticals.[51]While the importance of the rules regarding mutual recognition cannot be disregarded, the principal goal of the TTIP negotiations seems to bridge the regulatory divergence across the transatlantic region through deepened regulatory cooperation.[52]

IV. Provisional Conclusion

Despite the variety of frameworks to unilaterally and mutually recognize equivalence of SPS measures, technical regulations, and results of conformity assessment procedures, they are not actively used so far.[53]

A few of the principal reasons are pointed out here.

First, the costs of technical and administrative procedures for the recognition of equivalence often outweigh the trade benefits that can be gained from that.[54] For example, in order to determine equivalence of SPS measures, the authorities of an importing country have to examine SPS measures and relevant legal frameworks of exporting countries. Although the burden to demonstrate equivalence may be placed on exporters/exporting countries, the administrative costs for the authorities are not insignificant. Considering the fact that the trade benefits arising from equivalence recognition are often reaped by exporters and not by importers, the authorities of an importing country may not have a strong incentive to go throgh the burdensome process for equivalence determinations.

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[51] Summary of EU TTIP position papers, provided by Citizen Trade Policy Commission (September 19, 2013), *available at*http://maine.gov/legis/opla/CTPCEUTTIPpositionpaperssum.pdf.

[52] *Cf.* Simon Lester and Inu Barbee, *The Challenge of Cooperation: Regulatory Trade Barriers in the Transatlantic Trade and Investment Partnership*, 16 J. INT'L ECON. L. 847, 853-59863-64 (2013).

[53] For example, only two equivalence determinations have been notified to the SPS Committee although there may be equivalence determinations that are not notified. SPS Committee, Notification of Determination of the Recognition of Equivalence of Sanitary or Phytosanitary Measures, G/SPS/N/EQV/PAN/1 (9 August 2007); SPS Committee, Notification of Determination of the Recognition of Equivalence of Sanitary or Phytosanitary Measures, G/SPS/N/EQV/DOM/1 (19 June 2008). *See also*GRUSZCZYNSKI, *supra* note 34, at 267.

[54] The United States once pointed out in the SPS Committee the following reasons for the limited use of equivalence; 1) the trade benefits from an equivalence determination may not be substantial enough to justify the administrative burdens of the determination; and 2) it is difficult to link numerous and disparate measures to a country's appropriate level of protection and to address various stake holder concerns. US SPS Submission, *supra* note 15, paras.15-18.

Second, differences in SPS measures and technical regulations often arise from differences in public policy objectives, which cannot be bridged by recognition of equivalence. For example, equivalence of SPS measures can be recognized by an importing country only if an exporting country pursues the same as or higher than the level of SPS protection considered as appropriate by the importing country. However, in reality, differencesin SPS measures often arise from differencesin positions of importing and exporting countries as to the appropriate level of protection. It is simply impossible to recognize equivalence of SPS measures of importing and exporting countries if the measures pursue different levels of protection. The same is true for the recognition of equivalence of technical regulations. An importing country often cannot recognize equivalence of different technical regulations of an exporting country because the differences result from differences in objectives that the regulations of the exporting and importing country are seeking to fulfil.

The second reason is particularly important as it leads to a provisional conclusion that equivalence is not desirable when harmonization is not desirable. More simply put, equivalence may not be an effective alternative to harmonization.[55]Just as harmonization may diminish the sovereign right ofcountries to regulate, equivalence as well could prevent countries from pursuing their own public policy objectives unless it is limited to the cases where policy objectives of SPS measures or technical regulations are shared by importing and exporting countries.[56] In fact, excessive recognition of equivalence could jeopardize the regulatory autonomy of countries if it results in the massive importation of products under different (and not genuinely equivalent) regulations. One author goes as far as to argue that mutual recognition "has a self-destructive quality which gives it a short life."[57]

In this connection, potential impacts of an equivalenceclause included in FTAs are worth mentioning. The issue of equivalence in FTAs is normally delath with as a part of trade liberalization negotiations. That means the issue of equivalence is often accompanied with a demand to harmonize SPS measures and technical regulations in order to increase the frequency of equivalence determinations and thereby remove

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[55] One author suggests that mutual recognition is unlikely to be an alternative to harmonization "when the harmonization claim is strongly normative." David W. Leebron, *Lying Down with Procrustes: An Analysis of Harmonization Claims*, *in* Jagdish Bhagwati & Robert E. Hudec, FAIR TRADE AND HARMONIZATION: PREREQUISITES FOR FREE TRADE, Vol.1 Economic Analysis 41(The MIT Press, 1996), at 91-92. *See also* Nakagawa, *supra* note 1, at 132.

[56] It should be noted here that harmonization is also feasible if the policy objectives are shared by importing and exporting countries.

[57] Davies, *supra* note 35, at 266.

obstacles to trade caused by different SPS measures and technical regulations. While harmonization of SPS measures and technical regulations is not prerequisite for the recognition of equivalence,[58] equivalence is more likely to be recognized if differences in SPS measures and technical regulations are narrowed down. In a way, equivalence in FTAs works as a driving force to harmonization rather than an alternative to it.[59]Equivalencethrough FTAs may have at least one advantage in that it drives harmonization in a forum that is closer to domestic regulatory authorities than harmonization on a global scale. In this sense, equivalence may be referred to as a regional or bilateral version of harmonization.In any event, considering that equivalence could produce the same result as harmonization does, we need to consider an *alternative to equivalence*in order to preserve the regulatory autonomy of countries to pursue their public policy objectives.

[58]*Cf.* HUMBERTO ZUNIGA SCHRODER, HARMONIZATION, EQUIVALENCE AND MUTUAL RECOGNITION OF STANDARDS IN WTO LAW (Kluwer Law International, 2011), at 131-34.
[59]It is observed in the European Union that successful mutual recognition with respect to a certain regulation tends to provoke harmonization movement with that respect.Davies,*supra* note 35, at 271-72.

Comments on “Mega-RTAs under the WTO Law”

Written by Kim, Jong-Bum

Sohn, Jiyoung (EwhaWomans University)[1]

Many are curious about what the consequences of Mega-RTAs such as TPP and TTIP will be like. Some experts in Korea seems cautious, since we are not in the center of the ongoing negotiation, and the others show their confidence that we have other strategies such as Korea-Canada FTA, Korea-New Zealand FTA and Korea-Australia FTA. At all events, those FTAs will definitely make world trade ordermore complicated, due to the “rules of origin.” In this situation, this article is very timely and precious, since it clarifies the consequences of the rules of origin on the Mega-RTAs and overlapping RTAs.

Firstly, this article explainswhat “Mega-RTAs” are, which bring about “overlapping RTAs”. The suggested examples are the proposed TPP and NAFTA, and possibly, TTIP and NAFTA.

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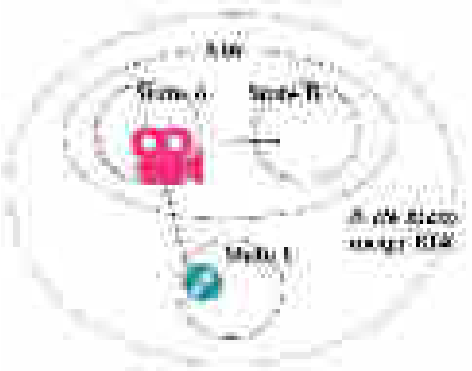
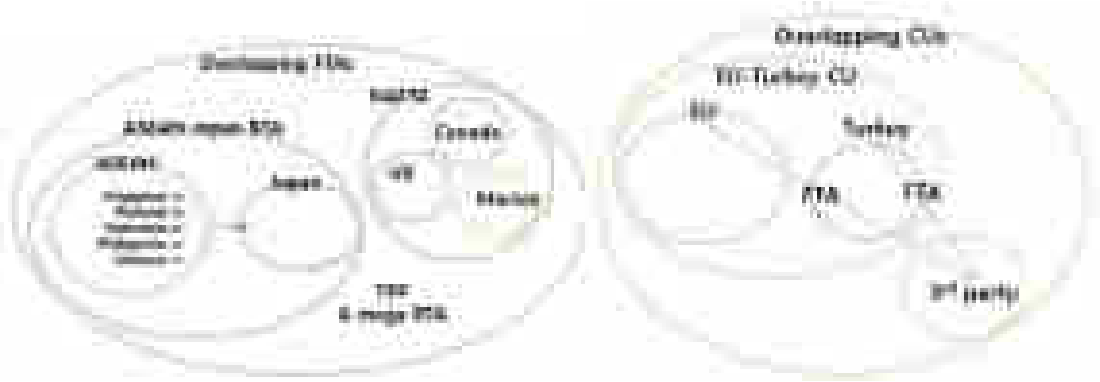


In addition, the cross-cumulation arrangements in the rules of origin of RTAs lead to a significant development, since this clause enables inputs from third parties to be treated like inputs from the RTA members. Thus, this article calls it "a *de facto* mega-RTA."

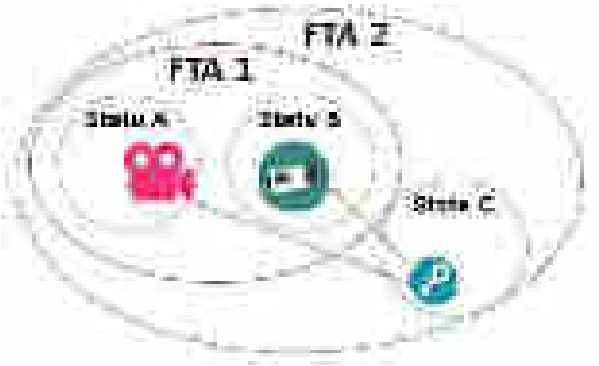
Both a mega-RTA and a cross-cumulation arrangement encourage the trade in intermediate inputs among the trading partners, however, these are different for the GVC economy.



This article examined "Overlapping FTAs" and "Overlapping CUs", respectively. Overlapping FTAs can emerge when at least two states become the member of other RTAs, like the ASEAN and its RTA partners; Japan is a party not only to individual bilateral RTAs, but to the ASEAN-Japan FTA, which allows the export to an ASEAN party from another ASEAN party would enjoy preferential treatment under the ASEAN-Japan FTA. Furthermore, the proposed TPP will expand much more overlapping RTAs, forming a mega RTA.

Overlapping CUs, with the example of EU-Turkey CU, also share the EU members as the overlapping parties. Since the tariff elimination in the EU-Turkey CU applies to only goods that are 'wholly or partially obtained or produced from products coming from third countries which are in free circulation in the Community or in Turkey' and that are 'coming

from third countries and in free circulation in the Community or in Turkey,' it does not mean the elimination of duties on the trade of goods between the EU members. That is, the EU as a CU and the EU-Turkey CU have overlapping parties, but goods traded among EU states, the preferential market access is allowed only by the EU.



Under the GVCs economy, emerged by the revolution in ICT, production stages of manufacturing can be geographically dispersed. This feature requires inputs from third countries more, with a new RTA with an enlarged membership. This will be greater thanthe pre-existing RTA due to the operation of a cumulation clause, which allows to expand the scope of definition of an originating good.

This article also indicated that preferential trading opportunity is enlarged as a product qualifies for preferential treatment in multiple RTAs. The representative example is Japan-ASEAN RTA; some products for which processing were done in any ASEAN countries with materials from Japan would be recognized as originating goods both under the Japan-ASEAN RTA and under the bilateral RTA between Japan and an individual ASEAN country.

Accordingly, an exporter in Japans will choose the RTA that eliminated duties over more tariff lines. However, the decision will not be easily made, since each RTA stipulates different condition for emergency measures.

This article explained that the EU has developed cross-cumulation arrangements in

the rules of origin of RTAs, combining with the overlapping RTAs. A cross-cumulationarrangement with at least three participants, each country in a bilateral relation with another country, allows materials originating from any country in the arrangement to be considered as originating materials under the RTA between two or more parties in the arrangement. This effect produced by the cross-cumulation clause is equivalent to that resulting from the formation of the A-B-C RTA, with the A-B RTA, the B-C RTA, and the A-C RTA. In terms of the trade in final products, the intra-RTA trade liberalization in each bilateral RTAs with a cross-cumulation clause would be equivalent to the intra-RTA trade liberalization in the A-B-C RTA. This is because the clause has the effect of considering the intermediate inputs as originating materials, processed in the countries participating in the arrangement.

To sum up, Mega-RTAs and cross-cumulation arrangements have two characteristics of RTA; one is that Mega-RTAs have the effect of including as the RTA parties those countries from which intermediate goods are sources, and the other is that a cross-cumulation arrangement in the rules of origin of RTAs allows even intermediate inputs imported from third parties as originating materials. The former is legally conform to the WTO system, GATT Article XXIV, but this a mega-RTA with overlapping RTAs will raise transaction cost for exporters, and burden the importing authorities with the costs of administering complicated rules of origin. Still, The latter does not create overlapping RTAs but is not compatible with the WTO rules, since the materials imported from other WTO members excluded from the cross-cumulation arrangement are accorded with less favourable treatment, with GATT Article I violation.

With this analysis, we need to predict what the potential consequences of TPP and TTIP for Korea will be like and prepare our own strategy. In particular, Korea is the only

WTO member whohas concluded FTA with both the US and the EU, and TPP seems also crucial, considering competitive relations with Japan. Furthermore, we need to come up with our strategy to handle complicated rules of origin with the development of rules of origin.

Comments to Prof. Fukunaga's presentation

Sungjin Kang*

I. Introduction

Prof. Fukunaga's presentation on the "Equivalence" under the SPS/TBT Agreements is a timely and helpful contribution to the practice of the WTO regarding this issue. The discussant would like to make a few comments and raise a few questions for further discussion.

II. SPS Agreement

Prof. Fukunaga provided a comprehensive and well-thought summary of the multilateral and regional/plurilateral practice of the implementation of equivalence rules. However, there are some additional rules to consider in the SPS context. Article 4 of the SPS Agreement imposes a straightforward obligation of recognition of equivalence of other Members' SPS measures upon objective demonstration of achieving the goals. However, the SPS Agreement alone does not provide full picture of the multilateral framework of the equivalence rules. Annex A. 3. of the SPS Agreement makes it clear that the standards, guidelines and recommendations established by the Codex Alimentarius Commission functions as an international standard under the SPS Agreement in case of food safety measures. In this regard, it is important to refer to the relevant Guidelines of the Codex Alimentarius Commission.

In 1997, Codex Alimentarius Commission adopted GUIDELINES FOR THE DESIGN, OPERATION, ASSESSMENT AND ACCREDITATION OF FOOD IMPORT AND EXPORT INSPECTION AND CERTIFICATION SYSTEMS ("Codex Guidelines") which provides the a framework for the development of import and export inspection and certification systems consistent with *the Principles for Food Import and Export Inspection and Certification*. Section 2 of the Guidelines defines "***Equivalence"*** as "the capability of different inspection and certification systems to meet the same objectives." Section 5 provides for a detailed guidelines on the recognition of equivalence in the food inspection measures, and the elements of the Equivalence Agreements. The principle is basically the same as the Article 4 of the SPS Agreement, with more detailed, albeit non-binding, principles of operation of the equivalence recognition issues.[1]

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*The views in this comment are strictly personal to the discussant. It is not attributable to any official position of the WTA, or any of the institutions the discussant previously worked.

[1] **SECTION 5 - EQUIVALENCE**

9. The recognition of equivalence of inspection and certification should be facilitated where it can be objectively demonstrated that there is an appropriate system for inspection and certification of food by the exporting country in accordance with these guidelines.

10. For the determination of equivalence, governments should recognize that:

- inspection and certification systems should be organized for the risk involved, considering that the same food commodities produced in different countries may present different hazards; and,
- control methodologies can be different but achieve equivalent results. For example, environmental sampling and the strict application of good agricultural practices, with limited end product testing for verification purposes, may produce a result equivalent to extensive end product testing for the control of agriculture chemical residues in raw products.

11. Controls on imported food and domestically produced foods should be designed to achieve the same level of protection. The importing country should avoid the unnecessary repetition of controls where these have been already validly carried out by the exporting country. In these cases a level of control equivalent to domestic

Of course, the standards and guidelines of the Codex Alimentarius Commission is recognized as a rule for harmonization. However, the Guideline provides a very useful tool to administer recognition of equivalence and draft equivalence agreements in case of food safety issues.
Regarding the EC Council Directive 91/493/EEC, Article 10 of the Directive means that the health standards adopted by the Member States governing the import fisheries products from the third countries must be "equivalent" to the fisheries produced locally within the EU/EEA. In addition, Article 11 of the same Directive provides that "For each third country or group of third countries, fishery products must fulfil the specific import conditions fixed in accordance with the procedure laid down in Article 15, depending on the health situation in the third country concerned." Article 15 provides that there should be a separate inspection procedure for the imports from third countries. It may be more helpful if you can elaborate the meaning of the Article 10 of the Directive.
Lastly, Prof. Fukunaga did not include the development in the FTAs concluded by Japan. It would be great if she can include some comparison between Japan's FTAs and Korea's FTAs in the next version.

III. TBT Agreement

First of all, Article 9.7 of the KORUS FTA is more of "harmonization" of rules than the rules for mutual recognition/equivalence. Korea and the US exchanged an additional letter for mutual recognition of automobile safety standards. In this letter, Korea agreed to provide that an originating motor vehicle produced by a manufacturer that sold no more than 25,000 originating motor vehicles in the territory of Korea during the previous calendar year shall be deemed to comply with Korean Motor Vehicle Safety Standards (KMVSS) if the

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controls should have been achieved at the stages prior to import.
12. The exporting country should provide access to enable the inspection and certification systems to be examined and evaluated, on request of the food control authorities of the importing country. Evaluations of inspection and certification systems carried out by the authorities of an importing country should take into account internal programme evaluations already carried out by the competent authority or evaluations performed by independent third-party bodies recognized by the competent authority in the exporting country.
13. Evaluations of inspection and certification systems by an importing country for purposes of establishing equivalence should take account of all relevant information held by the competent authority of the exporting country.

Equivalency agreements

14. The application of equivalence principles may be in the form of agreements or letters of understanding established between governments either for inspection and/or certification of production areas, sectors or parts of sectors. Equivalence may also be established through the administration of a comprehensive agreement which would cover inspection and certification of all food commodity forms traded between two or more countries.
15. Agreements on the recognition of equivalence of inspection and certification systems may include provisions concerning:
- the legislative framework, control programmes and administrative procedures;
- contact points in inspection and certification services;
- demonstration by the exporting country of the effectiveness and adequacy of its enforcement and control programmes, including laboratories;
- where relevant, lists of products or establishments subject to certification or approval, accredited facilities and accredited bodies;
- mechanisms supporting continued recognition of equivalence, e.g., exchange of information on hazards and monitoring and surveillance.
16. Agreements should include mechanisms to provide for periodic review and updating and include procedural mechanisms for resolving differences arising within the framework of the agreement.

manufacturer certifies that the motor vehicle complies with U.S. Federal Motor Vehicle Safety Standards (FMVSS)
In addition, Article 2.1 of the Annex 2-C of Korea-EU FTA imposes obligation for both parties to endeavor to implement international standards adopted by the WP29 of the UNECE. As far as I understand, equivalence / mutual recognition agreement under the TBT is bilateral / plurilateral to recognize the existing technical regulations and standards by the parties. If this provision intended to provide nuances of the mutual recognition, Korea and the EU would have agreed to insert a provision which makes the international standards set by the WP29 of the UNECE would be deemed to fulfil the standards for motor vehicle environmental performance and safety, rather than a loose provision like this.
The recently concluded the EU-Canada Trade Agreement (CETA) also has a chapter on TBT. CETA provides that Article 6 of the TBT agreement would be incorporated to the CETA, and Article 4.2 of the TBT Chapter of the CETA provides for the procedure for request for equivalence determination.[2] In addition, I am also curious of the Japanese FTA practice. It was good to find that Japan signed MRAs with other states, but what is the practice of Japan's FTAs?

IV. Comments on the Provisional Conclusion

It will be good if Prof. Fukunaga can provide an example or further explanation of the administrative costs for equivalence determination by an importing state. I think that the administrative costs would vary on case-by-case basis. Perhaps it is significant for importing state to assess the equivalence of an exporting state's SPS/TBT measures if the exporting member has lower SPS standards. However, the cost may not be that great if both importing and exporting states have equally sophisticated system which can be trusted, the administrative costs may not be that great as she argues.
In addition, harmonization of the SPS rules and technical barriers are the primary objectives of the SPS/TBT agreements, while equivalence determination is a "supplemental" means towards that objective. It will be great if Prof. Fukunaga supplements her provisional conclusion by providing further arguments regarding the relationship between harmonization and equivalence.

[2] A Party that has prepared a technical regulation that it considers to be equivalent to a technical regulation of the other Party having compatible objective and product scope may request in writing that the other Party recognize it as equivalent. Such a request shall be made in writing and set out the detailed reasons why the technical regulations should be considered to be equivalent, including reasons with respect to product scope. The Party that does not agree that the technical regulations are equivalent shall provide to the other Party, upon request, the reasons for its decision.

Session 4 Issues of Global Trade Governance

Room: Champagne A Hall

CHAIR: HYEON Dae-Ho (Korea Legislation Research Institute)

Presenters

13. **LEE Se-Ryon (Chonbuk National University) & KIM Dae-Won (University of Seoul): A Critical Review on the Relevant Market Concept in Canada-Renewable Energy Case - Judicial Integration or Fragmentation?-**
14. **LEE Sang-Mo (Korea Legislation Research Institute): Issues and Implications of Renewable Energy Policy in China**
15. **CHUNG Chan-Mo (Inha University): Anatomy of Confidentiality of Trade Negotiation**
16. **IRWIN Andrew (Productivity Commission, Australia): Policy Analysis Framework for Australian Bilateral and Regional Trade Agreements-**

Discussants

LEE Jee-Hyung (Ewha WTO Law Center)

KIM Ha-Na (Yonsei University)

CHUNG Ki-Chang (Yoon & Yang)

Junior Discussant

KIM Min-Jung (Seoul National University)

[Conference Draft: Please Do Not Cite or Quote]

A Critical Review on the Relevant Market Concept in *Canada-Renewable Energy* Case - Judicial Integration or Fragmentation?-

KIM Dae-Won*
LEE Se-Ryon**

"Life is offensive, directed against the repetitious mechanism of the Universe."

-Alfred Whitehead-

I.Introduction: Subsidies against Climate Change

1. Subsidies for Renewable Energy

Governments around the globe have granted subsidiesthrough various forms for different reasons. While the rules on subsidies under the WTO are regulated through two instruments--the Agreement on Subsidies and Countervailing Measures ("ASCM") and the Agreement on Agriculture--,the ASCMmainly constitutes the most general regulations of subsidies. The original GATT contained rather limited provisions with respect to subsidies and countervailing measures, which were embodied in Articles XVI and VI.However, there was a shift from a rather flexible and indeterminate approach of the GATT towards a more legalistic and precise one as the WTOASCM elaborated the discipline of subsidy by introducing a comprehensive definition of subsidy and detailed investigation procedures for countervailing duties.However, it was still pointed out that regulations for the domestic subsidiesunder the ASCM were still relaxed relative to export subsidies.[1]

With the growing significance of environmental issues in international trade, the newform of trade disputeparticularly relating to climate change hasbegun to emerge as a major global environmental challenge.[2]While the typical type of most trade disputes involvedthe principles

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[1]G.Horlick & P Clarke, "WTO Subsidies Discipline During and After Crisis," *Journal of International Economic Law*, Vol 13. No.3 (2010), pp.866-867.

[2]In this respect,Stewart reports as follows that "out of 15 complaints filed under the ASCM from 2010 to August 2013, 6 have involved climate-related incentives given in relation to biodiesel, solar cells, wind-power

of market access, the environmentally-oriented disputes began to concern industrial policies of the WTO members as in the recent *Canada-Renewable Energy* case.Since the lapse of the provisions of the ASCM on the category of 'non-actionable'subsidieswhich were used for research and development, regional inequality and environmental protection, subsidiesare now classified as either prohibited or actionable subsidies under the current legal framework of the ASCM.[3]This suggests that even if a government undertakes a seemingly justifiable measure in response to purely environmental problems, whichare notefficiently dealt within the conventional market system, such measuremay nevertheless be in conflict with the ASCM. Consequently, it leavesvirtually no room for climate change subsidies to legally fit into the subsidy discipline of the ASCM.Hence, a theoretical discourse is necessary for the justification of governmental measures such as climate change subsidies whose main objective is to correct a market failure. As part of this discussion, several literatureshave already addressed some options such as the applicability of the general exceptions in the GATT XX, incorporation ofa new category or a revival of non-actionable subsidies within the ASCM,recognition of a waiver to WTO obligations on the grounds of climate change.[4]

In line with this observation, the findings by the Appellate Body in the *Canada-RenewableEnergyCase*are notable to the extent that they shed, as we shall estimate, new light on the approach to climate change subsidies particularly in the field of the renewable energy sector.Of particular interest for the purpose of this paper isto find harmonious ways to legally interpretthe climate change subsidieswithin the existing framework of the ASCM. The primary focus of this paper, therefore, will be on critical assessment and interpretative elements of the Appellate Body's holdings with special reference to two requirements in determining of a subsidy as well as criteria of 'actionable' subsidies.

2. Outline of the *Canada-Renewable Energy* Case

In 2011 Japan and the EU separately challenged Canada, claiming that a number of measures taken by Ontario's government renewable energy program were inconsistent with the GATT, TRIMs and the ASCM. A challenging measure at issue was a feed-in-tariff (FIT) program attached with local content requirements. The said program provided renewable energy producers long-term contracts for the sale of their energy at a guaranteed purchase price. The

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equipment, and renewable energy." This trend clearly indicatesthe growing importance of subsidy issues that can arise in the context of climate policies.D. Stewart, "First WTO Judicial Review of Climate Change Subsidy Issues,"*American Journal Of International Law*, Vol.107 (2013) p.868.

[3]The current limits on subsidies in the ASCM do not take into account any policy justification of a subsidy, though Article 25.3(iii)of the ASCM requires each WTO Member to provide an annual notification of its subsidies, including the policy objective and/or purpose of the subsidy.

[4]See R. Howse, "Climate Mitigation Subsidies and the WTO Legal Framework; A PolicyAnalysis,' International Institute for Sustainable Development (2010), pp.17-24. See also Aaron Cosbey and Petros C. Mavroidis, "A Turquoise Mess; Green Subsidies, Blue Industrial Policy and Renewable Energy: The Case for Redrafting the Subsidies Agreement of the WTO," *The Journal of International Economic Law*, Vol.17 (2014).

complainants challenged the FIT program on two grounds. First, the local content requirements attached to the program were in violation of the national treatment principle. Second, the FIT programs constituted an unlawful subsidy as defined in the ASCM. The Appellate Body confirmed the Panel's decision on the first grounds that the Minimum Required Domestic Content Level under the FIT program was in violation of the TRIMs and did not fall with the ambit of Article III(3)(8)(a) of the GATT. As the Appellate Body issued its conclusions in May 2013, it, more importantly, did not establishwhether the FIT-based benefit existed within the meaning of the ASCM. For the purpose of this presentation, we will confine out discussion to the content of the ASCM.

II. Climate Change Subsidies and Market

1. Category of Climate Change Subsidies

While international environmental law is not codified as extensively as international trade law, the established sourcesare available through a number of multilateral treaties among which the most important one is the UN Framework Convention on Climate Change ("UNFCCC"). Although the UNFCCCdoes not explicitlyprovide specific commitments towards 'climate change subsidies,' it defines climate change as "a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods."[5]For the purpose of this paper, 'climate change subsidies'refer to those measures aiming at mitigating adverse effects of climate change as defined in the UNFCCC.

Within the sphere of the international energy law, which is less comprehensive than international environmental law,the Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects stipulates that parties may provide fiscal or financial incentives to facilitate energy efficient technologies, yet in a manner that both ensures transparency and minimizes the distortion of international markets.[6] According to the International Energy Agency (IEA), climate change measures are largely divided into two categories: regulatory and economic instruments. While the former refers to financial supports and price signals to influence the marketsuch as taxes, tax relief, grants or subsidies, feed-in tariffs ("FIT") for renewable energy, the latter category includesa wider range of instruments with which a government imposes targetsenergy performance standards and requirement for companies to manage energy consumption, produce or purchase a certain amount of renewable energy.

Whena governmentresponds to climate change issues through a range of measures and

[5]UNFCCC Article 1.2

[6]Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects, adopted on December 17, 1994, 2080 UNTS. 100, Article 6(3).

policies, the most relevant part will be thereduction of greenhouse gases(GHGs). In this context, Article 2.1 of the Kyoto Protocol[7],in achieving its quantified emission limitation as well as promoting sustainable development, calls for the following policies to be implemented:

- •Enhancement of energy efficiency in relevant sectors of the national economy;
- •Protection and enhancement of sinks and reservoirs of greenhouse;
- •Promotion of sustainable forms of agriculture;
- •Research on, and promotion, development and increased use of, new and renewable forms of energy;
- •Progressive reduction or phasing out of market imperfections,
- •fiscal incentives, tax and duty exemptions and subsidies in all greenhouse gas;
- •Encouragement of appropriate reforms in relevant sectors aimed at promoting policies and measures which limit or reduce emissions of greenhouse gases;
- •Measures to limit and/or reduce emissions of greenhouse gases; Limitation and/or reduction of methane emissions through recovery and use in waste management

2. Economic Considerations of Climate Change Subsidies: The Market

To properly assess the possibility of consistency of climate change subsidies with the rules of WTO,we need first to focus on economic perception of the ASCM in conjunction with the concept of market. From a purely economic perspective, a natural benchmark for identifying subsidization is a hypothetical market equilibrium without the intervention of government.[8]Therefore, no case will be made for a subsidy under such a perfect competitive market. However, it is nearly impracticable to apply the concept of subsidization becausesuch equilibrium in perfect competition can hardly be observed in reality.[9]The backgroundthat lies behind the presentregulatory framework for subsidies is the spread of protectionism for domestic industries through almost unrestricted subsidy measures. These practicesbecame one of the underlyingcauses for economic crisis, whichtriggeredthe Great Depression in the late 1920sand ultimately led tothe World War. [10] More importantly, among other criticisms,economic efficiencies of subsidy were not adequately taken into account.

As is frequently the case in economic analysis, public intervention may be warranted when the market fails to provide desirable public goods or to halt externalities. When it comes to climate change, economists have often described it asthe “greatest and widest-ranging market failure ever seen,” and even “the greatest market failure the world has seen.”[11] Climate

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[7]While the Kyoto Protocol does not explicitly mention subsidies, it does call on, in its Article 2(a)(v), parties to reduce or phase out fiscal incentives and subsidies that run counter to the objective of the UNFCCC.

[8]Alan O. Sykes, “The Economics of WTO Rules on Subsidies and Countervailing Measures,” John M.Olin Program in Law and Economics Working paper No.186 (2003), p.3.

[9]*Ibid.*

[10]G. Hufbauer & J.Erb, *Subsidies in international Trade* (Institute for International Economics, 1984), p.8.

[11]Luca Rubini, “Ain’t Wastin’ Time No more: Subsidies for Renewable Energy, The SCM Agreement, Policy

change subsidies, thereby, may play a crucial role to correct market failure and even when they generate positive externalities. For instance, as renewable energy is confronted by barriers related to the financial markets, infrastructure and regulation, the subsidies for renewable energy may be justified at least in principle. Here, it raises difficult questions because such 'climate change subsidies' for development of renewable energy or environment-friendly technologies as a tool to remedy market failuresare not generally compatible with the relevant rules on subsidies in the ASCM.In short, though climate change subsidies are positivelyutilized to correct 'the greatest market failure,' it is quite feasible at present time that such subsidies will nonetheless be found in violation of the WTO rules mostly inthe context of the ASCM.

Moreover, it should be also pointed out that the benchmark for 'conferral of benefit,' which is one of the criteria for a subsidy as defined in the ASCM,isthe ordinary competitive market upon which the current jurisprudence of the WTO is based. Therefore,in terms of economics or policies, it would be highly challenging to assess the justifiability of climate change subsidies even if they are deemed as measures tocorrect the already distorted market with constant government intervention or imperfect competition.[12]The current market for climate change subsidies is premised on the specific market where government had continuously conferred benefits for producers and consumers of fossil fuels,the largest source of greenhouse gas.This implies that a wide range of preferablepolicies for fossil fuel energy is availablesuch as the supply of networks on energy distribution and tax expenditures in the existing market structure, consequently putting renewable or other alternative energy marketson an unequal footingwith competing conventional energy sources.In relation to this circumstance, the Kyoto Protocol, in its article 2(1)(a)(v), calls for the progressive reduction of "subsidies in all greenhouse emitting sectors that run counter to the objective of the Convention." Climate change subsidies, when taken into consideration of the distinctive features of the relevant market, are indeed justifiable measures not only for the sake ofa great cause such as responding to climate change, but also due to thefact that they promote a greater use of non-fossil-fuels and correct the market failure for fossil fuel energy.

The discussion of market as a policy justification of climate change subsidies is only significant to the extent that the legal benchmark for financial contribution or benefit, the criteria for subsidy in the ASCM, is the market capable of price-setting. Let alone thediscussion of obligation by treaty such as Kyoto Protocol or international customary law, what lies at the heart of the climate change debate is the atmosphere, which is clearly distinguished from an ordinary market due to its special status as a global common good.To

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Space, and Law Reform, Journal of International Economic Law, Volume 15, Number 2 (2012) p.528. Also See . The Economics of Climate Change: The Stern Review. Cambridge Press (2007).

[12]A. Syke, "The Questionable Case for Subsidies Regulation: A Comparative Perspective," *Journal of Legal Analysis*, Volume 2, Number 2 (2010), pp.501-503.

be more specific, whena firm is given the allowances on the promise to emit GHGs up to a certain ceiling, this does not imply that the firm has been granted with a pre-existing property right in the atmosphere, instead the assignment of such a right or entitlement comes from the state.[13]This Emission Trading System, which is one of the three market-based mechanisms introduced by the Kyoto Protocol, is indeed valuable asset that can facilitate transactions in the marketplace.

III. Climate Change Subsidies and Norm: the ASCM

1.Background of the ASCM

Prior to the WTO agreements, no mandatory instrument at the multilateral level was available to fully restrict the subdues. The provisions of Article XVI of GATT 1947 have generally acknowledged the potential trade distortion effects of subsidies. However, Article XVI merely provided that subsidies increasing exports or limiting imports could be subject to a notification and discussion of "the possibility of limiting the subsidization" when subsidization in question was deemed seriously prejudicial to the interests.[14]Also, GATT 1947 Article VI, as part of a self-help, allowedcountervailing duties on subsidized imports only if they "cause or threaten material injury to an established domestic industry." A major advance in subsidy discipline was established in the ASCM with the introduction of a comprehensive definition of the term "subsidy" and more elaborated procedures to bring its two main categoriesof subsidies--prohibited and actionablesubsidies--to the Dispute Settlement body.[15]

2. Determination of a Subsidy (I): Financial Contribution in Article 1.1(a)(1)

A subsidy is broadly defined in Article 1 of the ASCM. In general, for a subsidy to be found to exist, there must first be one of the four types of financial contribution by a government as set forth in Article 1.1(a)(1).[16] This implies that even if measures at issue generate a benefit

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[13]R. Howse, "Climate Mitigation Subsidies and the WTO Legal Framework: A Policy Analysis," International Institute for Sustainable Development (2010), p.8

[14]GATT 1947 Article XVI

[15]For general discussions, A. Stoler, "The Evolution of Subsidies in GATT and the WTO," *Journal of World Trade*, Vol. 44, No.2 (2010), pp.797~807.

[16]ASCM Article 1(1)(a)reads that:

> (i) a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees);
> (ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits)(1);
> (iii) a government provides goods or services other than general infrastructure, or purchases goods;
> (iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be

for a recipient, they will not be subsidies under the ASCM in the absence of financial contribution. In other words, the form of instrument used is indeed a pivotal factor; conversely speaking, a measureexerting a market effect equivalent to a subsidy does not, *ipso facto*,convert itself into a subsidy.

In particular, the form of contribution under Article 1.1(a)(1)(iii), which involves a provision of goods or services by a government other than general infrastructure, was relevantto identification of financial contribution in the FIT program implemented by the Government of Ontario in the *Canada Renewable Energy* Case.In *Canada-Renewable Energy*, the Appellate Body reviewed the Panel's findings that the Government of Ontario takes possession over electricity and thus purchases electricity.[17]In particular, given the specific characteristics of electricity, the Appellate Body agreed with finding by the Panel that a purchase of electricity involves the transfer of an entitlement of electricity, rather than the taking of physical possession of the electricity.[18]

It should also be recalled that in the *US-Lumber* Case, the issue was raised as to the meaning of "goods" in the phrase "provides goods or services other than general infrastructure." The Appellate Body ascertained whether the term "goods" included trees even before they are harvested, that is, standing timber attached to the land and incapable of being trade across borders.[19]It was pointed out that the stumpage arrangements grant tenure holders a right to enter onto government lands, cut standing timber and enjoy exclusive rights over the timber that is harvested.[20] According to the Appellate Body, the key issue for purposes of determining whether a government provides goods in the sense of Article 1.1(a)(1)(iii), was the consequence of the transaction.[21]This analysis is closely related to the climate changes subsidies whose main purpose is to protect and enhance the sinks and reservoirs of GHGs. For instance, if a government merely provides a certain area of forest to a private person on the condition ofreducing GHGs, such governmental measure would not constitute as a subsidy because the land, itself would not constitute as 'goods' and the trees would not be cut down. It will be highly unlikely, in this case, to find financial contribution as defined in the ASCM; however, if the same forest in question is provided in exchange for the timbersfrom other area, it infers that such measure will likely fall within the meaning of financial

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vested in the government and the practice, in no real sense, differs from practices normally followed by governments;

[17]WT/DS412/AB/R, WT/DS426/AB/R, 5.111

[18]WT/DS412/AB/R, WT/DS426/AB/R, 5.111; WT/DS412/AB/R, WT/DS426/AB/R, para.5.128

[19]WT/DS257/AB/R, paras 57-59.

[20]*Ibid.*

[21]WT/DS257/AB/R, para 75.

contribution in the ASCM.[22]

3. Determination of a Subsidy (II): Benefit in Article 1.1(b)

Turning now to our particular focus on the benefit analysis, Article 1.1(b) of the ASCM addresses second requirement to determine a subsidy. The proper analysis of a benefit involves the careful assessment on whether the recipient is better off than it would have been without the financial contribution. In other words, the test for when a benefit is conferred is whether the financial contribution makes a recipient better off than it otherwise would have been.[23]

(1) The relevant market

In order to verify whether measures adopted to support trade in renewable energy fall within the scope of the ASCM, the requirements set out in this provision need to be thoroughly analyzed. In particular, as the existence of a benefit needs to be proved, the question arises as to when exactly a benefit is conferred. In the *Canada-Renewable Energy* case, the Panel first reviewed the economics of wholesale electricity markets and the Ontario market opening experience in 2002 to conclude that "competitive wholesale electricity markets would only rarely attract sufficient investment in the generation capacity needed to secure a reliable supply of electricity" and that this "could not have been achieved in Ontario in 2002 solely on the basis of the operation of a competitive wholesale electricity market."[24]Furthermore, the Panel reviewed several in-province and out-of-province benchmarks that werebased on the assumption that the relevant market for the benefit comparison was a single market for electricity generated from all sources of energy. The Panel considered all these benchmarks to be distorted and thus not appropriate, for a proper benefit analysis.[25]

However, the Appellate Body saw two main problems with the Panel's analysis of relevant market for the purpose of benefit comparison. First, it was of the view that the Panel should have started, rather than concluding, its benefit analysis with the definition of the relevant market. According to the Appellate Body, the definition of the relevant market was central to, and a prerequisite for, a benefit analysis under Article 1.1(b) of the ASCM. The existence of benefit could properly be established only by comparing the prices of goods and services in

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[22]A. Green, "Trade Rules and Climate Change Subsidies," *World Trade Review*, Vol. 5(3) (2006) p.394.

[23]Appellate Body Report, -Measures Affecting the Export of Civilian Aircraft (WT/DS70/AB/R, para 157; The US-Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom, WT/DS138/AB/R, para.68.

[24]WT/DS412/AB/R, WT/DS426/AB/R, para.5.167.

[25]*Ibid.*

the relevant market where they compete.[26]Second, the Appellate Body observed that the fact that electricity is physically identical, regardless of how it is generated, suggested that there is highdemand-side substitutability between electricity generated through different technologies. The Appellate Body also noted possible additional factors such asthe types of contract, the size of the customer, and the type of electricity generated that may have been used to to differentiate on the demand-side, which the Panel did not consider in its analysis of the relevant market.[27]

The Appellate Body also emphasized the relevancy of supply side factors in determination of the relevant market. The supply-side factors suggested that wind power and solar-PV producers of electricity could not compete with other electricity producers because of differences in cost structures and operating costs and characteristics. Such differences make it very unlikelythat the former may exercise any form of price constraint on the latter. In contrast, conventional generators produce an identical commodity that can be used for base-load and peak-load electricity as they have larger economies of scale and exercise price constraints on wind power and solar PV-generated producers.

In line with this, the Appellate Body further noted[28]:

> "It is often the government's choice of supply-mix of electricity generation technologies that creates markets for wind and solar PV-generated electricity. A government may choose the supply-mix by setting administered prices (based on the principles of cost recovery and reasonable margin) for technologies that would not otherwise be able to recover their costs on the spot market. Alternatively, a government may require that private distributors or the government itself buy part of their requirements of electricity from certain specified generation technologies. As we consider further below, in both instances, *the definition of a certain supply-mix by the government cannot in and of itself be considered as conferring a benefit within the meaning of Article 1.1(b) of the ASCM*. (emphasis added)

The Appellate Body also correctly pointed out that the Panel's analysis of the relevant market focused on the preferences of the final consumers and ignored that electricity was purchased by the Government of Ontario at the wholesale level and resold to consumers at the retail level.[29]This suggests that even if demand-side factors weighed in favor of defining the relevant market as a single market for electricity generated from all sources of energy, supply-side factors, due to the significant differences in cost structures and

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[26]WT/DS412/AB/R, WT/DS426/AB/R, para.5.169.

[27]Ibid.

[28]WT/DS412/AB/R, WT/DS426/AB/R, para.5.175.

[29]WT/DS412/AB/R, WT/DS426/AB/R, paras.5.176~178.

characteristics,prevented the very existence of windpower and solar-PV generation, absent government definition of the energy supply-mix of electricity generation technologies.

(2) The benchmark price

It is important to note that although the Panel defined the relevant market as a single whole market for electricity generated from all energy sources, it did not consider that the competitive wholesale electricity market was an appropriate benchmark, given that the government intervention was required to ensure a stable and reliable supply of electricity. Here, the Appellate Body has come up with a market-based approach to benefit benchmarks in situations where government intervened to create markets that would otherwise not exist. For example, when a government create electricity markets, a constant and reliable supply is indispensable to maintain the supply-demand balance between generators and consumers. The imbalances would eventually destabilize the network, causing interruptions of power supply. This type of intervention has an effect on market prices, as opposed to a situation where prices are determined by unconstrained forces of supply and demand, it does not exclude *per se* treating the resulting prices as market prices for the purposes of a benefit analysis under Article 1.1(b) of the ASCM. After all, in absence of such government intervention, there could not be a market with a constant and reliable supply of electricity.

Next, the crucial question still remains as to whether and how determination of subsidy is different when a government intervention creates a market as opposed to an intervention in an already existing market.According to the Appellate Body, considerations relating to the choice of energy supply-mix by a government, including wind and solar PV generated electricity may be crucial to the viability and sustainability of the electricity market in the long term. It stated, in relevant part that:[30]

> "Nevertheless, a distinction should be drawn between government interventions that create markets that would otherwise not exist and other types of government interventions in support of certain players in markets that already exist or to correct market distortions therein. Where a government creates a market, it cannot be said that the government intervention distorts the market, as there would not be a market if the government had not created it. *While the creation of markets by a government does not in and of itself give rise to subsidies within the meaning of theASCM, government interventions in existing markets may amount to subsidies when they take the form of a financial contribution, or income or price support, and confer a benefit to specific enterprises or industries."*(emphasis added)

> "A comparison between renewable energy electricity generators and conventional energy electricity generators required consideration for the full costs associated with

[30]WT/DS412/AB/R, WT/DS426/AB/R, para.5.188.

generation of electricity, which will underlie a government definition of energy supply-mix.*Thus, if the higher costs for renewable energy have certain positive externalities, such as guaranteeing long-term supply and addressing environmental concerns whereas lower price for non-renewable electricity have certain negative externalities*. In light of the above, it leads to the conclusion that the fact that the government's definition of the energy supply-mix for electricity generation does not *in and of itself* constitutes a subside. *Rather, the benefit benchmarks for a wind and solar-PV generated electricity should be found in the markets for wind and solar PV-generatedelectricity that must result from the supply-mix definition*. Thus where the government has defined an energy supply-mix that includes wind power and solar-PV electricity generation technologies, as in the present disputes, a benchmark comparison for purposes of a benefit analysis for wind power and solar PV electricity generation should be with the terms and conditions that would be available under market-based conditions for each of these technologies, taking the supply-mix as a given."[31] (emphasis added)

4. Determination of Actionable Subsidies: Article 2.1(a)~(c)

In addition to the above two requirements, a subsidy has to also meet the 'specificity' test to fall under the legal framework of the ASCM. The test of specificity comes in two different ways; first, where a subside is explicitly limited to a sector or a region, it is deemed to be de jure specific. However, when the authority establishes objective criteria governing the eligibility, the requirement for specificity will not be fulfilled provided that such eligibility is automatic and conditions are strictly adhered to.

The requirement of specificity was designed as an initial screening mechanism to inspect only those foreign subsidies which truly are broadly available and widely used throughout an economy. The specificity criteria was originally intended to ensure that government spending upon public goods that are used incidentally by domestic producers did not come within the remit of the ASCM. In this respect, the specificity could equally be used to exempt subsidies for renewable energy from regulation as stipulated in Article 2.3. As in the field of transportation infrastructure, the nature of renewable energy as a public good suggests that governments should adopt broad climate change mitigation support strategies in order to maximize the positive externality of mitigation efforts.

5. Non-Violation Concept

In continuation of the discussion on 'actionable subsidies,' Article 5 of the ASCM stipulates the forms of adverse effects to the interests of other Members. One of the forms of adverse effects, as stipulated in Article 5(b), is the"nullification or impairment of benefits accruing directly or indirectly to other Members under GATT 1994, in particular the benefits of

[31]WT/DS412/AB/R, WT/DS426/AB/R, para.5.190

concession bound under Article II of GATT 1994." The term, 'nullification or impairment'is notably parallel to Article XXIII(1)(b) of GATT 1994, which set forth the so-called 'non-violation complaints' that may be invoked to challenge any measure, provided that it results in 'nullification or impairment of a benefit."[32]This particular provision may potentially be used as one of the grounds for claiming the violation of interests in the tariff concession in regard to climate change subsidies. Such claim, if Article 5(b) in the ASCM is applied, is conceivable in caseswhere certain measures[33]are contended as climate change subsidies despite of being subsidies in the legal sense or subsidies without the element of specificity, thereby causing obstaclesto implementing climate change subsidies.

Another important point to mention is the requirement of legitimate expectation stipulated in GATS Article XXIII(3)[34] as it relates to the non-violation claim of climate change subsidies. For instance, if a climate change subsidy at issue had not existed at the time of the negotiation for tariff concession, such subsidy, in principle, is not a measure which could have been reasonably expected. Accordingly, implementation of such measure will likely amount to the infringement of legitimate expectation. However, we should pay special attention to the tendency of the rulings by DSB which distinguish measures related to non-commercial values such as protection of human life or preservation of exhaustible natural resources from other measures and increase the burden of proof thereof. While most climate change subsidies have been implemented subsequent to major tariff concession negotiations including the Uruguay Round, any additional governmental measures in response to climate changes could have sufficiently and reasonably been foreseen. With the adoption of the UNFCCC in 1992 and the increasing prevalence of the international negotiations on climate change since then, it seems rational to expect the implementation of climate change subsidies.

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[32]GATT 1994Article XXIII (1)(b) reads that:
1. If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of…
(b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or…

[33]The term 'measure' under GATT Article XXIII(1)(b) was broadly interpreted as not only to include legally enforceable governmental actions but also to encompass non-binding actions which could potentially have adverse effects on competitive conditions of market access, and measures requiring a high degree of cooperation between government and private actors. WT/DS44/R ("japan-Film"), paras 10.43~10.49.

[34] GATS Article XXIII(3) reads that: If any Member considers that any benefit it could reasonably have expected to accrue to it under a specific commitment of another Member under Part III of this Agreement is being nullified or impaired as a result of the application of any measure which does not conflict with the provisions of this Agreement, it may have recourse to the DSU.

VI. Conclusion

In the *Canada-Renewable Energy* case, the Appellate Body could not determine whether the challenged measures conferred a benefit within the meaning of Article 1.1(b) of the ASCM and subsequently whether they constitute prohibited subsidies inconsistent with Articles 3.1(b) and 3.2 of the ASCM. In its determination of the benefit benchmark, the Appellate Body stated that a distinction should be drawn between government interventions that create market that would otherwise not exist and other types of government intervention in support of the markets that already exist, or to correct market distortions therein. Where a government creates a market, it cannot be said that the government intervention distorts the market, as there would not be a market if the government had not created it. While the creation of markets by a government does not in and of itself give rise to subsidies within the meaning of the ASCM, government interventions in existing markets may amount to subsidies when they take the form of a financial contributions, or income or price support, and confer a benefit to specific enterprises or industries. Following from this, such distinction of government intervention that creates a market and government intervention in an existing market for determination of a subsidy may have wide implications in the future, which may extend well beyond the electricity sector and give sufficient room for policy instruments.

The purpose of this paper was not to be comprehensive, but rather to concentrate on some of the more important interpretations as it related to the *Canada-Renewable Energy* case. As noted at the outset, there has been considerable discussion on the aspect of amending treaties as well as of the interplay between trade and environmental regimes with respect to issues regarding trade and climate change. Following observations and implications can be made from the *Canada-Renewable Energy* Case.

Firstly, while the conventional disputes were involved with market access principle in most cases, the new type of trade disputes concerning environmental values are rather closely related to the industrial policies of the WTO members as in the case at issue.For instance, the Canadian FIT program combined with local content requirements could have been straightforwardly subjected to the category of prohibited subsidies without the artificial interventions by the Appellate Body.At the same time, a FIT program without attachment of localcontent requirements leaves a door open for future cases. In the absence of specific environmental justification for subsidies with the ASCM, these changed circumstances are also prominently featured in the GATT Article XX defense.

Secondly,as the role of governments or governmental agencies has become increasingly importantas the main players in climate change mitigation, special attention should be given to the relevancy of the Government Procurement Agreement(“GPA”) to similar disputes. In the *Canadian Renewable Energy* case, the Appellate Body rejected to apply Article III(8)(a)

of the GATT, owning as an excuse for the possible inconsistency with the GATT's national treatment principle because it found that two comparable products, electricity and electricity generation equipment,were not in a competitive relationship.However, had the close relationship between electricity and generation equipment been found, the impact of governmental procurement defense must have beenquite significant. In this respect, the government procurement defense would be not only an efficient leeway against the national treatment principle, but also a safe harbor for the climate change mitigation measures. It should also be noted that the revised GPA includes an article to cover global outsourcing project.[35]

Finally, this paper sought to draw a special attention to the concept of the 'relevant market' as a benchmark to determine the existence of benefit. In *Canada-Renewable Energy*, the Appellate Body was particularly cognizant of two separate markets, namely a market for conventional energy and a market for renewable energy. The latter category is the market for wind and solar PV-generated electricity, which can only come into existence by a government regulation considering both demand and supply side substitutability. While subject to much debateand criticism on this approach, it signals a valuable direction for the FIT program such as of Canadian oneto be left intact and to continue to endorse environmental value.

[35]Article 4.2 of the Revised GPA reads that:

With respect to any measure regarding covered procurement, a Party, including its procuring entities, shall not: (a) treat a locally established supplier less favorably than another locally established supplier on the basis of the degree of foreign affiliation or ownership; or (b) discriminate against a locally established supplier on the basis that the goods or services offered by that supplier for a particular procurement are goods or services of any other Party.

ISSUES AND IMPLICATIONS OF RENEWABLE ENERGY POLICY/LAW IN CHINA

2014.11.07.

Sang Mo Lee (KLRI)

Outline

- ❖ Background and Concept of Renewable Energy
- ❖ Policy and Law of Renewable Energy
- ❖ Schemes of Renewable Energy Law
- ❖ Renewable Energy Related Disputes
- ❖ Implications and Conclusion

Background

- Fierce Competition for Energy Resources
  - Given the devastating effects of Climate Change and global financial crisis, world energy market is becoming more complex and unstable.
  - There is a shortage of energy and a Declining fossil energy supply .
  - Effectively utilize Domestic resources and, at the same time develop Renewable energy sources, such as *solar*, *biomass.*
  - China reclaims the top spot for renewables energy investment in terms of energy diversification, restructuring energy industry, solving electric problems in rural agricultural areas. Ultimately to promote strategy in support of climate change and sustainable growth.
- Focus on Renewable Energy Development
  - In responses to increased energy consumption and population growth along with climate change, high dependency on coal energy and environment pollution.
  - Particularly, Korea rank #1 in Carbon Dioxide emission starting in year 2000. Korea therefore announced the goal of reducing Carbon Dioxide emission to 40~50% by year 2020 to the level of year 2005.
  - Target total energy consumption of non fossil energy rate to 15%.

- Major Status on Renewable Energy (As of 2012)
  - Continuous growth on renewable energy generating unit(accumulated) and generation quantity.
  - Recorded 3 million 21040 KW, 1 Billion $61 million Kwh.
  - Installed Capacity increased 11% compared to previous year and generation quantity increased 30% compared to previous year->noticeable growth and renewable energy.
  - Renewable energy generating unit comprised 28% on China's domestic total energy generating unit.
  - Capacity of Generating Plant Composition: Water Power 21.8%, Wind Power 5.3%, Biomass 0.7%, Solar 0.3%.
  - Renewable Energy Generation Quantity: Comprised 20% of total generation quantity
  - Generation Quantity Composition: Water Power: 17.4%, Wind: 2.0%, Biomass: 0.8%, Solar: 0.08%.
  - China reclaims the top spot for renewables energy investment: #1.
    - ✓ China *USD 650 million(24%), USA USD 356 million(13%), Germany USD 228 million(9%).*
  - Total investment on China's domestic Generating Unit: Renewable energy comprised 50%.

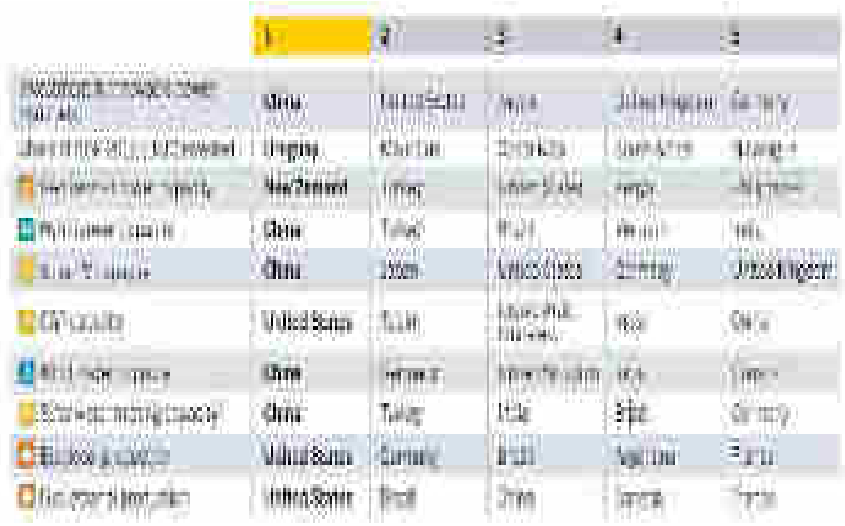
Total Consumption of Energy and its Composition

Year	Total Energy Consumption (10 000 tons of SCE)	As Percentage of Total Energy Consumption (%)			
		Coal	Crude Oil	Natural Gas	Hydro-power, Nuclear Power, Wind Power
1990	98703	76.2	16.6	2.1	5.1
1995	131176	74.6	17.5	1.8	6.1
2000	145531	69.2	22.2	2.2	6.4
2005	235997	70.8	19.8	2.6	6.8
2010	324939	68.0	19.0	4.4	8.6
2011	348002	68.4	18.6	5.0	8.0
2012	361732	66.6	18.8	5.2	9.4

Total Production of Energy and its Composition

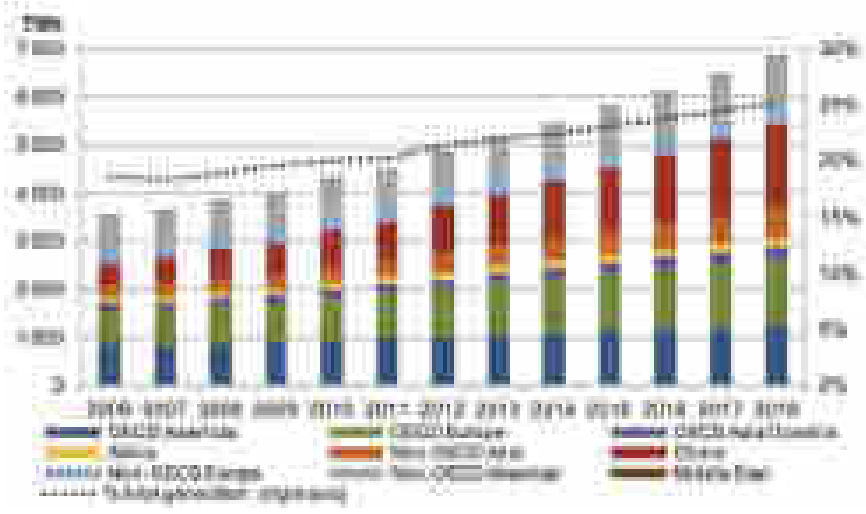
Year	Total Energy Production (10 000 tons of SCE)	As Percentage of Total Energy Production (%)			
		Coal	Crude Oil	Natural Gas	Hydro-power, Nuclear Power, Wind Power
1990	103922	74.2	19.0	2.0	4.8
1995	129034	75.3	16.6	1.9	6.2
2000	135048	73.2	17.2	2.7	6.9
2005	216219	77.6	12.0	3.0	7.4
2010	296916	76.6	9.8	4.2	9.4
2011	317987	77.8	9.1	4.3	8.8
2012	331848	76.5	8.9	4.3	10.3

ANNUAL INVESTMENT / NET CAPACITY ADDITIONS / PRODUCTION IN 2013



TOTAL CAPACITY OR GENERATION AS OF END–2013

Trends in Renewable Energy Generation Quantity and Prospects by world Region (2006~2018)



Concept of Renewable Energy

- The term "new energy and renewable energy" are used in mixed way under Energy related law.
  - Regulations using New Energy term: Total 81.
  - Regulations using Renewable Energy term: Total 75.
  - Regulations using both Renewable Energy and New Energy: Total 6 .
- Definition
  - New Energy: New energy is derived from natural processes that are replenished constantly. In its various forms, it derives directly from the sun, or from heat generated deep within the earth (Article 2 of New Energy)
  - Renewable Energy: Renewable energy" refers to non-fossil energies, such as wind energy, solar energy, hydro energy, bioenergy, geothermal energy and ocean energy, etc. (Renewable Energy Law of PR C Art 2)
  - There are separate definitions, but no regulations exist on differences between the two.
  - "New Energy" generally used for New Energy Vehicle . Renewable Energy is also used. There is no actual benefit of using either form.

※ Guangzhou new energy and renewable energy development plan(2008~2020)(Opinion Gathering)

- ✓New Energy: May refer to "new" forms of energy like alternative energy, free energy, renewable energy etc. (include nuclear energy) .
- ✓Renewable energy: Sunlight, Wind, tides, Plant Growth, and from heat generated deep within the earth.
- ✓New Energy : Include New Energy and Renewable Energy.

◆ EU

- Renewable Non Fossil Energy resources. Solar, Wind.
- Renewable energy resources include: biomass, hydro, geothermal, solar, wind, ocean thermal, wave action, and tidal action.

◆ United States

- biomass, water, geothermal, wind and solar, energy from the waste.

◆ IEA(International Energy Agency)

- There is distinction between Renewables and Non-Renewable Wastes.
- Renewable Energy : Include thermal, photochemical, and photoelectric, photosynthetic energy stored in biomass, energy generated from city wastes (total 10)
- Waste : Non-renewable city waste, industrial waste (total 2)

◆IRENA(International Renewable Energy Agency)

- Any energy resource that is naturally regenerated over a short time scale and include bio energy, heat generated deep within the earth, hydropower, ocean energy(tidal energy), solar energy.

◆Korea

- There is a distinction between New Energy and Renewable Energy terms. However. Meaning is different to that of China.
- New Energy: Convert existing coal energy into new energy(Coal Gasification/Liquefaction ,fuel cell, hydrogen energy).
- Renewable Energy: solar energy, wind power, biomass energy, energy from waste, geothermal energy, water power, and ocean energy.

※ There is discussion on amendment of Act on the Promotion of the Development , use and diffusion of new and Renewable Energy.

Policy/Law of Renewable Energy

- From 1949 to 1992, the basis for Chinese energy industry was so weak that China mainly focused on conventional energy development during this period. Through enforcing several five-year plans gradually, China developed petroleum, coal, and electric power vigorously.
- After the 1992, three major factors laid the foundation for China's formulation of macro policies on the development and utilization of renewable energy.
- The Kyoto Protocol, which sets the schedule of greenhouse gas emissions reductions for developed countries, 22 had obvious impacts on policies and legislation in the countries subject to its emissions reductions.
- After the adoption of the Kyoto Protocol which sets the schedule of greenhouse gas emissions reductions for developed countries, 22 had obvious impacts on policies and legislation in the countries subject to its emissions reductions and China amplified renewable energy production and formulation of relevant policies and regulations.
  - China, as a developing country, had no specific duty to reduce emissions under the framework of the Kyoto Protocol,

Renewable Energy Related Policy

- 21st Century-White Paper on Population, Environment and Development
- *Guidelines for the Development of New Energy and Renewable Energy in China* (1995.1)
- Brightness Programme (1996)
- New energy basic items maintenance regulations (1997.5)
- Circular on the Issues of Further Supporting theDevelopment of Renewable Energy (1999.1)
- The 10th Five-Year Plan for new energy and Renewable Energy Development" (2001.10)
- Notice of the National Development and Reform Commission on Issuing Administrative Provisions on Renewable Energy Power Generation (2006.1)

Renewable Energy Related Laws

◆There is an announcement of China Energy law on China's comprehensive energy strategy and mechanism. However, there is no active discussion on the amendment.

◆Separate Energy law with focus on Independent Legislation.

- Independent Energy Legislation: Electricity Law, Coal Act, Renewable Energy Resource Act and Energy Saving Act etc. Total 4.
- Related Law: Mining Resource Act, Water Environment Protection Law, Clean Production Stimulation Act, Circular Economy Promotion Law etc. Total 30.
- Related Administrative Law : Total 30 (State Council Promulgation).
- Related International Treaty : Total 10.
- Section Regulation: 200 conditions.

Renewable Energy Related Policy

◆The 11th Five-Year Plan for energy Development (2007.4)

◆Renewable Energy long term development plan (2007.8)

◆The 11th Five-Year Plan for Renewable Energy Development (2008.3)

◆Strategic development and stimulation of emerging industry and decision of the Council of State (2010.10)

◆The 12th Five-Year Plan for Renewable Energy Development (2012.8)

◆The 12th Five-Year Plan for Energy Development (2013.1)

◆ Notice of the State Oceanic Administration on Issuing the Outline for the Development of Marine Renewable Energy (2013-2016) (2013.12)

Regulations relating to Renewable Energy

- Clean Air Act (1985.9)
- Coal Act (2013.6)
- Water Act (1988.1)
- Electricity Act (1995.12)
- Clean Production Stimulation Act (2002.6)
- Water Act (2002.8)
- Renewable Energy Act (2005.2 enacted, 2009.12 amended)
- Energy Saving Act (2005.2 enacted, 2007.10 amended)

- Renewable Energy Amendment
  - The Standing Committee of the National People's Congress of the People's Republic of China (PRC) adopted an amendment to the Renewable Energy Law, which was first passed on February 28, 2005 (Total 8 article and 33 sections).
  - Big change in China's Energy Generation Quantity and Capacity
    - ✓ China's 2006 Energy Generation Quantity and Capacity surpass total Generation Quantity of five years period from 2001-2005.
  - The amendment aims to support the country's emerging renewable energy sector and guaranteed energy safety and protection as well as sustainable development. Although the Feb. 28th, 2005 Law contains similar requirements for state power grid enterprises to buy the total amount of power produced by renewable energy sources, it is said to be lacking in focus on climate change response.
  - China is part of Climate Change Convention and Kyoto Protocol. China Proposed To cut CO_2 emissions intensity by 40–45% below 2005 levels by 2020 at the 2009 United Nations Climate Change Conference in Qatar. Moreover, China announced that the country will work toward non-fossil fuels in primary energy consumption to about 15% by 2020.

Schemes of Renewable Energy Law

- Quantity Target System
  - The quantity target system on renewable energy is the legal requirement for the proportion of renewable energy in the energy production or consumption mix
  - Article 4 The state shall give priority to the development and utilization of renewable energy in energy development and promote the establishment and development of the renewable energy market by setting an overall target for the development and utilization of renewable energy and adopting corresponding measures.
  - By 2015, the annual renewable energy consumption will reach 478 million tons of standard coal equivalents (TCE); including 400 million TCE coming from commercialized renewable energy, representing more than 9.5% in overall energy mix (12th Five-Year Plan period)

- Feed in Tariff (FIT)
  - A feed-in tariff advanced renewable tariff is a policy mechanism designed to accelerate investment in renewable energy technologies. It achieves this by offering long-term contracts to renewable energy producers, typically based on the cost of generation of each technology. Rather than pay an equal amount for energy.
  - The state applies the system of guaranteeing the purchase of electricity generated by using renewable energy resources in full amount. (Article 14
    - ✓ Transition from Total Buying System(2005) to Total purchase guaranteed system (2009)
  - Currently implemented on Sunlight Energy, Wind Power, Biomass, waste energy
  - Paid through Renewable Energy Development Fund, the sources of the fund composed of " Public Budget Special Category" and "Renewable Energy Electric power Price supplemental dues

- Due to the dissemination of renewable energy, development fund has become larger. The financial burden on Government led to hike on energy supplemental taxes.
- Any power grid enterprise violating Article 14 of this Law by failing to purchase the quantity of the electricity generated by using regenerable energy resources as required and thus causing economic losses to the relevant enterprise which uses regenerable energy resources to generate electricity shall be liable for such losses and be ordered by the State Electricity Regulatory Commission to make corrections within a specified time limit and, if it refuses to make corrections as required, be given a fine not exceeding the amount of the losses suffered by the relevant power enterprise (Article 29).
- Total 70 countries are using it, and Korea uses RPS System.

◆Classified Fixed Grid Price

- Article 19 The on-grid electricity prices for projects of electricity generation by using renewable energy shall be determined by the administrative department of price of the State Council in light of the conditions of different areas and the characteristics of electricity generation by using renewable energies of different types.

◆ Development Fund

- A renewable energy development fund shall be set up by the national finance, and the sources of funds shall include the annual special-purpose funds arranged by the national finance, the additional income to the price of electricity generated by using renewable energy resources as collected according to law, etc.
- Total Four Countries including United Stated manages Development Fund.

- Financial Assistance and Tax Incentive
  - Article 14 The state applies the system of guaranteeing the purchasing of electricity generated by using renewable energy resources in full amount. According to the national plan for the development and utilization of renewable energy resources, determine the target proportion, which shall be realized in the planning period, between the electricity generated by using regenerable energy resources and the total electricity generated and work out the specific measures for power grid enterprises to firstly schedule the generation of electricity with renewable energy resources and purchase electricity generated by using renewable energy resources in full amount.
  - Article 25 A financial institution may offer a favorable loan with a financial discount for a renewable energy development and utilization project that is listed in the regenerable energy industry development guidance catalogue and that meets the credit requirements.
  - Article 26 The state shall adopt a tax preferential policy for projects that are listed in the regenerable energy industry development guidance catalogue.
  - 56 countries are currently managing similar system including Korea.

Renewable Energy Related Disputes

	Date Launched	Dispute Type	Forum	Complainant	Respondent
1	November 2011	AD/CVD Investigation	US Department of Commerce/ITC	US	China
2	November 2011	LCRs	MOFCOM	China	US
3	July 2012	AD/CVD investigation	MOFCOM	China	US, Korea, EU
4	July 2012	AD/CVD investigation	European Commission	EU	China
5	January 2012	AD/CVD investigation	US Department of Commerce/ITC	US	China, Vietnam
6	November 2012	AD/CVD investigation	Indian Ministry of Commerce	India	China, Taiwan, Malaysia, US
7	September 2010	LCRs, Subsidies	WTO	Japan, EU	Canada
8	December 2010	LCRs, Subsidies	WTO	US	China
9	November 2011	LCRs, Subsides	MOFCOM	China	US
10	November 2012	LCRs, Subsides	WTO	China	EU, Greece, Italy
11	February 2013	LCRs, Subsides	WTO	US	India
12	TBD	LCRs, Subsides	WTO?	India	US

United States and China Disputes in Solar Energy Industry

- Roughly 95% of China's solar production was exported in 2010. Increase in volume of Chinese shipments of solar cells in 2011 to the Unites States increased four times compared to 2009.
- On October 19th, 2011, Coalition for American Solar Manufacturing(United States Company Headquarter in Germany. Composed of 7 companies including Solar World Industries America) filed investigation to International Trade Commission and U.S. Department of Commerce.
- 2011 December 2nd preliminary judgment: ICT ruled that China Solar Panel posed threat to United States Solar Panel market.
- 2012 March 19th: United States Department of Commerce preliminary judgment: China industries caused damages to the United States Solar Panel Market by exporting low prices product after receiving subsidy from china government.

- On October 10th, 2012 Department of Commerce Final Ruling:, the U.S. imposed punitive tariffs mimimum of 18.32% to maximum 249.6% and a countervailing duty minimum 14.78% to 15.97 maximum
- On November 7, 2012, ITC Final Ruling: ITC determined that Chinese photovoltaic imports materially injured the U.S. industry through Government Subsidy and Aniti-dumping unfair practices. Ultimately passed 6-0 votes.
- United States can impose Anti Dumping tariffs and countervailing duty for the next five years China Solar Panel.

China and the United States Wind Power Related WTO Disputes

- On December 22nd, 2010, The US initiated dispute proceedings against China at the WTO.
- The US alleging that Beijing's special fund for wind power manufacturing is an illegal subsidy under international trade law.
- Certain Measures Affecting the Renewable Energy Generation.
  - ✓ Article 4 : Limit support for subsidies to " China Investment and china capital controlled corporations within Wind Power Facilities production and Manufacturing.
  - ✓ Article 6: Subsidy limits to " Wind Power Wing, Gear Box , generator need to be manufactured by China Capital Controlled corporations and recommended use of converter and a bearing manufactured by China Capital Controlled corporations.
- Abolition of Regulation through negotiation between two countries.

Implication and Conclusion

- **Energy law and Problems associated with renewable energy law**
  - Insufficient Energy basic law, big gap on development of independent legislation and inconsistent relation with related law.
  - Bio mass Energy, tidal, geothermal, water power energy policy is quite old. Thus, there is a need for development support. Confusions arising from division of Energy supervising institutions.
- **Implications for Korea and China FTA**
  - Renewable energy sources account for about 33.3% in trade. There can be more active trade between China and Korea due to FTA treaty.
  - Energy Cooperation methods are necessary among Northeast Asia.
  - However, there is a possibility for conflict with trade agreement containing international investment principles.
  - Particularly, it requires caution on Production supply. Needs to consider withdrawal on ISD process due to violation of FTA investment principles.

Thank you!

ANATOMY OF CONFIDENTIALITY OF TRADE NEGOTIATION

CHUNG Chan-Mo*

1. SECRECY, TRANSPARENCY AND TRADE NEGOTIATION

Transparency is regarded as an essential element of legitimacy in modern state administration. Diplomacy, however, has often been secret since long time ago and survived the criticism thatdiplomatic secrecy is a source of international instability. After the First World War, the US President Wilson tried to give light on the secretive practice of diplomacy by mentioning in his Fourteen Points that:

1. Open covenants of peace, openly arrived at, after which there shall be no private international understandings of any kind, but diplomacy shall proceed always frankly and in the public view.

As to the phrase "openly arrived at", however, Wilson explained to the Senate that the phrase was not meant to exclude confidential diplomatic negotiations involving delicate matters.[1] The intention was reinterpreted as meaning that nothing which occurs in the course of such confidential negotiations shall be binding unless it appears in the final covenant made public to the world.[2]

Apart from the fact that the word “secret” is avoided due to its bad connotations, confidential trade negotiation is a version of secret diplomacy applied in the area of trade. The degree of secrecy may vary. In a liberal case, secrecy is limited to the bargaining session, though in a strict case, the existence of negotiation itself is secret. In the middle, any agreement is secret until the negotiation is completed.

General consensus is that confidentiality and transparency represent two ends of

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[1]In fact, the peace treaties to end the War, the Versailles and St. Germain Peace Treaty, did not follow Wilson’s Point 1.

[2]Interpretation of President Wilson's Fourteen Points by Colonel House, PRFA, 1918. Supplement 1: The World War, Vol. 1, pp. 405-413.

continuum.[3]Efforts should be made to develop balanced approaches from the strong points of each prototype.[4]The process of international negotiation, however secretive it still looks like, has gone through slow evolution in recent centuries, the features of which include growing transparency.[5] Despite this long-term trend, there are some reactionary moves in the contemporary world which try to tighten up secrecy of negotiation. This article notes the practices of secret negotiation of free trade agreement (FTA), relevant court decisions and legislation as headingtowards wrong direction. It focuses on Korean experiences.

2. CONFIDENTIALITY OF TRADE NEGOTIATIONS: LOOKING THROUGH THE LEGAL DISPUTESIN KOREA

Korea along with most other countries has conducted confidential FTA negotiation. For example, it is reported that there was a Memorandum of Understanding between Korea and the United States for the Korea-US FTA (hereinafter, KORUS FTA), under which each Party committed that final text of agreement would be disclosed when the Parties reached on the final agreement. Parties also consented that documents produced during negotiation would be confidential for 3 years since the agreement enter into force. Government officials, members of Parliament and other interested persons were able to access relevant documents under the oath of confidentiality.

2.1. At the Constitutional Court

In two constitutional cases, Members of Parliament requested release of draft of trade agreement and strategy report on the negotiationwhich the Korean Government considered confidential.

[3]Ann Florini, "The End of Secrecy", *Foreign Policy*, No. 111 (Summer, 1998) p. 50.

[4]Aurélien Colson, "Chiaroscuro in Negotiations: Secrecy, Transparency, and Asymmetry in International Negotiations", in Colson, Druckman, and Donohue (eds.),*International Negotiation: Foundations, Models, and Philosophies. Christophe Dupont*, 2013.

[5]Raymond Cohen and Paul Meerts, "The Evolution of International Negotiation Processes", *International Negotiation* 13 (2008), pp. 149-156.

2.1.1 Facts of the Cases:

(1) ***Case Concerning Competence overWTO Rice Negotiation***[6]

In 2004, Korean Government entered into negotiation with WTO Members on changing its GATT schedule of concessions in order to extend the moratorium of transformation of quota into tariff system on rice import. During the process, the Government wrote a side letterthat accepted some demands from interested countries such as the United States, India and Egypt in return for their recognition of the extension of the moratorium.

Korean Government submitted the National Assembly a bill of revised GATT schedule of concessions, but without the side letter. 9 opposition parliamentary members (the plaintiffs) requested that the bill should include the side letter. As the Government rejected the request, the plaintiffs brought this competence dispute suit against the Government claiming that the Government intruded upon the consenting rights of the National Assembly as to conclusion and ratification of the treaty and the plaintiffs' right to discuss and vote on the treaty bill by the Government's acts of concluding and ratifying the side letter without consent of the National Assembly.

(2) ***Case Concerning Competence overKORUS FTA***[7]

In February 2006, Korea and the United States made a sudden declaration launching the KORUS FTA negotiation without any prior formal feasibility study or internal consultation. Both governmentsproceeded to hold 1st negotiation conference in June and 2nd in July. Opposition parliamentary members of Korea expressed concern over the unilateral drive for the KORUS FTA by the Korean Government and requested release of information and consultation about the negotiation. The Government did not respond the request and held the 3rd negotiation meeting in September of the year. So, 23 complaining opposition Members of the Parliament brought this suit claiming that the unilateral pursuit of the KORUS FTA by the President and Government of Korea infringed their right to consent conclusion and ratification of a treaty and right to deliberate and vote in the Parliament.

2.1.2 Arguments of the Parties and the Court's Opinion:

[6] 2005 Hun-Ra 8, decided on July 26, 2007.

[7] 2006 Hun-Ra 5, decided on October 25, 2007.

As the issues of the cases and the reasoning of the Constitutional Court's opinion are identical in both cases, I mention those of the latter case only.

Arguments of the Applicants

Korea-US FTA in its nature is a treaty which requires parliamentary consent for its conclusion and ratification in accordance with Article 60(1)[8] of the Constitution as it is first, a "treaty which pertains to restriction on sovereignty" by creating an exclusive jurisdiction over disputes and excluding domestic judicial power; second, a "treaty which burdens the State or people with an important financial obligation"; third, a "treaty which relates to legislative matters" by requiring amendment, deletion, or enactment of domestic law.

As Part II, Section 1 of the Vienna Convention on the Law of Treaties defines conclusion of treaties as the whole series of process from adoption of the text of a treaty through negotiation, to authentication of the text, to expressing consent to be bound by a treaty, and to exchange or deposit of instruments of ratification, parliamentary power to consent conclusion and ratification of a treaty stipulated in Article 60(1) of the Constitution means a substantive power to consent the whole treaty making process, to be informed fully over the process, and to give its opinion.

Thus, in relation to the conclusion of the Korea-US FTA, the defendants should have duly submitted request for consent to the National Assembly before the appointment of trade representative with full power and the beginning of negotiation, and should have provided enough information to discuss and feedback its opinion to the defendants before sending the completed text of the treaty for consent. As the defendants omitted these processes, it in fact infringes the right to consent of the National Assembly to the conclusion and ratification of a treaty, and the right to deliberate and vote. It therefore violates the Constitution.[9]

Arguments of the Defendants

The President and the Government (Ministers of Justice and Foreign Affairs) responded, among others, that individual Members of the Parliament cannot bring a suit on behalf of the Parliament itself; that 'conclusion' in Article 60(1) means other consent to be bound besides ratification and does not include negotiation; that the Defendants have no obligationto disclose negotiation; and that Members of the parliament can freely deliberate and vote on a treaty once it is submitted to the Parliament after the KORUS FTA negotiation is completed.[10]

[8]Article 60 (1) The National Assembly shall have the right to consent to the conclusion and ratification of treaties pertaining to mutual assistance or mutual security; treaties concerning important international organizations; treaties of friendship, trade, and navigation; treaties pertaining to any restriction on sovereignty; peace treaties; treaties which will burden the State or people with an important financial obligation; or treaties related to legislative matters.

[9]Case Reporter of the Constitutional Court 19-2, pp. 438-9.

[10]Ibid, pp. 439-440.

Ruling of the Constitutional Court

If a decision of National Assembly was made by majority vote and nevertheless the minority group of Congressmen who were against the majority's will could bring competence dispute suit, it is against the nature of majority principle and parliamentary system. If parliamentary members resolve political disputes by judicial means instead of discussions and conversations under democratic procedures in the National Assembly, it would be an overuse of judicial power. Under current legal systems without express legal provisions allowing 'third party suit' in which a part of the National Assembly can assert something belonging to the competence of the whole, individual members of the Assembly cannot bring competence dispute suit in which they allege the intrusion of consenting power of National Assembly on the conclusion and ratification of treaties.Thus,the applicants as members of the National Assembly [not the National Assembly itself] have no standing to make this jurisdictional complaint.[11]

While the right to consent is for external expression of opinion of the National Assembly, the right to deliberate and vote of the Members of the National Assembly is for internal building of the opinion of the National Assembly. Thus, the right to deliberate and vote of the Members of the National Assembly can only be infringed by internal relations of the National Assembly and cannot be infringed by external relations of the National Assembly[12]. Thus this claim is also illegal.As both claims are illegal, the application is rejected.[13]

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[11]Ibid, pp. 440-442.

[12]Justice Lee Gonghyun issued a separate opinion on this point arguing that right to deliberate and vote may be infringed by external forces, but consented with the majority opinion as there is neither specific infringement nor clear danger thereof in this case which was brought before the Government ever complete the negotiation and ask consentto the National Assembly.

"The right to consent of the National Assembly to the conclusion and ratification of treaties may be understood as a power to control state administration. The power to control of the National Assembly however has the nature of 'negative control' and cannot have the nature of positive power to participate and form the exercise of the executive power in a certain direction. Therefore, there is no right to consent of the National Assembly to the conclusion and ratification of treaties in the sense that it may involve in each negotiation activities of treaty conclusion. Thus, there is no possibility that the right to consent of the National Assembly or the right to deliberate and vote of Members of National Assembly be breached until when the authentic text of a treaty is established and expression of consent to be bound is requested.

Having said that, it is difficult to concede that there is infringement or serious threat of infringement of the right of applicants unless it is evident that the negotiation is carried out under the precondition of exclusion of the parliamentary right to consent. It is also hard to concede that there is serious threat of infringement of the right of applicants unless it is evident through the non-disclosure of information in this case that the defendants will not disclose or comply with the request of the National Assembly to attend and reply even after the submission of consent proposal."Ibid, pp. 443-4.

[13]Ibid, p. 442.

2.1.3 Comment

Although the legal doctrine that right to know is an integral part of freedom of expressionis firmly established, the right is not explicitly written in the Korean Constitution. The Constitutional Court seems to be very cautious to give teeth to this legal doctrine. The complainants in both cases, in fact, did not rely of the right to know, they invoked right to consent to the conclusion and ratification of treaties and right to deliberate and vote. These are explicitly written rights given to the National Assembly or its Members.These written rights, however, turned out to be not so wide or instrumental to secure the right to know even for these selected representatives of the people.Was it a tactical mistake on the part of the complainants?In any way these cases were enough to show the extremely secretive approachin relation to trade negotiation which the Korean Governmenttook and embraced by some circles of the society including the law lords.

The challenges were not without any fruit. The Government conceded to provide information on trade negotiation to a limited number of parliament members in a limited manner as described in the following cases.

2.2. At the Supreme Court

After Korea and the US held 2nd round of negotiation for KORUS FTA, the National Assembly of Korea established a Special Committee on KORUS FTA. The government reported and held periodic consultation with the Special Committee.A staff to an opposition Member of Parliament was arrested and prosecuted for leaking the government reportssubmitted to the Special Committee on KORUS FTA.

The Supreme Court ruled:[14]

> "The leaked document in this case contains negotiation strategy and responses to major issuessector by sector, which cannot be regarded as known facts among the public. Once disclosed, those contents would advantage the United States as it can prepare response to issues of our prior interests and detailed negotiation strategies, while disadvantage Korea as its negotiation strategy is all exposed, which would fail Korea to attain the preset negotiation objectives. In consideration of the above, at least those parts of the document are facts which the state, the administration and the people at large in its objective and general perspective have interests in no disclosure and which amount to professional confidentiality deserving protection as material secret information."

[14] 2009Do2669 Judgment, decided on June 11, 2009.

He served nine months in prison.

2.3. At Lower Courts

At a later stage of KORUS FTA negotiation, April 2007, the Korean Government allowed Members (and a staff each) of the Foreign Relations Committee and the KORUS FTA Special Committee of the National Assembly to look at latest drafts of the KORUS FTA through computer monitors at a specific room of the Assembly with a security attendant. The information was not allowed to disclose to the public.

Faced with this limited accessibility, some activists resorted to theOfficial Information Disclosure Act (OIDA)[15] in order to get the full access to the draft text of the KORUS FTA. When their requests for disclosure were rejected, the activists appealed to the court. The point of dispute is whether the information meets the requirements of exemption under Article 9(1) of the Act which reads:

> Article 9 (Information Subject to Non-Disclosure)(1) All information that is held and managed by public institutions shall be disclosed to the public,provided that the information falling under each of the following subparagraphs may be closed to the public:
>
> i. Information that is classified as a matter that needs to be kept secret or closed under other Acts and delegated orders (limited to the rules of the National Assembly, the rules of the Supreme Court, the rules of the Constitutional Court, the rules of the National Election Commission, the Presidential Decree and municipal or local ordinances);
>
> ii. Information pertaining to matters such as the national security, the national defense, unification, foreign relations, etc., which, if disclosed, is feared to seriously undermine significant national interests;
>
> iii. - iv. (Omitted)
>
> v. Information pertaining to matters such as audit, supervision, inspection, tests, regulations, tendering contract, the development of technology, the management of personnel affairs, and matters in the midst of decision-making processes and internal-review processes, etc., which if disclosed, carries a reasonable possibility of seriously impeding the proper performance of work as well as research and development;
>
> (Provisions hereinafter are omitted)

Seoul Administrative Court ruled [16] :First, a draft text of Korea-US FTA is

[15] This is a Korean version of the Freedom of Information Act of other countries including the U.S.

[16] 2006Guhap23098 Judgment, decided on 2.2. 2007.

notsecretinformation classified under the National Security Treatment Regulation. So it cannot be secret information classified under Article 9(1) i) of the Act.

Second, Memorandum of Understanding between Korea and the United States to keep documents exchanged for the Korea-US FTAconfidential is not a treaty ratified and promulgated according to the Korean Constitution. Thus, it is not other Acts and delegated ordersunder Article 9(1)i) of the Act.

Third, a draft text of Korea-US FTA is information classified under the Official Information Disclosure Act (Article 9(1) ii) as pertaining to foreign relations, disclosure of which raises concerns to seriously harm significant national interests.

> "Draft texts which were produced and exchanged during negotiation of the Korea-US FTA contains detailed claims, responses and negotiation guidance etc. for the elimination of trade barriers, disclosure of which to the public would result in the situation where other states may use those information in later trade negotiations and where the interests of Korea and the US conflict each other. In addition, abiding by the memorandum between Korea and the US not to disclose documents made during the negotiation is consonant with national interest to keep international credibility, and it should be considered that foreign affairs require expertise over which decision of the defendant need to be respected to a large extent."[17]

Fourth, a draft text of Korea-US FTA is information classified under the Official Information Disclosure Act (Article 9(1) v) that is in the midst of decision-making procedure and internal consideration, disclosure of which raises reasonable concerns to seriously interfere with fair conduct of affairs.

> "Draft texts contain detailed claims, responses and negotiation guidance etc. of each government for the elimination of trade barriers during the Korea-US FTA over which interests of individual people and each firm may conflict with those of the nation as a whole and interests may differ among themselves. Thus, disclosure of drafts would result in the situation where each interest group requests change of negotiation strategy, which may distort or fail the negotiation. Ittherefore amounts to raising concerns to seriously interfere with fair and efficient conduct of Korea-US FTA negotiation."[18]

The reasoning was followed in a later judgment[19] which also concerns disclosure request for the information relating to the KORUS FTA negotiation. The court's statement, however, contains elements of somewhat different nuance.

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[17]Ibid,reasoning part (2).

[18]Ibid, reasoning part (3).

[19]Seoul Administrative Court, 2007Guhap31478 Judgment, decided on 4. 16. 2008.

"Although transparent disclosure of trade agreement would provide bases for desirable public discussion to form societal consensus, non-disclosure of some aspects of trade may also contribute to the protection of national interests. Thus, some part of trade negotiation should be kept in secret while some other part should be disclosed transparent. It is not required to disclose every part of agreement over trade negotiation. The deficiency in transparency due to the non-disclosure in this case may be remedied to a large extent by the control of National Assembly or by criticizing any problem arising thereof in a subsequent implementation stage."[20]

2.4 Evaluation of Korean Court Practices

Is it true that the lack of transparency may be remedied either by the parliamentary scrutiny or by *ex post* discussion over consequences of the FTA? Parliamentary democracy is not a full replacement of participatory democracy. Members of National Assembly play their proper role only when the people in general remain awake. Access to information and knowledge is a system of rights that support participatory democracy, without which the passive public may fall into the victim of either dictatorship or demagogue. In addition, *ex post* remedies are not always available, and are usually more costly than *ex ante*.

In no case did Korean court compel the government to disclose documents relating to trade and investment agreements. On the contrary, wide discretion of the government in deciding the level of disclosure is allowed. Korean judiciary does not seem aware of the global phenomenon of information levelling, the emergence of the role of the public at large in the Internet age, and the need to adjust distributive justice among the stakeholders of trade agreements.

Although it is admitted that reconciling the tradition of secrecy with contemporary demands for transparency is a difficult job especially for a judiciary of a civil law legal system, the decisions we noted above are disappointing in that there is not a slightest trace of effort for the reconciliation except the latest decision by a lower court.

3. FALLACY OF CONFIDENTIALITY RHETORIC

The lack of transparency noted above is only a copycat of long tradition followed by governments and courts around the world including the EU[21] andthe US[22].In the following,

[20]Ibid, reasoning part (2).

[21]Case T-301/10 Sophie in 't Veld v. European Commission, Judgment of the General Court (Second

we find that the grounds for confidentiality submitted by governments and recognized by various courts are, in fact, mere rhetoric with shallow substance.

3.1 The claim that disclosure of information harms negotiating position

Conventionalists argue that secrecy is necessary for protecting one party's negotiating goal and strategy from the prying eyes of the other or third parties. The claim is based on the assumption that trade negotiation is a zero-sum game in which one party gains as much as the other party loses. Economic theory and historical experience, however, shows that trade negotiation is a plus-sum game in which both parties can gain. Different from zero-sum game, plus-sum game can achieve more gains by cooperative behavior. Sharing of information on priorities of each party facilitate negotiation process.

People tend to think getting the biggest trade surplus as a proper goal of trade negotiation which should be pursued by whatever means allowed. That is simply wrong. Economists note that gains from unilateral liberalization are likely to far outweigh potential gains from using protection as a bargaining chip in trade negotiations.[23]The country which experiences worsening or unbalanced trade terms as a result of trade negotiation would feel cheated or at least something got wrong. Naturally, the country would request renegotiation and it will cost both partiesunnecessary time and resources.This is an undesirable consequence that might be caused when governments do not pay due consideration to the fact that trade negotiation is not a one off game but a repeated game.

Considering that mutually balanced growth of trade between the parties is the proper common goal of negotiators, disclosure of wish and offer lists as well as priorities among them at the early stage and in a candid manner should onlybe preferredand not avoided.[24]The virtue and necessity of transparency in trade negotiation is also true as to the third parties.In terms of security, information disclosed to one should be regarded as disclosed to everybody. It would cost a lot to take back spilled water, to no avail. Moreover, transparency constitutes a precondition for the application of most-favored-nation principle which is included in most

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Chamber) 19 March 2013.

[22]*Center for International Environmental Law v. USTR,* US Court of Appeals for the DC Circuit,No. 12–5136,Decided on June 7, 2013.

[23]Caroline Freund,*Reciprocity in Free Trade Agreements*, World BankPolicy Research Working Papers, 2003; Jagdish Bhagwati (ed.), *Going Alone: The Case for Relaxed Reciprocity in Freeing Trade*, vol 1, The MIT Press, 2002.

[24]Yonghyun Suh & Yoon-Young Angela Choe, "Negotiators as Mediators: The Case of 1987-1995 Korea-United States Bilateral Trade Negotiations", *Negotiation Journal*, October 2010, p. 450.

trade agreements.Thus, transparency enhances the efficiency and effectiveness of trade negotiation.

3.2 The claim that information in the midst of negotiation may not be disclosed

This is an efficiency rationale based on the concern thatif negotiation details are released, opponents whose interests are not in line with the expected result of the negotiation which increases general welfare of the public may try to block the negotiation. In some circumstances, disclosure of information to the public about an imminent andcritical decision may make the decision-making process even more complex and obstruct any deal among the players. It is also a statistical truth that as the number of participants increase it would be more difficult to reach an agreement. The so-called "green room" meeting in the WTO is a typical case of closed negotiation.This however was necessitated in the situation of multilateral trade negotiation where more than one hundred economies participated, and at a latest moment of negotiation to break a deadlock. Even this green room meeting is criticized by excluded majority participants and thus now generally avoided.[25]

The possibility of changing a draft agreement for the reflection of unrepresented opinions decreases as negotiation approaches the final stage. The cost of amendment to a draft agreement increases as the deal comes close. Strong party may request weak party change of an agreement at any time. The reverse is simply not true. Incorporating opinion of domestic interest group from the beginning of a negotiation is much more feasible approachfor a weak party than postponing it to the final stage. Even in the case of trade negotiation between equal parties, parallel domestic consultation to draw a consensus among the domestic constituents should be carried out along with international negotiation. Transparency provides a platform for each stakeholder to take part in the negotiation process on an equal footing. This enhances democratic legitimacy of the negotiation and possibility of eventual ratification of the output of the negotiation.

The concern that disclosure of drafts of agreement at an early stage would result in the situation where each interest group requests change of negotiation strategy, which may distort or fail the negotiation, comes from passive attitude of the government. The rationale for free trade agreement is that there are enough gains arising from the agreement to compensate losing sectors of the economy in the increased competition resulting from the agreement. It may be thinkable that some sectors of the economy demand disproportionately large sum of compensation which disable successful conclusion of an agreement despite theoretical and empirical evidence for the gains from freer trade. It shows the necessity to develop a proper

[25]Craig VanGrasstek , *The History and Future of the World Trade Organization*, WTO Publications, 2013, pp. 204-207.

domestic mechanism through which domestic interest groups find a mutually satisfactory level of concession and compensation in a routine manner. Active involvement of groups benefiting from the agreement would also help to counterbalance the excessive demand.

Ordinary people as a risk-averter tend to overestimate the size of danger while underestimate the size of benefit from a deal.This emphasizes the need for providing more information in a comprehensible manner to the disadvantaged groups of the economy. Concealing would only make greater the fear of the adversely-affected.

3.3 The claim that transparency harms trust in international relations

This is rather a confession that international relations in the old days put priority on something other than the interests of the general public. Negotiators acting on behalf of the people do not need the kind of trust in confidentiality as required for members of crime networks.

We may reinterpret the claim as meaningthat confidentiality preserves flexibility of negotiation position which is necessary for a give-and-take bargaining. Disclosure tends to politicize trade negotiation, which makes the work of negotiators more difficult.We may find following faults in these claims. First, it should, however, be remembered that negotiators themselves sometimes seek politicization of a negotiation as a negotiation tactic or in a less frequent case, for their private publicity. Second, if abundant information is provided on a regular basis it is actually rare to be politicized. Third, politicization is something we should work for in a democratic society so that the people give informed consent to the decision made by their representatives.

We may also reinterpret the claim as meaning that confidentiality enables frank talks, which in turn increase the possibility of finding a compromise. In response, I should point out that they misunderstood transparency. Transparency proponents do not demand the negotiation session be televised so that they can see every movement of negotiators. The extent and form of disclosure may be modulated as far as the essence of the progress of negotiation is provided.

Confidentiality in trade negotiation has long history which itself proves its value. That, however, does not mean that the confidentiality should dominatenegotiation of the 21st century well. On the contrary, even though we accept the necessity of confidentiality in some part of negotiation, reports to parliament and consultation with interest groups haveincreasingly led large portion of negotiation to half-light. Reporting to the public in general is an inevitable path which eliminates the indefensible informational inequality.Thus, it should be said that internal trust lies with openness and external trust lies with cooperation

in openness.[26]

3.4 The claim that confidentiality is legitimate

Legality does not guarantee legitimacy. Despite the judicial confirmation of legality of confidential trade negotiation, it failed to silence vociferous and persistent requests to open up information on trade negotiation. At the public hearing, at the street protest, at the academic seminar, and at the press release of political parties and non-governmental organizations, the first item of the demand list has been "more transparency". It is because confidential trade negotiation is:

- Against democratic legitimacy. Secret negotiation restrictsformation of a consensus opinion of the people. People may become unsatisfied because of procedural fault even in the case wherethe end result is good. Monopolistic decision-making is inferior to the participatory decision-making from a democratic point of view.

- Against equality. Corporations and strong interest groups can influence policy-making even under non-transparent process through the closed channel of consultation, while the general public cannot.

- Against accountability. We cannot be certain that people behind the curtain will behave fairly and will come out to take responsibility when things go wrong.

- Against evolving norms of the Internet era. The Internet has fostered new cultural codein which everybody can say a word in a policy-making process on a more equal putting. This new generation of people, "netizen", are characterized as "prosumers". They are not satisfied with passive consumption of trade policy. They want to be involved in the production process of FTAs. That,of course, would not extend to a degree that the citizen should be represented in the negotiation table. They, however, see no reason for the well-known Internet policy-making principles, especially transparency, are not applied in the area of trade policy-making.[27]

[26]Julio A. Lacarte, "Transparency, Public Debate and Participation by NGOs in the WTO: A WTO Perspective", *Journal of International Economic Law* 7(3), 2004.

[27]See OECD, "OECD Council Recommendation on Principles for Internet Policy Making", 13 December 2011, which states "Transparency ensures that Internet users have timely, accessible, and actionable information that is relevant to their rights and interests."

The nature of trade agreement also favors transparent negotiation. It is admitted that every aspects of diplomacy cannot be made open. Open negotiation to end a war or to draw a territorial border, to name only a few, is unrealistic. Trade negotiation, however, is different from those politically sensitive negotiations. It is basically about money, on which the people are accustomed to make rational choice. Dealing with money also tends to corruptunless transparent.

4. ACTIONS TOWARDSTRANSPARENT TRADE NEGOTIATION

4.1 Korea Took an Action, but Is It a Progress?

After several years of discussion with a number of bills, Korea finallypromulgatedthe Acton the Conclusionand Implementation of Trade Agreements (ACITA)[28] in January 2012. The introductory phrase of the legislation states that the Act is for the purpose of *enhancement of procedural transparency* of the conclusion of trade agreements, and of effective pursuit of trade negotiation.[29]

Some parts of this Act, however,contradict with its aim. Despite of the promising statement("government shall not refuse to disclose the information on ground that the trade negotiation is ongoing") in the second sentence of paragraph ① of Article 4, every request for information on trade negotiation may be dismissed under paragraph ②, subparagraphi of which even induce collusion among the negotiating partners.

> Article 4 (disclosure of information)① Upon request for disclosure of information concerning the conclusion process and implementation of trade agreements, government shall disclose relevant information in accordance with the Official Information Disclosure Act. *Government shall not refuse to disclose the information on ground that the trade negotiation is ongoing.*
>
> ②Irrespective of paragraph 1, information which fall into one of following categories *may be refused to disclose*. Disclosure request by the Speaker of National Assembly made in accordance with the consensus of the Consultative Bodies of the National Assembly may not be refused.

[28]For an overview of the Act, from a different perspective, see Jaemin Lee, "Korea's FTA Drive and Enactment of Trade Treaty Conclusion Procedure Act of 2011" (in Korean), *Seoul International Law Journal* 19(1), 2012.

[29]Article 1 of the Act

i. When anegotiating partner state of atrade agreement requests non-disclosure of information with the reason that it affects interests of the state

ii.*When disclosure may seriously harm national interest or interfere with trade negotiation in relation to a specific proceeding of trade negotiation*

iii. When one of exceptions stated in Article 9(1) of the Official Information Disclosure Act apply

This broad scope of exception to the disclosure principle makes the purpose of the Act unattainable.The legislature seems to have been either tricked by the devil of details or captured by the regulated. Other important provisions of the Act include:

Article 7 (Public Hearing) Public hearing shall be held *before* establishing the Plan for the Conclusion of a Trade Agreement.

Article 12 (Report of the Result of Negotiation) ① The Minister of Trade[30] should immediately report the course of events of negotiation and important contents of agreement to the National Assembly Trade Committee when the trade agreement was signed.

②The Minister of Trade should immediately disclose to the public the contents of report made in accordance with paragraph 1.

Article 14 (Public Briefing) The Minister of Trade shall hold public briefing before entry into force and implementation of the trade agreement

Note that public interaction is given only before and after the negotiation, and not during the negotiation which frequently lasts more than three years. The possibility of multi-source information gathering is also strictly blocked. If anybody involved in the trade negotiation does not abide by the confidentiality, he would risk criminal punishment:

Article 22 (Duty of Confidentiality) ①A public official, while in office as well as after retirement,shall not disclose secrets obtained during carrying out his job related to this Act.

②Private individual shall make an oath of confidentiality when he shares the undisclosed information under Article 4(2) in order to give advice or support in relation to trade negotiation or agreement.

③One who made an oath of confidentiality in accordance with paragraph ② shall be regarded as public official in the application of punishment under Article 127 of the Criminal Act.[31]

[30]In full, "Minister of Trade, Industry and Energy" (author's note)

[31] Article 127 (Divulgence of Official Secrets)A public official or former public official who divulges official

The 2012 Act on the Conclusion and Implementationof Trade Agreements somewhat enhanced the role of parliamentary control over FTA negotiation. The Act, however, did almost nothing to enhance the level of scrutiny by the public at large.Neither public hearing without adequate information nor post-signing disclosure would contribute much to meeting the desire of the people to express their interests over the relevant trade negotiations.

In order to tighten the exceptions to transparency, paragraph ② of Article 4 of Act on the Conclusion and Implementation of Trade Agreements should be deleted. The wording of the current provision is much loose than that of Article 9 of the Official Information Disclosure Act.[32] Even after paragraph ② of Article 4 of the ACITA is deleted, Article 9 of the OIDA will apply to trade negotiation but with the constraints of the second sentence of paragraph ① of Article 4 of the ACITA. The second sentence of paragraph ② of Article 4 of the ACITA does neither harm nor good considering the difficulty of getting consensus and the timeliness of information. Article 22 is also recommended to be eliminated due to its chilling effect on open government.[33]

In 2013, the new Korean Government of President Park Geun-hye transferred the commanding function of trade negotiation from the Foreign Ministry to the Industry Ministry. Whether intended or not, this organizational change may provide the chance of strengthening consultation with domestic industries. At the moment, the text of free trade agreement is made public after it is initialed. It is recommended that each sectorial chapters of trade agreement be made public once the draft is tentatively agreed before the whole agreement is finalized, under the understanding that it may be further changed until the whole text is agreed. Important development of a trade negotiation should be reported to the public at large as well as to selected members of parliaments.

4.2Global calls for more transparent trade negotiation

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secrets obtained in the course of performing his duties and classified by Acts and subordinate statutes as secret shall be punished by imprisonment or imprisonment without prison labor for not more than two years or suspension of qualifications for not more than five years. (author's note)

[32]Notice that the words "significant" and "seriously" in Article 9(1) ii and v respectively of the OIDA were dropped in Article 4②ii of the ACITA.

[33]Besides that the provision is a typical abuse of criminal punishment, any legitimate purpose of it may be achieved through other laws such as the Act on Public Officials and the Security Regulation.

The ancient regime of secret trade negotiation began to confront strong call for reform.

US

- 151 Democrats of the House of Representatives signed a letter decrying Trans Pacific Partnership (TPP) secrecy and opposing the use of outdated "Fast Track" procedure.[34]

- Over 80 law professors called for public process for TPP intellectual property chapter:

  "Nor does yesterday's leaked text solve the problem of transparency and accountability since it is both unofficial and perhaps out-of-date. It should be (and remains) the role of our government, and not leakers, to create public dialogue by sharing the accurate and current informational foundations required for meaningful public input."[35]

- Bloggers joined to express their support to the call for transparent trade negotiation.[36]

EU

- The European Parliament rejected the Anti-Counterfeiting Trade Agreement (ACTA) with the reason that the law negotiated in secret is usually bad law.[37]

- European Trade Union Confederation (ETUC) called for greater transparency in EU-US negotiations during EP hearing[38]

- Transatlantic Consumer Dialogue (TACD), a U.S.-European network of about 80 nongovernmental organizations, requested that Transatlantic Trade and Investment Partnership (TTIP) draft negotiating texts should be published so that the public can

[34]http://delauro.house.gov/index.php?option=com_content&view=article&id=1455:delauro-miller-lead-151-house-dems-telling-president-they-will-not-support-outdated-fast-track-for-trans-pacific-partnership&catid=2&Itemid=21

[35]http://infojustice.org/wp-content/uploads/2013/11/Law-Professors-TPP-11142013.pdf

[36]Margot Kaminski, "Capture, sunlight, and the TPP leak", Concurring Opinions, November 14, 2013. http://www.concurringopinions.com/archives/2013/11/capture-sunlight-and-the-tpp-leak.html#sthash.49E2SekX.dpuf

[37] "Everything you need to know about ACTA", European Parliament News, http://www.europarl.europa.eu/news/en/news-room/content/20120220FCS38611/3/html/David-Martin-on-ACTA-law-negotiated-in-secret-is-usually-bad-law

[38]http://www.etuc.org/a/11647

read them just as industry lobbyists do.[39]

These are only some examples.People in other countries are not silent.[40]

5. SPECULATIONS ABOUT OTHER REASONSBEHIND THE RHETORIC

Some may say that what is said in the official place such as courthouse is indeed diplomatic rhetoric. Facing the unveiledtruth behind the rhetoric might be unpleasant.

First, it is true that the more do people influence a negotiation the more will it be difficult tosucceed to reach an accord.'No accord' is usually received as a failure internationally as well as domestically. Thus, an accord rather than no accord meets the self-interests of negotiators. Transparency makes the work of negotiators more complex. They should consider more domestic interests, many of which are conflicting each other and mishandling of which would break the negotiation.Confidentiality is a method to screen out the involvement of outsiders from the negotiation process and increase the chance of an accord.

Second, negotiators may be lured into monopolizing information, which is the source of power in any society. Selective and discriminatory disclosure of trade information maximizes self-interests of negotiators. Negotiators may, by asking confidentiality of negotiating documents, help each other to swagger at home.

Third, in some countries officials do not stay in their particular positions for a long time. They rotate into other position every couple of years. When an official is in the negotiation seat in this organizational culture, his rational choice of behavior is not to make too many fusses. Following a routine path will guarantee him a comfortable life until the age of retirement. Innovation is certainly a virtue in government as well. Most of bureaucrats are, however, risk-averters.Ways to reduce the level of risk exposed in the case of transparency shouldbe developed along with incentives.

Fourth, liberals used to criticize US foreign policy for supporting or acquiescing at dictatorship in the third world for its own short term interests. In the same vein, western powers should ask themselves whether they are not requesting secrecy of trade negotiation in

[39]Steve Suppan, "The struggle for transparency in the U.S.-EU trade deal", November 5, 2013 http://www.iatp.org/blog/201311/the-struggle-for-transparency-in-the-us-eu-trade-deal

[40]Toby McIntosh, "Spotlight on Trade Talks after WikiLeaks Disclosure", 22 November 2013. http://www.freedominfo.org/2013/11/spotlight-on-trade-talks-after-wikileaks-disclosure/

order to get a favorable deal which is hard to get in an open negotiation. Gains got in such a manner would leave long lasting scars in the minds of the people of the other party.

Fifth, the hidden goal of negotiation might be detached from the general interests of the people. Transparency and democracy raise troubles for the effective negotiation and conclusion of that kind of agreements. Indeed, studies show that autocracies enter into more bilateral agreements than democracies.[41]

6. THE WORLD IS CHANGING!

6.1 The Internet Age

The undemocratic tradition of secrecyshould be discontinued in the age of free flow of information and open governmentwhich have been revitalized by the digital technology.The Internet, designed as an open, decentralized network that empowers users at a grassroots level, has increasingly influencing the power structure of a society.

The people in this Internet ageall want to receive information relevant to their interest and participate, or at least leave a short electronic message about decision-making, and get notified that the decision-makers have considered the message. Should trade policy be an exception?The current state of national and international legal system reflects the ancient regime where decision was made at closed meetings among selected few.

E-government is another reflection of the information society that is becoming more transparent.The Internet technologyempowered the public to participate in the governance process. People get used to havepublic data and service at their fingertips. They would expect the same thing about trade negotiations.Is the secretive trade negotiation regime in harmony with the Government 3.0 vision which seeks the paradigm shift from state-centered to people-centered administration through enhancement of transparency and information sharing?[42]

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[41]Ana Carolina Garriga, "Regime Type and Bilateral Treaty Formation: Do Too Many Cooks Spoil the Soup?", *Journal of Conflict Resolution*, Vol. 53, 2009; Michael M. Simon and Erik Gartzke, "Political System Similarity and the Choice of Allies: Do democracies flock together, or do opposites attract?", *Journal of Conflict Resolution*, Vol. 35, 1996.

[42]Gov't to widen administrative data transparency, korea.net, Jun 20, 2013. http://www.korea.net/NewsFocus/Policies/view?articleId=109276

6.2 The subject of trade agreement is evolving

In the old days, trade agreement affected interests of king only. A negotiator was naturally required to report to the king only. For the ordinary, it was none of their business. Modern trade agreements affected treasury of trading companies and the government.More people wanted information and say on trade agreements. A negotiator was requested to report to the representatives of the people as well as the sovereign.

The scope of trade agreements has extended so much since the Uruguay Round establishing the WTO that it reached into the various areas of services and intellectual properties.Recent FTAs often cover competition, investment, environment, labor and so forth.Trade agreements in the 21st century thus directly affect treasury and freedom of the ordinary people, who are not sufficiently represented by the parliamentary system. Therefore, it is just natural that general public want to be informed and participate in the decision-making over the matters of their keen interests, and they actually have fundamental right to do so.[43]

This simplified history shows that information has been provided to the public just as much as they demand. People in the contemporary digital world demand the trade information be on the web so that they can look up whenever they want. Government 3.0 promises that information be provided before requested.[44]If Government 3.0 excludes information on trade negotiation, it plunges into a lip service or a catchphrase without substance.

6.3 Sign of change towards transparency

The following initiativesshow that however slow it rolls the wheel of history cannot be stopped as is the trend towards transparency of trade negotiation.

WTO

Although the WTO is formally an intergovernmental organization, it adopted a general rule that all official WTO documents shall be unrestricted.[45] Despite of the fact that the

[43] Right to information is a precondition to the freedom of expression and other civil and political rights.

[44][Editorial] 'Government 3.0', *The Korea Herald*, June 21, 2013.

[45]Procedures for the Circulation and Derestriction of WTO Documents: Decision of 14 May 2002, WTO document WT/L/452, 16 May 2002.

general rule is specked with exceptions[46], it is evident that the institution is eager to transform itself into a more transparent one.

UNCITRAL

Arbitration used to be a typical method of confidential dispute settlement. UNCITRAL made an important shift to this past practice by adopting Rules on Transparency in Treaty-based Investor-State Arbitration, which entered into effect on 1 April 2014. UNCITRAL acknowledges the fundamental role of the public as a stakeholder in investor-State disputes, and through this new Transparency Rules aims to provide a level of transparency and accessibility to the public of these disputes that is to date unprecedented.[47]

Korea

Recalling the days in which negotiators exchanged side-letters and hidedthose from the public eyes even after the end of negotiation[48] were just a decade ago,we may acknowledge the current level of transparency after the adoption of the ACITAas an improvement, albeit far from satisfactory.

7. THE WAY FORWARD

7.1 Further reform of trade negotiation procedure

The trade liberalization process should be transparent and informative enough to persuade even uncompetitive sectors of the industry that they will also be better off by the deal in the end.Transparency, however, does not require that negotiation should be carried out in a glass room with microphone. Admitting that there is trade-off between the efficiency and transparency rationales, the call for information is limited to a reasonably appropriate level of reform to meet the demands of the society.

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[46] Minutes of meetings shall be derestricted 45 days after the date of circulation; documents relating to modification or renegotiation of concession or to specific commitments shall be derestricted upon certification of such changes in the schedules; documents relating to working parties on accession shall be derestricted upon the adoption of the report of the working party.

[47]Press Release, "UNCITRAL adopts Transparency Rules for treaty-based investor-State arbitration and amends the UNCITRAL Arbitration Rules", 12 July 2013, http://www.unis.unvienna.org/unis/pressrels/2013/unisl186.html

[48]Constitutional Court of Korea, Case No : 2002Hun-Ma579, decided on December 16 2004, on Agreement for Trade of Garlic between Republic of Korea and People's Republic of China.

In addition to the amendment as suggested above, the ACITA and its Implementing Regulation should be improved in the following aspects:

- First, consultation before the formal launch of an FTA should be extended in time and depth with full provision of feasibility studies.

- Second, a progress report should be released after each round of negotiation. The content of report may be subject to prior review of the other party unless all the parties agree on a single report. Public hearing and interactive consultation should be provided during the inter-sessional period of negotiation when substantive development was made in the previous session.

- Third, drafts agreed by negotiators should be released and open to public input from domestic stakeholders well before the signing of an agreement.Two month before initialing and two more month interval into official signing would be an option.[49]

7.2 Promoting the norm and culture of transparency

There is currently no general international law requiring that negotiation should be transparent.[50] We may however notice evolving norms in that direction. The General Assemblyof the United Nations adopted a resolution on principles and guidelines for international negotiations[51], in whichnegotiating states are requested to take due account of engaging, in an appropriate manner, in negotiations the third states whose vital interests are directly affected by the mattersin question.[52] As an application of *bona fide,* a general principle of law,interested parties, domestic or foreign, should be informed about relevant negotiations and be given a chance to make their views known.

Efforts are needed to foster this norm and culture at the domestic level as well.The expression, "fair trade" has been used to rebalance the terms of trade for the benefit of developing countries. The terminologywould also be useful to express the need to rebalance interests of each domestic stakeholder as well. For the successful rebalance of conflicting interests, new norm and culture of transparency, accountability, and solidarity should be developed. Among the three, transparency would be the first step to take. The finding that negotiators representing a dictatorship are in a weaker bargaining position than

[49]NAFTA was released one month before the signing, and drafts of FTAA were released years earlier. Fast Track Trade Authority also required prior notification to the Congress 90 days before signing.

[50]Alberto L. Davérède, "Negotiations, Secret", listed subject in the Max Planck Encyclopedia of Public International Law, Oxford University Press, 2012.

[51]United Nations General Assembly, "Principles and guidelines for international negotiations" Fifty-third session: Agenda item 149, A/RES/53/101, 20 January 1999.

[52]Ibid,paragraph 2(b).

negotiators under democracy[53] raises concern that secrecy would have worse effect on developing countries. Secrecy may even be tactically employed by a strong democratic country as a means to request under the table concession from a small less democratic country.

Trade negotiation is no zero sum game. Every member of society can gain if the earnings of trade are properly distributed.The distribution principleand mechanismshould be developed in a transparent and democratic manner, which is the best way to prevent corruption and achieve fairness.

The international system after World War II was based on intergovernmental cooperation, in which officials from the executive branch took the lead and acted on behalf of their states. In the post-Cold War era, however, the growth of economic interdependence, the proliferation of transnational actors and other stakeholders including political parties and NGOs, the spread of information technology and increasing number of global issues generate a strong need for multi-leveltransnational cooperation. An important characteristic of global governance of contemporary transnational problemsisa change of discussion structure: from inter-governmental dialogue to multi-stakeholder dialogue.

Disclosing summarized facts and recordings of negotiation would be the first step to transparency. As trust builds up among negotiating parties and interested constituents, releasing wider scope of information including negotiation strategy may be considered. In a long-term relation such as global trade, strategic behavior of concealmentdoes not bear fruit.Honesty is not only moral but also productive when met by other honest minds.

7.3 Global Alliance for Transparency

In fact, transparency has developed into a universal value advocated at various levels of governance. Each country sets transparency as one of principal trade negotiating objectives.[54] The problem is that each country requests transparency of all others except itself. Unless other negotiating partner also opensits negotiation strategy, a state would not reveal its hidden card.States are thus trapped into a prisoners' dilemma, where individual behavior based on self-interests and mistrust of each party harms the collective welfare.

Officials of negotiating parties may also collude not to disclose negotiation details for various reasons.National movements to promote transparency in trade negotiation need to increase global alliance so that governments may not collude or hide behind others.

[53]Robert D. Putnam, "Diplomacy and Domestic Politics: The Logic of Two-Level Games", *International Organization*, Vol. 42, No. 3. (Summer, 1988), pp. 427-460, at 448-449.

[54]For example, US Trade Promotion Authority Act of2002, Public Law 107-210, Section 2102. (b)(5).

Policy Analysis Framework for Australian Bilateral and Regional Trade Agreements

Presentation to the Trade and Global Governance Conference, Seoul, Korea, 6 -7 November 2014

Mr Andrew Irwin, Inquiry Research Manager,
Australian Productivity Commission

Outline

1. About the Productivity Commission
2. Bilateral and Regional Trade Agreements report
3. Improving the policy analysis framework
4. Developments since the Commission's report

Microeconomic focus

- The Productivity Commission is an independent review and advisory body on microeconomic policy reform and regulation
- Our role is to achieve better informed policy decisions through *independent, published analysis and advice*
- The Commission acts on requests from government for (non-binding) advice. While we have a good record of our recommendations leading to reform, this is not always the case.

Antecedents

A widening remit

1921
Tariff Board

- Trade focus
- Manufacturing industry development objectives

→

1974
Industries Assistance Commission

- All sectors
- Facilitate adjustment

→

1990
Industry Commission

plus
- Infrastructure
- Barriers to competition
- Social & environmental implications

→

1998
Productivity Commission

plus
_ Human capital & regulation
- Social, environmental & economic interaction

Three core operating principles

1. Independent analysis and advice
   - Government funded, but arm's length from the Executive (within Treasury portfolio)
   - Underpinned by Act of Parliament – Commissioners have 5 year appointments
2. Transparent processes that are open and public
   - Terms of reference, submissions, hearings on web
   - Published outputs – draft and final reports
3. Examining policy impact on the wellbeing of the community as a whole
   - 'to achieve higher living standards for the Australian Community' – includes environmental and social dimensions

Change in focus of work: 1995 to date

1. **Greater focus on economy-wide issues**
   - National Reform Agenda, consumer policy framework, R&D, innovation, OH&S, carbon
2. **Analysis of social and environmental issues**
   - Gambling, Indigenous disadvantage, parental assistance, ageing, disability, drought policy, water policy, climate change
3. **Government service and regulation review**
   - Review of Government Services
   - Regulatory burdens and regulation benchmarking
4. **Development of research capacity**
   - including on environment, structural adjustment and disadvantage
5. **…and continuing industry issues**
   - Wheat marketing, airports, urban water, motor vehicles, trade agreements and anti-dumping

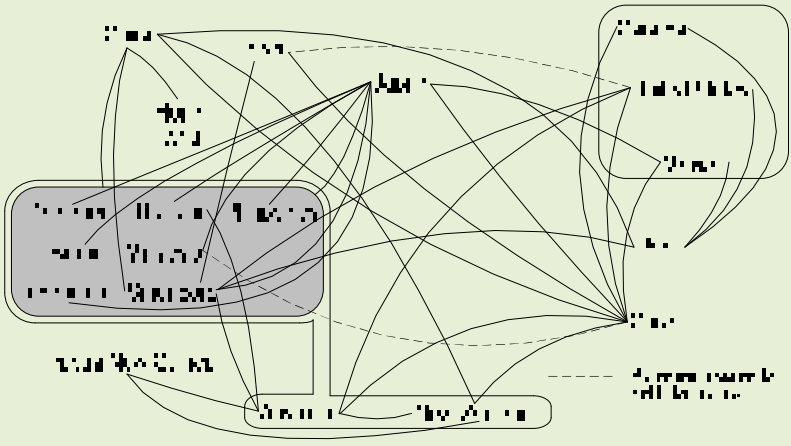
Recently completed commissioned work

- Wheat export marketing (2010)
- Caring for older Australians (2011)
- Disability care and support (2011)
- Australia's urban water sector (2011)
- The Australian retail industry (2011)
- Economic regulation of airport services (2011)
- Impacts and benefits of COAG reforms (2012)
- Australia-New Zealand economic relations (2012)
- Regulatory Impact Analysis (2012)
- Electricity network regulation (2012)
- Minerals and energy resource exploration (2013)
- Small business engagement (2013)
- Automotive Manufacturing (2014)
- Access to Justice (2014)
- Childcare and Early Childhood Development (2014)

2. Trade Agreements: what was the Commission asked to do?

- In 2010, the Commission was asked to study the impact of bilateral and regional trade agreements (BRTAs) on:
  - Trade and investment barriers
  - Australia's economic performance
- Extent to which BRTAs have 'safeguarded' against new barriers
- Potential for BRTAs to promote regional integration
- Role of BRTAs in supporting WTO and multilateral system
- Scope for BRTAs to:
  - Reduce barriers in trading partners, and promote growth and productivity; consider alternatives for doing so
  - Evolve over time to deliver further benefits

Context: Agreements amongst APEC members (2010)



Australia's approach to agreements

- Australia pursues 'Comprehensive agreements that seek to reduce trade barriers'

However…

- The Commission found little evidence from businesses and industry groups of significant commercial benefits
  - This may be because the main factors that influence decisions to do business abroad lie outside the scope of BRTAs

What did business groups say?

Some groups supported continued use of BRTAs:

- National Farmers' Federation:
  - *… the Australian Government should continue to pursue bilateral and regional trade agreements under strict principles … This comes not only from a desire to open up new markets and improve economic welfare but also derives from defensive reasons.*
- Business Council of Australia:
  - *The negotiation of FTAs has been an important means of reducing barriers to trade and investment, resulting in tangible benefits for both Australia and other nations …*

… while others were more sceptical

… based on information from members

- Australian Chamber of Commerce and Industry:
  - *As it currently stands the BRTA process is not delivering practical benefits as well as it could. ... a strategic, consultative and outcomes-based approach wider than just BRTAs is necessary.*
- Australian Industry Group:
  - *… FTAs are somewhat limited in their ability to actually deliver … FTAs have not been highly effective in practice in reducing barriers between Australia and its partner countries.*

Modelling the impact of BRTAs

- Commission undertook two modelling exercises
  - 'Ex ante' CGE modelling of hypothetical BRTAs (with a small country and a large country), including of the effects of Australia not entering BRTAs with countries when rivals did
  - 'Ex post' econometric study of effect of BRTAs on observed trade flows
- Analyses suggest:
  - Tariff concessions increase trade between partners
  - Some of this offset by trade diversion
  - Results sensitive to take-up of preferences, RoO
- Overall, increases in national income from preferential agreements likely to be modest
- Greater gains available from unilateral reductions

Unilateral and multilateral are best

Simulation: tariffs to zero	*GDP-Australia*	*Share of potential world gain*
	Per cent change	Per cent
T1. Australia-small country[a]	0.054	5.7
T2. Australia-large country	0.117	12.4
T3. Australia unilateral	**0.559**	**59.5**
T4. Stylised APEC	0.862	91.7
T5. World	0.940	100

a Simulations are representations of the effects of the removal of barriers to trade. T1 Represents zero tariffs on all trade between Australia and a small country, T2 on trade between Australia and a large country. T3 simulates unilateral liberalisation as the removal of tariffs on all imports into Australia. T4 simulates zero tariffs on imports into all APEC countries and T5 simulates zero tariffs worldwide. *Source*: Simulation results.

Scope for improvement

- Unilateral reform in Australia offers relatively large economic benefits,
  - Avoid delaying reform to retain 'bargaining coin'
- Internationally,
  - Australia should continue to pursue multilateral agreements (Doha)
  - Building the case for reform requires improvements in domestic transparency/policy analysis *within* each country
  - Other opportunities for trade facilitation
- Consider more cost-effective approaches

Possible more cost-effective approaches

- Consider the objective in question and the appropriate instrument(s) –
  - Strategic/security (defence) agreements/ MoU for strategic objectives
  - Other forms of economic cooperation/mutual recognition
- Where possible, favour agreements based on non-discriminatory provisions. Some areas in particular lend to non-discriminatory reform:
  - Services reform, competition policy, government procurement, technical barriers to trade, capacity building and trade facilitation

'Broader' agreements are not always better

- The Commission found that some BRTA provisions risk increasing costs for business, government and consumers
- Australia should adopt a cautious approach to core labour standards and exclusions for trade in cultural goods/services
- Avoid the inclusion of:
  - Intellectual Property provisions, which have concentrated benefits and economy-wide costs;
  - Investor-state dispute settlement clauses, which have little evidence of benefits but carry significant financial and policy risks

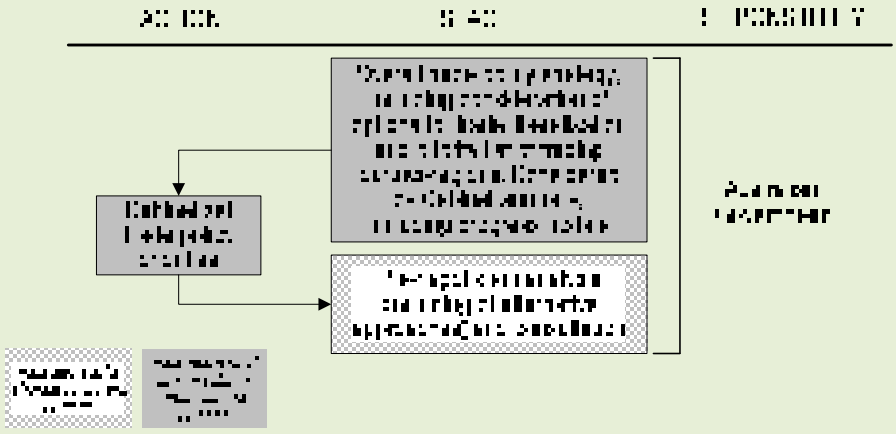
3. Improving future policy analysis

- The approach to, and timing of, feasibility studies has resulted in preferential agreements being oversold
  - Little relationship between what has been modelled/cited as the benefit, and what is eventually negotiated
- Prepare a formal trade policy strategy, including priorities and objectives, consideration of alternative approaches, and 'bail-out triggers'.
  - A public version of the strategy should be released.
- Before signing, undertake independent and transparent assessment of likely impacts
  - Assessment should be against the text of agreement
- Enhance transparency by publishing estimates of negotiation costs

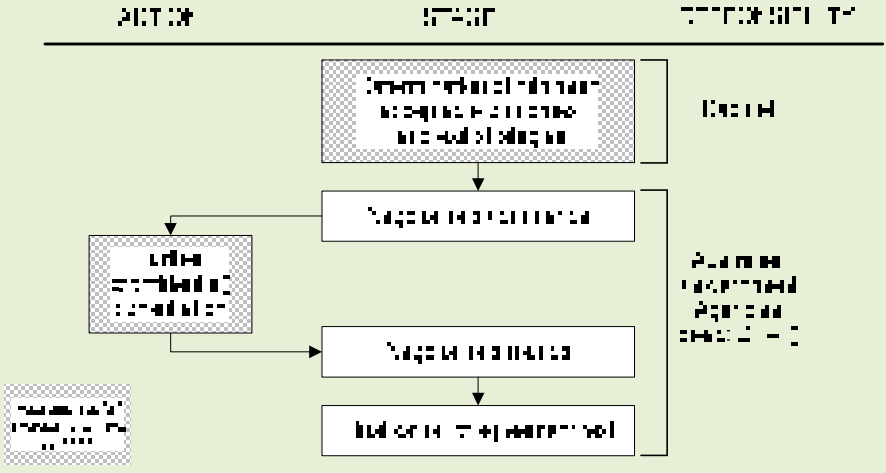
Realism in pre-negotiation analysis

- Existing *feasibility* studies necessarily occurred before negotiations had begun.
- Before agreement, must make assumptions:
  - Past Australian studies assumed comprehensive liberalisation – full and immediate tariff reductions.
  - Community expectations set, and 'oversold'
  - More recent Australian studies (India, Indonesia) included scenarios for 5 and 10 year phase-ins. (Korea: 5 years)
- Other countries used more realistic assumptions:
  - NZ-Korea (2007) based on past agreements included 10 and 20 year phase-ins varying by product.

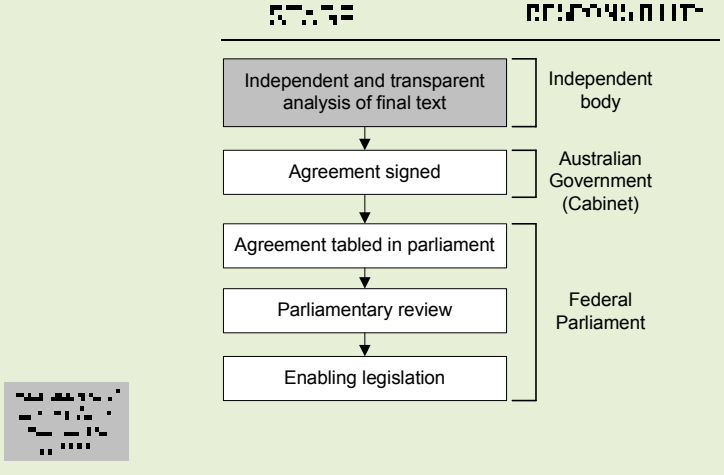
Pre-negotiation analysis



If a BRTA is selected … negotiation phase



Post-negotiation analysis and finalisation



Developments since 2010: ISDS

- Frequency of cases increasing – from 5 per year in 1993 to 57 lodged in 2013.
- Australia involved with Philip Morris Asia case, through a 1993 BIT with Hong Kong. Next stage early 2015.
- Government policy:
  - 2011: Then government ruled out ISDS
  - 2014: Current government 'inclusion of ISDS provisions will be considered on a case-by-case basis'

Developments: Intellectual Property (IP)

- September 2014: Competition Policy Review Draft Report recommended:

  'Given the influence that Australia's IP rights can have on facilitating (or inhibiting) innovation, competition and trade, the Panel considers that the IP system should be designed to operate in the best interests of Australians. …

  Independent and transparent analysis of the costs and benefits to Australia of any proposed IP provisions in trade negotiations should be undertaken to inform international trade negotiations'

Developments: policy assessments

- October 2014: The Senate Foreign Affairs, Defence and Trade References Committee made these observations regarding future agreements:
  - **IP:** focus on multilateral obligations, and 'ensure that potential impact of IP provisions in trade agreements is properly assessed'.
  - **Assessment process:** increase stakeholder participation in NIA. Part or whole of NIA should be prepared by an independent body.

The Commission's key messages

- Unilateral and non-discriminatory reforms are likely to offer the greatest benefits to Australia
- The likely economic benefits of preferential agreements have been 'oversold', expectations were too high and have not been realised
- Improvements are needed to the independence, transparency and timing of BRTA assessments
  - Particular need for comprehensive review when including issues that are established social policies, increase barriers, or raise costs

Thank you

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Comments on "A Critical Review on the Relevant Market Concept in Canada-Renewable Energy Case" by Lee Se-Ryon & Kim Dae-Won

Minjung Kim (Seoul National University)

1. The importance of the issue

The question of how to deal with some environment-friendly policies under the Subsidy Agreement is new and very important. Especially, identifying an environmental policy as a subject matter under the Subsidy Agreement and, hence, determining applicability of the Agreement is a legally critical threshold issue.

In this Canada-Renewable Energy Case, the subsidy claim was largely devoted to the legal issue of how to consider the Canadian FIT-program according to the definition of subsidy provided in Article 1. The Panel ruled that the Canadian FIT-program was not a "subsidy" in the meaning of the Subsidy program since "benefit" was not conferred. The AB found that it could not definitely determine whether "benefit" was conferred or not because there were not enough factual evidence to base upon. In the process of the Panel's and the AB's review, most of the arguments and analyses were surrounding the concept of "benefit", more specifically, the concept of "relevant market" or price benchmark.

2. "Benefit" from an economic perspective

1) "Benefit" in a basic model

Thinking about the concept of "benefit", it is probably worthwhile briefly mentioning about basic economic theory for subsidies and its welfare analysis. In economics, the welfare effect of subsidy in a partial equilibrium model is generally described based on three components: consumer surplus, producer surplus and deadweight loss. When the government gives a subsidy to producer, some of the subsidy amount will be delivered to producers, enabling them to maintain price competitiveness while the rest of the amount will be gone as deadweight loss. This first part, the amount delivered to producers, is maybe what conventionally meant to be "benefit conferred" in the Subsidy Agreement.

2) "Benefit" by an environment subsidy

The welfare analysis for environmental subsidies is somewhat different. Environmental subsidies deal with negative externalities and it is believed that, through subsidies, these externalities will be addressed or gone. Therefore, the final outcome is not just producers' price competitiveness based on prices maintained low but it also includes the eventual removal of such negative externalities altogether. In other words, the "benefit conferred" in

this case is not just limited to producers and producers' competitiveness, but it also incorporates overall social welfares such as clean air, clean water, and revival of nature eventually brought about. This different feature was probably the reason why we had the category of Green-light subsidies in the beginning. I think this feature must be taken into account when we apply the Subsidy Agreement to green subsidies.

3. "Benefit" analysis based on benchmarks

In disputes, the DSB has compared prices in markets in order to determine "benefit conferred". Depending on which price benchmarks are compared against, therefore, the outcome may vary. Thus, the concept of "relevant market" plays important role, providing guidance for benefit analysis.

(1) Problem of indentifying a "relevant market"

Commonly, subsidies are designed to provide industrially strategic advantage in already established markets. In this circumstance, a comparison between subsidized market and unsubsidized relevant market may be possible and probably plausible to infer the benefit conferred.

However, some subsidies are designed to establish a certain market because this new market is considered to be indispensible or desirable for social benefit. If the objective of a subsidy is *establishing* a socially indispensible (desirable) market, there may arise an important legal problem in the benefit analysis, namely, the difficulty, if not impossibility, in identifying the benchmark. In other words, there can hardly be a comparable market to a market virtually non-existing at the moment of subsidization. I think the Canadian FIT pregame belongs to this category and such difficulty was well noted by the Appellate Body. However, the AB neither proceeded to make findings nor suggested any definite criteria for this analysis, leaving this question unresolved.

(2) The concept of "market" in modern time

Today, markets are changing fast; new markets are created while others disappear. Markets are highly differentiated and segregated by different types of values. For example, products based on new technologies create differentiated markets from products based on traditional coarse technologies; products with certain social values create different markets from products without them; products with eco-label vs. products without it. In this sense, renewable energy market is something new and different from conventional energy markets, and this new trend in terms of the concept of "market" must also be taken into account not only in the analysis under the Subsidy Agreement but also in the application of the other WTO Agreements.

Special Session for Small and Medium Enterprises and Sustainable Development II

17. A Conversation with CHOI Won-Mog (National University of Singapore) on " Making International Economic Law a Friend of Global Governance of Environmental Protection - Reinterpretation of the National Treatment Principle - "

(1) Chair: WANG Heng

(2) Panelists: DESIERTO Diane, FUKUNAGA Yuka

(3) Open-Floor Discussion

<Idea of Keynote Speech - Draft, not Final >

Making International Economic Law a Friend of Global Governance ofEnvironmental Protection

- Reinterpretation of the National Treatment Principle-

Won-mog Choi

I. Introduction

It is obvious that the global governance of environmental protection demands more flexible interpretation of the national treatment principle of the WTO. In other words, more trade measures instituting regulatory distinctions need to be legitimized if they are based on global environmental concerns. Although GATT Article XX is the primary tool to legitimize such distinctions, it is no secret that the general exception provision is not delicately drafted nor comprehensive enough to deal with contemporary issues for global environmental protection because it was drafted in 1940s where there arose no serious environmental concerns as opposed to today.

Given this, any attempt to reinterpret the national treatment principle -- the golden rule of multilateralism --, should be made in collaboration with intentional endeavor to prevent a possible clash between the two inalienable values, free trade and global environmental protection.

The recent trend inWTO Appellate Body rulings regarding the national treatment principles of the WTO Agreement bears this out. Proper analysis of this trend and observations of its implications will shed more light on this process of judicial activism for the future.

II. Reinterpretation of the “Less Favourable Treatment” Standard

In several recent cases involving obligations of the TBT Agreement, the Appellate Body has elaborated on the issue of interpretation of "less favorable treatment" standard arising under Article 2.1 of the TBT Agreement. As the Appellate Body put it in the first of these cases(*US - Clove Cigarettes*):

> where the technical regulation at issue does not *de jure* discriminate

> against imports, theexistence of a detrimental impact on competitive opportunities for the group of imported*vis-a-vis* the group of domestic like products is not dispositive of less favourabletreatment under Article 2.1. Instead, a panel must further analyze whether thedetrimental impact on imports stems exclusively from a legitimate regulatory distinctionrather than reflecting discrimination against the group of imported products. (See para. 182)

Thus, the Appellate Body has established two elements for an analysis of whether *defacto* "less favorable treatment" exists: (1) whether the measure has a "detrimental impact" on importedgoods; and (2), if so, whether any such impact stems exclusively from a legitimate regulatory distinctionand thus reflects "discrimination." Some technical regulations that have a *de facto* detrimental impact on imports may not be inconsistent with Article 2.1 where a regulatory distinction is designed and applied in an even-handed manner. In assessing even-handedness, a panel must carefully scrutinize the particular circumstances of the case, that is, the design, architecture, revealing structure, operation, and application of the technical regulation at issue." (*US - Cool*, AB, para. 271)

With regard to the issue of burden of proof under Article 2.1, the body explained that "it is for the complaining party to show that the treatment accorded to imported products is less favourable than that accorded to like domestic products." Then, "[w]here the complaining party has met the burden of making its *prima facie* case, it is … for the responding party to rebut that showing." For example, it explained, "[i]f … the complainant adduces evidence and arguments showing that the measure is designed and/or applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination of the group of imported products and thus is not even-handed, this would suggest that the measure is inconsistent with Article 2.1." If, however, the respondent "shows that the detrimental impact on imported products stems exclusively from a legitimate regulatory distinction, it follows that the challenged measure is not inconsistent with Article 2.1." (Para. 272)

Although the Appellate Body indicated Article 2.2 and the 2nd, 5th and 6th recitals of the TBT Agreement preamble as its basis of such interpretation, this interpretation of the term "less favourable treatment" is far beyond its ordinary meaning. Given that the non-discrimination principle in WTO Agreement is a fundamental basis of protecting competitive opportunities of an imported product, and because the treatment no less favourable standard of GATT Article III.4 prohibits WTO Members from modifying the conditions of competition in the marketplace to the detriment of the group of imported products *vis-à-vis* the

group of domestic products, a panel examining a claim of violation under Article 2.1 of TBT Agreement should seek to ascertain whether the technical regulation at issue modifies the conditions of competition in the market of the regulating Member to the detriment of the group of imported products vis-à-vis the group of like domestic products. In other words, it seems natural that whether or not there is detrimental impact on imported products is determinant of less favourable treatment, and there seems to exist no room for the consideration of regulatory legitimacy in determining "less favourable treatment". Notwithstanding this natural understanding, the Appellate Body is intentionally endeavoring to create a new interpretation of "less favourable treatment" based not only onthe effect but also regulatory legitimacy of the measure.

This interpretation is clearly marking a new borderline of interpretation between free trade proponents and regulatory autonomy supporters in the territory where the "less favourable treatment" element has been traditionally understood predominantly by the detrimental effect test. It is clear that the element has been interpreted based on the effect only test.

In *US — Gasoline*, the Panel, in a finding not addressed by the Appellate Body, found that the measure in question afforded to imported products less favourable treatment than that afforded to domestic products because sellers of domestic gasoline were authorized to use an individual baseline, while sellers of imported gasoline had to use the more onerous statutory baseline:

> "The Panel observed that domestic gasoline benefited in general from the fact that the seller who is a refiner used an individual baseline, while imported gasoline did not. This resulted in less favourable treatment to the imported product … Moreover, the Panel recalled an earlier panel report which stated that 'the words "treatment no less favourable" in paragraph 4 call for effective equality of opportunities for imported products in respect of laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products.'(*US-Section 337*, para. 5.11)The Panel found therefore that since, under the baseline establishment methods, imported gasoline was effectively prevented from benefitting from as favourable sales conditions as were afforded domestic gasoline by an individual baseline tied to the producer of a product, imported gasoline was treated less favourably than domestic gasoline."(*Gasoline*, para. 6.10)

In *Japan — Film*, the Panel reiterated the standard of equality of competitive conditions as a benchmark for establishing "no less favourable treatment":

> "… we consider that this standard of effective equality of competitive conditions on the internal market is the standard of national treatment that is required, not only with regard to Article III generally, but also more particularly with regard to the 'no less favourable treatment' standard in Article III:4. We note in this regard that the interpretation of equal treatment in terms of effective equality of competitive opportunities, first clearly enunciated by the panel on *US — Section 337(US-Section 337, para.5.11)*, has been followed consistently in subsequent GATT and WTO panel reports.(*See e.g. Panel Report, Canada-Provincial Liquor Boards, paras. 5.12-5.14 and 5.30-5.31; and Panel Report, US-Malt Beverages, para. 5.30; Panel Report, US-Gasoline, para. 6.10; Panel Report, Canada-Periodicals, p.75; and Panel Report, EC-Bananas III, paras 7.179-7.180*) (Panel Report,*Japan — Film*, para. 10.379)

In *Korea — Various Measures on Beef*, the measure at issue established a dual retail distribution system for the sale of beef. The Appellate Body first held that such different treatment of imported products did not necessarily lead to less favourable treatment. However, the Body continued to take the position that less favourable treatment is to be assessed by examining whether a measure modifies the *conditions of competition* in the relevant market to the detriment of imported products:

> "A formal difference in treatment between imported and like domestic products is thus neither necessary, nor sufficient, to show a violation of Article III:4. Whether or not imported products are treated 'less favourably' than like domestic products should be assessed instead by examining whether a measure modifies the *conditions of competition* in the relevant market to the detriment of imported products."(Appellate Body Report, *Korea — Various Measures on Beef*, paras. 135–137)

A delicate signal of departure from this effect only test was shown in *EC – Asbestos*, where the Panelin examining the less favourable treatment element in Article III.4 of GATT considered whether an identical ban was placed on domestic like products as placed on imported asbestos and asbestos-containing products.In other words, the Panel's test was only centered on the detrimental effect. This interpretation by the Panel was not appealed, and thus, the Appellate Body could not examine it. Despite this, the Body hinted that such an effect-only interpretation is a careless approach that does not take into account the

general principle of national treatment rule as expressed in Article III.1 of GATT. The following statement by the Body bears this out:

> A complaining Member must still establish that the measure accords to the group of 'like' *imported* products 'less favourable treatment' than it accords to the group of 'like' *domestic* products. The term 'less favourable treatment' expresses the general principle, in Article III:1, that internal regulations 'should not be applied … so as to afford protection to domestic production'. If there is 'less favourable treatment' of the group of 'like' imported products, there is, conversely, 'protection' of the group of 'like' domestic products. However, a Member may draw distinctions between products which have been found to be 'like', without, for this reason alone, according to the group of 'like' *imported* products 'less favourable treatment' than that accorded to the group of 'like' *domestic* products. In this case, we do not examine further the interpretation of the term 'treatment no less favourable' in Article III:4, as the Panel's findings on this issue have not been appealed or, indeed, argued before us."(Appellate Body Report, *EC — Asbestos*, para. 100)

In *EC — Approval and Marketing of Biotech Products* the Panel started to pay attention to this signal. In this case, Argentina argued that the European Communities failed to consider for final approval various applications concerning certain specified biotech products for which the European Communities had already begun approval procedures. In examining whether this violates Article III.4 of GATT, the Panel first focused on the "no less favourable treatment" element. The Panel noted that Argentina had not alleged origin-based discrimination, and concluded that Argentina had not established that the alleged less favourable treatment of imported biotech products was explained by the products' foreign origin rather than other factors:

> "… as a result of the measures challenged by Argentina, the relevant imported biotech products cannot be marketed, while corresponding domestic non-biotech products can be marketed, in accordance with the aforementioned statements by the Appellate Body this would not be sufficient, in and of itself, to raise a presumption that the European Communities accorded less favourable treatment to the group of like *imported* products than to the group of like *domestic* products.(Panel

Report, *EC — Approval and Marketing of Biotech Products*, paras. 7.2513–7.2516)[1]

It was at *Clove Cigarettes* that the Appellate Body finally materialized this signal into concrete holdings by adding the regulatory legitimacy element in the less favourable treatment determination. This addition is confined only in the TBT context. As a consequence, there is created a set of different conditions to ascertain “less favourable treatment” between GATT Article III.4 and TBT Article 2.1, despite the use ofthe identical language.

Soon, however, the Appellate Body seeks to blur this bifurcated approach in the *COOL* case and it seems intentional. In this case, the Appellate Body said that, in the context of both Article III:4 and Article 2.1, "for a measure to be found to modify the conditions of competition in the relevant market to the detriment of imported products, there must be a 'genuine relationship' between the measure at issue and the adverse impact on competitive opportunities for imported products." The "relevant question," it explained, "is whether it is the governmental measure at issue that 'affects the conditions under which like goods, domestic and imported, compete in the market within a Member's territory.'" In this regard, it noted that "[w]hile a measure may not require certain treatment of imports, it may nevertheless create incentives for market participants to behave in certain ways, and thereby treat imported products less favourably." However, it cautioned that "changes in the competitive conditions in a marketplace that are '*not* imposed directly or indirectly by law or governmental regulation, but [are] rather solely the result of private entrepreneurs acting on their own calculations of comparative costs and benefits,' cannot be the basis for a finding that a measure treats imported products less favourably than domestic like products." That is, "[i]n every case, it is *the effect of the measure on the competitive opportunities in the market* that is relevant to an assessment of whether a challenged measure has a detrimental impact on imported products." (Para. 270)

This means that the detrimental effect test should not only reflect commercial actors’ views, but it should also be based on the regulator’s view. According to the Body, this is the way to find out a “genuine relationship” between the measure at issue and the adverse impact on competitive opportunities for

[1]These signals however might be understood in another way: what the Appellate Body meant was simply that a formally different measure may not necessarily be a less favourable treatment; a key element that needs to be proven is the detrimental effect arising from such a different measure.

imported products. This delicate change of position by the Body seems to pave the way for more flexible interpretation of no less favourable treatment element in Article III.4 for future disputes. It enables future panels to consider regulatory legitimacy in Article III.4 less fabourable treatment test itself, before applying Article XX.

In other words, this subtle statement about "genuine relationship" seems to give a signal of 'go ahead' for panels to interpretthe phrase "less favourable treatment" in GATT Article III.4 under the full guidance of general principle of GATT Article III.1. As a result, panels would be required to examine regulatory legitimacy on top of any detrimental effect in de facto discrimination cases. Article III.1, which has been dormant for the long time, is now fully geared up to apply in the golden rule of trade in GATT as well as in TBT Agreement.

III. Reinterpretation of "So As To Afford Protection to Domestic Production"

Will this new trend affect the interpretation of other paragraphs under Article III of GATT, notably Article III.2? As the second sentence of Article III.2 makes explicit reference to the paragraph 1 of Article III, the regulatory legitimacy factor may well be examined in considering whether the measure at issue was applied to imported or domestic products "so as to afford protection to domestic production". In other words, if the detrimental effect on imported products, if any, is exclusively stemming from a legitimate regulatory distinction, it could be determined that the measure at issue was not applied so as to afford protection to domestic production. This will save many legitimate regulatory distinctions that do not fall under the limited scope of general exceptions in GATT Article XX.

For this, it seems that the Appellate Body needs to modify its earlier interpretation of the phrase "so as to afford protection". In *Korea-Taxes on Alcoholic Beverages*, the Panel had found that the Korean taxes on alcoholic beverages were applied "so as to afford protection" to domestic production. In making this finding, the Panel noted that the "structure of the Liquor Tax Law itself is discriminatory," and that there is "virtually no" imported soju, so the beneficiaries of the structure are almost exclusively domestic producers. Korea argued on appeal that, *inter alia*, the Panel ignored Korea's explanation for the tax structure, and ignored Korea's explanation for the absence of imported soju. (Paras. 147-148)

The Appellate Body rejected Korea's appeal, and upheld the Panel's finding on

this issue. In doing so, it first referred to its statements in *Japan - Alcohol* on the "so as to afford protection" element, where it had said that examination of whether a tax regime affords protection to domestic production "is an issue of how the measure in question is *applied,*" and that such an examination "requires a comprehensive and objective analysis." Furthermore, in that case it had also noted that "it is possible to examine objectively the underlying criteria used in a particular tax measure, its structure, and its overall application to ascertain whether it is applied in a way that affords protection to domestic products," and that the "protective application" of a measure can most often be discerned from "the design, the architecture, and the revealing structure of a measure." In this way, according to the Appellate Body, "the very magnitude of the dissimilar taxation in a particular case" may be evidence of such protective application. (Para. 149)

This is turning blind eyes to regulatory legitimacy of WTO Members, and this imprudent holding needs to be overruled as soon as possible by the highest tribunal itself. No matter how great the magnitude of the dissimilar taxation is, whether there is legitimacy in making regulatory distinction deserves consideration, particularly when such a core sovereign issue as taxation is pending.The principle in GATT Article III.1 must be reinterpreted to meanthat Panels must examine whether the measure at issue exclusively stems from a legitimate regulatory distinction or not.This reinterpretation will make three equivalent rules - i.e. the second sentence of Article III.2 of GATT, Article III.4 of GATT, and Article 2.1 of TBT Agreement – mutually consistent and corresponding.

IV. Reinterpretation of "Like Products"?

Still, the remaining task is to reinterpret the first sentence of Article III.2 of GATT so at to make panels consider regulatory legitimacy.Because the sentence does not make explicit reference to Article III.1, one cannot apply the newly interpreted "so as to afford protection" test to disputes arising under the first sentence. Moreover, the words "in excess of" under the sentence does not seem to allow consideration of regulatory legitimacy unlike the much flexible words "no less favourable" in Article III.4. Indeed, such quantitative word as "excess" cannot possibly be interpreted to require panels to consider whether the measure at issue stems exclusively from a legitimate regulatory distinction or not, even accepting that the Article III.1 principleguides the entire paragraphs of Article III.

One way of solution would be to consider the regulatory legitimacy in the “like products” determination. As a matter of fact, the ordinary meaning of the words “like products” is flexible enough to consider not only consumers’ view on product likeness, but also regulators’ perspective: Is it not always an open question to ask “like products to whose perspective”? This is why the Panel in *Clove Cigarette* held that likeness in Article 2.1 of TBT Agreement “must be evaluated in light of that objective” of the measure, i.e., the reduction of youth smoking. Such purpose “must permeate and inform our likeness analysis” to play the “accordion” of like products in TBT context. (Paras. 7.118-119)

This aim-and-effect type of understanding of likeness was rejected by the Appellate Body, who empathized that the determination of likeness under Article 2.1, as well as under Article III.4, is a determination about “the nature and extent of a competitive relationship” between and among the products at issue. (para. 120) Given Appellate Body’s consistent antagonism against the aim-and-effect approach in determining likeness, this rejection is of no wonder.

Instead, the Body went on to interpret the “less favourable treatment” element based on the regulatory legitimacy criteria. By doing this, the Body succeeded in considering the regulatory legitimacy anyway in resolving the TBT case. At the same time, however, it failed to open the door to consider the element in the first sentence of Article III.2, where only way to consider it is to take aim-and-effect approach in the likeness determination.

A recent decision by the Appellate Body gives a sort of consolation to aim-and-effect proponents, althoughit would not be a fully satisfactory one.

In *Philippines-Distilled Spirits*, the Appellate Body rejected Panel’s ruling that all distilled spirits are like products under the first sentence of Article III.2 because of close physical properties. According to the Body, a finding of likeness under the first sentence requires “a degree of competition that is higher than merely significant”. (Paras. 179-182)

This reasoning on "likeness" recalls the divided opinion on this issue in the *EC - Asbestos*case. There, two Members of the Appellate Body took the view that, under Article III:4, likeness is about the "competitive relationship" between products: "a determination of 'likeness' under Article III:4 is, fundamentally, a determination about the nature and extent of a competitive relationship between and among products." (para. 99) By contrast, one Member of the Division was skeptical about what he referred to as a "fundamentally economic interpretation" of "like products," stating: "the necessity or appropriateness of

adopting a 'fundamentally' economic interpretation of the 'likeness' of products under Article III:4 of the GATT 1994 does not appear to me to be free from substantial doubt." (para. 154)[2]

In the *Distilled Spirits* case, the Appellate Body seems to have built on the reasoning of the *Asbestos* majority, applying it beyond Article III:4. Of particular importance is that it did so despite the fact that the legal provision at issue was Article III:2, first sentence. The *Asbestos* majority had emphasized the distinction between Article III:4 and Article III:2, with the latter containing separate provisions for "like products" and "directly competitive or substitutable products," while Article III:4 refers only to "like products." For the *Asbestos* majority, this distinction indicated a broader scope of coverage for likeness under Article III:4 than for likeness under Article III:2, first sentence. (paras. 94-99) In *Distilled Spirits*, however, the Appellate Body cited a key passage from the *Asbestos* reasoning, and then seemed to apply this reasoning to "likeness" under Article III:2, first sentence:

> While in the determination of "likeness" a panel may logically start from thephysical characteristics of the products, none of the criteria that a panel considersnecessarily has an overarching role in the determination of "likeness" under Article III:2of the GATT 1994. A panel examines these criteria in order to make a determinationabout the nature and extent of a competitive relationship between and among theproducts.
> We understand that products that have very similar physical characteristics may notbe "like," within the meaning of Article III:2, if their competitiveness or substitutability islow, while products that present certain physical differences may still be considered"like" if such physical differences have a limited impact on the competitive relationshipbetween and among the products.(Appellate Body Report, EC – Asbestos, para. 99)

With these statements, the Appellate Body seems to have issued a clear ruling that, as a general matter and regardless of which provision is at issue, likeness in the context of WTO obligations is about the economic competitiveness of products.[3]

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[2] Appellate Body Reports – Philippines – Taxes on Distilled Spirits, Worldtradelaw.net Dispute Settlement Commentary, pp. 16-17.

[3]Worldtradelaw.net, ibid.

The full impact of this ruling is of much significance particularly to any environmental disputes. If certain two products sharing identical physical properties are actually treated differently in the particular market, those are not determined as like products. As the public awareness of environmental problems grows, more consumers would acquire different perceptions about environmental impacts arising from various products and their manufacturing process. More people will be interested in knowing which products are using more environmentally friendly materials, which manufacturers are more contributing to global green policies, and wastes of which products are naturally disposable. The time will come when even information of non-product characteristics related PPMS is widely shared among consumers in the market. All of these perceptions and elements are relevant and must be taken into account in determining national treatment violations as long as they affect product competitiveness in the market that is moving into a highly eco-sensitive direction.

Indeed, it seems to be a matter of time that regulatory distinctions are freely allowed to draw between eco-friendly goods and non-eco-friendly goods, regardless of their physical similarities.

Although it would not do as drastically as the aim-and-effect approach would, this new interpretation of product likeness will contribute to opening a door toward the era of peaceful coexistence between global trade and environmental laws.

<References to WTO Cases>

US - Clove Cigarettes, WT/DS406

US – Cool, WT/DS384, 386

US — Gasoline, WT/DS2

Japan — Film, WT/DS44

Korea — Various Measures on Beef, WT/DS161

EC — Approval and Marketing of Biotech Products, WT/DS291, 292, 293

Korea-Taxes on Alcoholic Beverages, WT/DS75, 84

Japan – Alcohol, WT/DS10, 11

Philippines-Distilled Spirits, WT/DS396, 403

EC-Asbestos, WT/DS135

US-Section 337, BISD 36S/345

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