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Trade liberalisation and standardisation – new directions in the 'low politics' of EU foreign policy

Marise Cremona
Tamara Takács
(eds.)

CENTRE FOR THE LAW OF EU EXTERNAL RELATIONS

**TRADE LIBERALISATION AND STANDARDISATION –
NEW DIRECTIONS IN THE ‘LOW POLITICS’ OF
EU FOREIGN POLICY**

**MARISE CREMONA
TAMARA TAKÁCS
(eds.)**

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LIST OF ABBREVIATIONS

AA	Association Agreement
ACP	African, Caribbean and Pacific Countries
ACTA	Anti-Counterfeiting Trade Agreement
ACUS	Administrative Conference of the United States
AQSIQ	Administration for Quality Supervision Inspection & Quarantine
ASEAN	Association of Southeast Asian Nations
BIT	Bilateral investment treaty
CCICA	Chicago Convention on International Civil Aviation
CCP	Common Commercial Policy
CEN	European Committee for Standardisation
CENELEC	European Committee for Electrotechnical Standardisation
CETA	Comprehensive Economic and Trade Agreement
CNCA	Certification and Accreditation Administration of the P.R. China
CNIS	China National Institute of Standardisation
C-TPAT	Customs-Trade Partnership Against Terrorism
DCFTA	Deep and Comprehensive Free Trade Agreement
DSB	Dispute Settlement Body
ECJ	European Court of Justice
EDF	European Development Fund
EDPS	European Data Protection Supervisor
EFTA	European Free Trade Association
EPA	Economic Partnership Agreement
ESO	European Standards Organisation
ETSI	European Telecommunications Standards Institute
EU	European Union
FET	Fair and Equitable Treatment
FDA	Food and Drug Administration Agency
FDI	Foreign Direct Investment
FTA	Free Trade Agreement
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
GI	Geographical indication
GMO	Genetically Modified Organisms
GPA	Agreement on Government Procurement
GSC	Global Standards Collaboration
HLWG	High-Level Working Group (on Jobs and Growth)
ICSID	International Centre on the Settlement of Investment Disputes
ICT	Information and Communications Technology
IEC	International Electrotechnical Commission
IIA	International Investment Agreement
ILO	International Labour Organization

INTA	International Trademark Association
INTA	International Trade Committee (of the European Parliament)
IP	Intellectual Property
IPFSD	Investment Policy Framework for Sustainable Development
IPR	Intellectual Property Rights
ISO	International Organisation for Standardisation
ITU	International Telecommunication Unit
MAI	Multilateral Agreement on Investment
MEA	Multilateral Environmental Agreement
MFN	Most favoured nation
MNC	Multinational company
MRA	Mutual recognition agreement
NAFTA	North Atlantic Free Trade Agreement
NTA	New Transatlantic Agenda
NTB	Non-tariff barrier
OECD	Organisation for Economic Co-operation and Development
OSHA	Occupational Safety and Health Administration
PTA	Preferential Trade Agreement
REACH	Registration, Evaluation, Authorisation and Restriction of Chemicals
SAC	Standardisation Administration of the P.R. China
SADC	Southern Africa Development Tribunal
SDO	Standards developing organization
SME	Small and medium enterprises
SPS	Sanitary and phytosanitary (measures agreement)
SSO	Standard-setting organisation
TBT	Technical barriers to trade
TEC	Transatlantic Economic Council
TEP	Transatlantic Economic Partnership
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
TRIM	Trade-related investment measure
TRIPS	Trade-related Intellectual Property Rights
TTIP	Transatlantic Trade and Investment Partnership
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
USTR	United States Trade Representative
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

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INTRODUCTION

TRADE LIBERALISATION AND STANDARDISATION – NEW DIRECTIONS IN THE ‘LOW POLITICS’ OF EU FOREIGN POLICY

The EU’s ‘low politics’ of trade and investment negotiations and its export of standards have played an important role in shaping the role of the Union on the international stage. As the world’s largest trading bloc, the European Union has been eager to maintain its position on international markets and increase its competitiveness. Whereas the EU – a member of the World Trade Organization and an actor that (allegedly) speaks with one voice in all of its trade and investment relations – professes multilateralism, it has consistently pursued a policy of entering into preferential trade agreements at bilateral and interregional levels. In fact, globalisation’s profound impact on EU trade relations has resulted in a patchwork of preferential trade arrangements and a continued drive towards the harmonisation of laws, so as to secure market access and create regulatory convergence and interoperability. To boost global competitiveness of European industries, regulatory convergence as a policy objective has been revived in EU-led trade talks by aiming for increased standardisation and/or mutual recognition.

The present Working Paper collects the contributions presented at a conference co-organised by the European University Institute (EUI) and the Centre for the Law of EU External Relations (CLEER) in June 2012. The conference brought together leading academics and practitioners to explore whether and to what extent trade liberalisation and harmonisation can be regarded as successful ‘low-politics’ areas in EU foreign policy and what the challenges are that the EU is and will be facing in these areas. The papers look at current developments in the EU’s trade policy from three perspectives: (i) the legal and policy objectives that the EU applies in its preferential trade arrangements, with particular attention to interregional approaches, the linking of trade to development and conciliation with multilateral efforts in market liberalisation; (ii) the role of and applied practices in the Union’s efforts to promote standardisation within the WTO and with regard some particularly important trade partners, such as the US and China; and (iii) challenges and EU strategies for reconciliatory efforts in investment policy within the context of trade.

THE DEEP AND COMPREHENSIVE FREE TRADE AGREEMENTS OF THE EUROPEAN UNION – CONCEPT AND CHALLENGES

Frank Hoffmeister¹

1. INTRODUCTION

Under the Treaty of Lisbon, the European Union's trade policy shall pursue a number of economic objectives, among which is 'the progressive abolition of restrictions to international trade' (Article 206 TFEU). Does this constitutional aim² still make political sense today? Has the EU not reached an unprecedented level of open markets already, by, *inter alia*, concluding the Uruguay Round in 1994 at the WTO and concluding a number of bilateral free trade deals?

The answer is that a lot can still be gained from further trade opening. Indeed, an astonishing 90% of future economic growth will be generated *outside* Europe. Thus, the only reliable source for growth in Europe is robust *external* demand. The EU is well advised to strengthen its links to those parts of the world where growth is much stronger than in the old continent. Increased trade will also increase competition, innovation and labour productivity. It may hence underpin structural reforms, and participating in global value chains is only possible if the EU industry can rely on cheaper imports. True, some EU production sectors with structural weaknesses fear such increased competition, but as their relative loss is compensated by gains in other sectors a positive macro-economic balance would be achieved.

Moreover, the Treaty puts trade policy in the wider context of the EU's external action. Hence, also EU trade policy is supposed to project EU values and interests in the world (Article 207(1) 2nd sentence TFEU). In particular, commercial links with other parts of the world shall also support the development of weaker countries and regions (Article 21(1)(d) and (e) TEU). Being both the world's first exporter (16.7% of worldwide trade in 2010) and largest importer (17.3% in 2010), it is also clear that the strategic directions of Union policy in the area of sustainable development are of tremendous importance for global trade.

Three different sets of instruments are available for the Union to pursue these ambitious goals: it can become Party to multilateral trade deals, conclude bilateral agreements, or take unilateral action. The first pillar centres round the World Trade Organization, where the Union is a traditional proponent of the Doha Development Agenda. However, as of 2012, the Doha negotiations are

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² For an interesting discussion of the legal significance of these constitutional objectives see J. Larik, 'Shaping the international order as a Union objective and the dynamic internationalisation of constitutional law', *CLEER Working Paper* 2011/5, p. 34ff.

somewhat stalled, as can be seen from the meagre result of the 8th Ministerial Conference held in Geneva in December 2011: other than deciding on the accession of Russia to the organisation and revising the plurilateral Agreement on Government Procurement (GPA) ministers were not able to give the multi-lateral trade agenda a push forward.³ The third pillar is in better shape. Since Lisbon, trade policy falls under ordinary legislative procedure under Article 207(2) TFEU,⁴ and the European Parliament and the Council have already updated some pieces of the EU's unilateral trading rules. For example, the co-legislator modernised the Generalised System of Preferences for developing countries in a clear direction: while eliminating the middle- and higher income countries from the scheme, it strengthened the incentives for the least developing countries.⁵

In the present contribution, we will have a closer look at the second pillar, i.e., bilateral trade agreements. In this field, the Union has come up with the concept of concluding 'deep and comprehensive free trade agreements' (DCFTAs). In Section 2, the geographical scope of those DCFTAs will be recalled, before going into the definition of the concept in Section III. Having identified the characteristics of a DCFTA, Section 4 is in turn dedicated to the challenges. Some concepts lead to internal discussions between the EU institutions, either touching institutional or competence issues or being of a more political nature. Other concepts are difficult to negotiate as the negotiation partners may have a different view on their usefulness. Section 5 offers a conclusion.

2. GEOGRAPHICAL SCOPE OF BILATERAL FTAS

Initially, the EU's trade policy focussed on reciprocal trade opening with partners of equal strength and emerging countries, whereas it gave trade preferences mainly for political reasons. This was done either because the partner countries had close historical ties as former colonies of certain Member States (ACP), or because of their geographic proximity.

2.1 Neighbourhood countries

The latter element proved important in the further integration of the EU's neighbourhood.⁶ We can quote an early FTA with Switzerland (1973) and the ambi-

³ See F. Hoffmeister, 'Institutional Aspects of Global Trade Governance from an EU Perspective', in Van Vooren *et al.*, (eds.), *The EU's Role in Global Governance* (Oxford: OUP, 2013), p. 145.

⁴ On the scope of Art. 207(2) TFEU see M. Krajewski, 'Die neue handelspolitische Bedeutung des Europäischen Parlaments', in Bungenberg and Herrmann (eds.), *Die gemeinsame Handelspolitik der Europäischen Union nach Lissabon* (Nomos 2011), p. 58ff.

⁵ See Commission proposal of 10 May 2011, COM(2011) 241 final. The text has been agreed with minor modifications by the legislator and is likely to be published by the end of 2012.

⁶ For an excellent overview of the different neighbourhood agreements see S. Blockmans and A. Łazowski (eds.), *The European Union and Its Neighbours – A Legal Appraisal of the EU's Policies of Stabilisation, Partnership and Integration* (The Hague: T.M.C. Asser Press 2006), p. 653.

tious European Economic Area Agreement with Norway, Liechtenstein and Iceland (1992). The Association Agreements with the Mediterranean countries also contained free trade chapters (Tunisia 1998, Morocco 2000, Israel 2000, Jordan 2002, Lebanon 2003, Egypt 2004, Algeria 2005, Interim Agreement with the Palestine Authority 1997). The two exceptions are Libya and Syria, with whom it was impossible to forge closer ties for political reasons. Modelled strongly on the Euro-Med examples, the Union also offered preferential free trade chapters in the Stabilisation and Association Agreements with the Western Balkan countries (Croatia 2005, Bosnia-Herzegovina 2008, Albania 2009, Montenegro 2010, Serbia 2010). Turkey even agreed to a customs union with the European Union (1995), and so did Andorra and San Marino back in 1991 and 1992, respectively.

2.2 Emerging economies

Importantly, though, the Union revised this approach at the end of the 1990s. Since then, it also seeks a much closer trade relationship with large developed partners outside the immediate neighbourhood. First steps were taken with 'old-generation' FTAs with Mexico (2000), South Africa (2000) and Chile (2003). In 2006, the Commission took the ambition even further. In its communication 'Global Europe', it announced its intention to go both 'deeper' and 'wider' in its negotiation approach.⁷ Hence, the negotiation chapters on goods and services should liberalise more than before, and new topics such as procurement, intellectual property rights, competition and investment should be included. Moreover, an effort should be made to strengthen sustainable development through bilateral trade relationships, which could include co-operative provisions in the area of labour standards and the environment.

This new approach was put into practice first with the Caribbean ACP countries (Cariforum Economic Partnership Agreement 2009) and then with Korea. The latter FTA is provisionally applied since 1 July 2011.⁸ It is 'deep' in so far as it saves roughly 1.6 billion EUR in customs duties per year and creates up to 80% new trading opportunities, including for service suppliers. It is 'comprehensive' in so far as it tackles non-tariff barriers, provides better access to government procurement, protects IPRs and contains a chapter on competition and sustainable development. Next to this 'model DCFTA', the EU has signed ambitious bilateral deals with Central America and Peru/Colombia (2012) and initialled the text with the Ukraine (2012). Five more DCFTA's are under negotiation (India, Canada, Singapore, Malaysia, Mercosur), while some countries of the Eastern Partnership (Moldova, Armenia) are pressing to open negotiations as well. Four of our Mediterranean partners are also ready to upgrade their trade relations with the European Union, and the Council has issued the relevant negotiating directives to the Commission in late 2011.

⁷ European Commission, 'Global Europe – Competing in the world – A contribution to the EU's Growth and Jobs Strategy', COM(2006) 567, 4.10.2006, pp. 11-12.

⁸ Notice on provisional application, OJ [2011] L 168/1.

2.3 US and Japan

Finally, the EU is nearing a ‘big bang’, as negotiations on DCFTAs with the heavyweights United States and Japan have begun in 2013. According to first estimates, no less than two thirds of new economic gains for the European Union could come from these new agreements, if they are ever concluded. With respect to Japan, the Council of Ministers adopted the directives in November 2012 and an interim review will be held after the first year of negotiations in spring 2014. Based on a report of a joint high-level group with the United States issued in February 2013, the EU Ministers authorised the Commission to negotiate a comprehensive agreement during their meeting in Dublin in June 2013. However, due to French resistance, the Commission was not authorised to negotiate on audio-visual services as this could – in the French view – endanger cultural diversity in the Union and jeopardize specific quotas and aid schemes in that sector.

3. CONCEPT OF DCFTAS

What are now the typical characteristics of a DCFTA? While any particular DCFTA may well contain slightly different provisions depending on the outcome of negotiations, the EU-Korea FTA contains the latest state of the art. We can thus go through it with a view of identifying typical provisions for an EU DCFTA.

3.1 Trade in goods

The liberalisation of trade in goods makes up no less than five (‘deep’) chapters in the agreement. Next to the traditional arrangements on national treatment and market access through the reduction or abolition of import duties, there is interesting language on export duties in Chapter Two. Article XI GATT does not outlaw such duties. They may, however, lead to unfair competition in the sourcing of precious primary goods. Against that background, the EU usually fights the imposition of export duties in third countries as those duties would usually favour domestic production. Article 2.11 translates this policy into a clear-cut prohibition of duties, taxes or other fees and charges imposed on, or in connection with, the exportation of goods to the other Party.

Chapter Three concerns trade remedies. Again, with a remarkable level of detail, the partners agree on the restrictive conditions under which bilateral or global safeguards can be used. This is not only of theoretical importance, as the French request of July 2012 to trigger a system of import surveillance in the car sector has shown. Replying in October, the Commission did not entertain that request as it could not be shown that there was an increase of imports of products falling into sensitive sectors concentrated in a particular Member State.⁹

⁹ See Art. 6(2) of the Safeguard Regulation No. 505/2011 relating to the EU-Korea FTA.

Furthermore, the parties also go into their respective systems of imposing anti-dumping and countervailing duties. Articles 3.10 and 3.14 export two traditional 'WTO plus' instruments of the EU's trade defence practice, namely the 'Union interest'¹⁰ and the 'lesser duty rule'.¹¹ Under the first test, a party can decide not to impose measures when it is not in the public interest to do so, because a duty would, for example, disproportionately hurt downstream users or consumers. Under the second test, the amount of a duty shall not be higher than adequate to remove the injury to the domestic industry. In other words: if there is a high dumping margin (for example 60%), but the injury for domestic industry is lower (for example 20%), then the anti-dumping duty shall not be higher than 20%, irrespective of the fact the dumping margin was higher. This stresses the remedial rather than punitive character of the EU's approach to trade defence.

Modern forms of non-tariff barriers are addressed in Chapters Four (Technical Barriers) and Five (Sanitary and Phytosanitary Standards). Here, the basic approach is to confirm the relevant WTO rules (TBT agreement and SPS agreement) and to offer further detail. For example, Article 4.9 contains a crucial rule to minimise trade effects of marking and labelling rules, and Article 5.6 promotes the cooperation of both parties to develop international SPS standards, guidelines and recommendations. Chapter Six (Trade Facilitation) foreshadows a future WTO agreement on the issue. An important 'frontrunner' rule is Article 6.10, according to which neither Party shall require the use of pre-shipment inspection or their equivalent – a clear 'shot' against restrictive US practice in the field.

3.2 Services and investment

Chapter Seven contains an impressive list of liberalisation commitments for cross-border services and establishment. In particular, Article 7.11(2) outlaws a number of practices used to curtail the commercial presence of juridical or natural persons of the other Party. Interesting is also Article 7.15, according to which nothing in this chapter shall be deemed to limit investor rights stemming from a Member State BIT with Korea. The temporary movement of service providers is regulated as well, and the agreement contains an extensive Chapter on domestic regulation. This goes particularly far, as each party promises to entertain a system of judicial, arbitral or administrative tribunals or procedures against administrative decisions (Article 7.23(2)). The free movement of capital chapter reflects in Article 8.1 and 8.2 the EU approach.

The EU-Korea FTA also contains a number of important horizontal provisions. Under Article 7.1(4) 'each Party retains the right to regulate and to introduce new regulations to meet legitimate policy objectives'. One recital in the preamble is even more specific, recognising the 'right of Parties to take mea-

¹⁰ Art. 21 of the Basic Anti-Dumping Regulation (Regulation No 1225/2009 of 30 November 2009, OJ 2009 L343/51).

¹¹ Art. 9(4) 4th sentence of the same Basic Regulation.

asures necessary to achieve legitimate public policy objectives on the basis of the level of protection that they deem appropriate, provided that such measures do not constitute a means of unjustifiable discrimination or a disguised restriction on international trade'. In line with Article 31 of the Vienna Convention on the Law of Treaties, this recital can be used as relevant context for the interpretation of the 'right to regulate'.

Not yet included in the EU-Korea agreement are, however, provisions on investment protection. However, as the commercial policy of the Union since Lisbon also enshrines 'foreign direct investment',¹² upcoming DCFTAs are likely to contain provisions on this topic. Negotiation directives to this effect already exist for the agreements with India, Singapore and Canada. We can hence expect the standard clauses on investment protection used hitherto by Member States in their bilateral investment agreements to resurface in the relevant DCFTA chapters of the Union. Moreover, the Union might in principle also be ready to agree on investor-to-state dispute settlement clauses.¹³

3.3 Market access in public procurement

Chapter Nine on public procurement makes the point that tenders by public authorities should in principle be open to bidders from the other Party on a non-discriminatory basis. Normally, negotiators would then identify a list of 'committed' entities to be attached to the agreement. These commitments may include entities from the federal government, federated states or local authorities. In the case of Korea, such a list was easy to establish as the parties had already given their respective offers in the framework of the plurilateral GPA negotiations at the WTO. Hence, Article 9.1(4) of the agreement only had the purpose to put the revised GPA text into provisional application on a bilateral basis. A bilateral working group monitors the actual implementation of these commitments.

In other cases, the establishment of a 'deep' list may prove to be much more controversial. For example, in the DCFTA negotiations with Canada, the EU's insistence to receive commitments from the Provinces has produced a real challenge for the Canadian negotiators. As the federal government is extremely cautious to commit the Provinces, we have seen a 'mixed' delegation on the Canadian side during the negotiating round in Brussels in June 2012. Led by the federal negotiator, all Provinces were represented to advance on this crucial point.

¹² For a good interpretation of the Art. 207(1) TFEU relating to foreign direct investment see A. Reinisch, 'The Division of Powers between the EU and its Member States "after Lisbon"', in Bungenberg, Griebel, Hindelang (ed.), *Internationaler Investitionsschutz und Europarecht* (Nomos 2010), pp. 99-112.

¹³ For more details see F. Hoffmeister and G. Ünüvar, 'From BITS and Pieces to European Investment Agreements', in M. Bungenberg *et al.*, (eds.), *European Investment Policy after Lisbon* (forthcoming).

3.4 Protection of intellectual property rights

The most comprehensive chapter of the EU-Korea FTA is dedicated to intellectual property rights. Again the WTO rules enshrined in the TRIPS agreement serve as a blueprint, but a number of provisions go further. For example, the Chapter on geographic indications is much more elaborate than the minimum rules contained in Articles 22 and 23 TRIPS. In particular, there is agreement that geographical indications shall be protected through a system of registration (Article 10.18); moreover, the Parties exchange lists of specific GIs they wish to see protected by the other side. Importantly, GIs shall prevail over trademarks which are submitted after a registration of a GI (Article 10.23). In the sub-section on patents, we can find new article on data exclusivity (Article 10.36), and there is an entire new sub-section on plant varieties.

The agreement also puts emphasis on enforcement of IPRs. Next to civil enforcement there are provisions on criminal enforcement. In particular, each Party shall provide for criminal procedures and penalties ‘in cases of wilful trademark counterfeiting and copyright and related rights piracy on a commercial scale’ (Article 10.54(1)). Criminal liability shall also be established for legal persons, as may be necessary (Article 10.56) and for aiding and abetting (Article 10.57). In this sensitive area, the agreement also lays down new rules for online service providers (10.62-10.65), falling short of a general obligation to monitor (Article 10.66). Finally, enforcement is also done through border measures, which are extensively regulated in Article 10.67 of the agreement.

3.5 Competition rules

A strong competition chapter is another characteristic of a DCFTA. Chapter Eleven makes the explicit link between the two subjects: Parties undertake to apply their respective competition laws so as to prevent the benefits of the trade liberalisation process in goods, services and establishment from being eroded or eliminated by anti-competitive business conduct or anti-competitive transactions (Article 11.1). Again, this point is not without political sensitivity – one may recall that absent such bilateral rules, the EU and Korea fought each other bitterly at the WTO over subsidies in the ship-building sector.¹⁴ Having settled this dispute, the parties have now laid down principles on anti-trust (Article 11.1(3), including on public enterprises and enterprises with special or exclusive rights (Article 11.4). Those provisions resemble the relevant EU rules (Articles 101 TFEU *et seq.*) rather closely. With respect to subsidies, the situation is, however, different. In that regard, the WTO SCM agreement is the clear reference point, but again, the Parties have agreed to enact additional disciplines. Most interestingly, ‘prohibited subsidies’ are not only export subsidies and local content subsidies, as under Article 3 SCMA, but also bailout guarantees and

¹⁴ See cases EC – Commercial vessels (complainant: Korea) WTO/DS301 and Korea – Commercial vessels (complainant: EC) WTO/DS273.

restructuring aid which fails to show realistic assumptions for recovery within a reasonable period (Article 11.11).

3.6 Sustainable development

Chapter 13 on sustainable development deals with the difficult issue of social, labour and environmental standards. Article 13.5 establishes a duty of consultation (para. 1) and makes compliance with enumerated international agreements a bilateral commitment (para. 2). Very important is also the stand-still clause in Article 13.7 according to which neither Party shall lower its environmental or social standards in order to influence trade and investment between them. This recognises the idea that investment shall not be promoted at the expense of labour or environmental regulation. Moreover, the agreement puts in place a dialogue with social partners (Article 13.13). However, a hard enforcement mechanism is not foreseen. If consultations between the governments do not settle an issue, a committee of experts may adopt recommendations, which the parties endeavour to implement (Article 13.15(2)). There is no duty to follow an expert recommendation – *a fortiori* it cannot justify retaliation.

3.7 Transparency and dispute settlement

A DCFTA is also quite explicit on transparency. Chapter Twelve of the EU-Korea FTA spells out the rudimentary rules under Article X GATT. Next to publication requirements (known under Article X:1 GATT), there are far-reaching rules on administrative proceedings and the need to establish or maintain judicial, quasi-judicial or administrative tribunals for the purpose of prompt review and, where warranted, corrective action (Article 12.6). While such requirements are not spectacular for well-established states with an independent judiciary, they may be more demanding for countries in transition. Also, the tiny Article 12.8 on non-discrimination does no less than establishing equal treatment for all matters covered by the agreement. Such assimilation of foreign operators to domestic operators may have to be taken into account when applying quite a number of domestic statutes.

With respect to dispute settlement, Chapter 14 provides for a sophisticated system. Unless excluded as, for example in the case of trade remedies (Article 3.15), SPS matters (Article 5.11) or sustainable development (Article 13.16), any dispute arising under the agreement can be subject to consultation, mediation or arbitration. The rules on arbitration follow the letter and the spirit of the WTO Panel system to a very large degree. This means that either side has the right to establish an arbitral tribunal, which can decide the dispute in a short time frame. To make this system operational, a list of arbitrators is maintained (Article 14.18) out of which the Parties may choose their nominees for a given dispute. If they cannot agree, a lot shall designate the individuals serving for the dispute (Article 14.5 (3)).

3.8 Institutional, General and Final provisions

The oversight of the agreement is laid into the hands of a Joint Trade Committee, comprising representatives of both sides. It is supposed to meet once a year (Article 15.1(2)) and may establish specialised committees and working groups. The Committee can adopt binding decisions by agreement between the Parties (Article 15.4(3)).

While this institutional set-up is all fairly standard in international agreements concluded by the EU, the General provisions are of more interest. Article 15.8 (balance of payments exceptions) and Article 15.9 (security exceptions) incorporate Articles XVII and XXI GATT, respectively. But the most pertinent Article XX GATT on general exceptions is not included there. Rather, the respective reference is included in Article 2.15 in the chapter on trade in goods. This technique illustrates that the aforementioned reasons (balance of payments, security) may be used to justify national measures derogating from all commitments taken under the agreement, whereas the ordinary public policy purposes only come into play for goods-related measures.

Finally, two aspects of the Final provisions are worth mentioning. First, a DCFTA is normally concluded for an indefinite duration (Article 15.11). In other words, the Parties envisage a stable relationship that should last 'forever' if political circumstances do not change dramatically. Second, a DCFTA may be concluded as a stand-alone agreement. But this does not mean that it is isolated from the broader contractual relations between the EU and the country concerned. Rather to the contrary: the agreement is 'an integral part of the overall bilateral relations as governed by the Framework Agreement' (Article 15.14(2)). This seemingly technical provision has political significance because it makes the human rights clause of the Framework Agreement operational also in the trade context. In other words: if a Party invokes the human rights clause, it may not only suspend parts of the Framework Agreement, but also the DCFTA.

4. CHALLENGES

This last point leads us directly to the challenges facing the EU's DCFTA policy. Are they 'political' enough? Again, the changed constitutional scenery after Lisbon already starts to tell. Since 1 December 2009 the European Parliament has the power to reject trade deals under Article 218(6)(a)(v) TFEU and has displayed a tendency to scrutinise EU trade agreements from a more political point of view. Three issues come to mind: political clauses, sustainable development and intellectual property rights. Moreover, Parliament may also be concerned about the relationship between the bilateral option and the multilateral framework.

4.1 Political clauses

After having endorsed the EU-Korea DCFTA with a huge majority in spring 2011, the European Parliament took a closer look at the relevant texts for Peru and Colombia. In the latter case, the situation of trade unionists was of concern to the MEPs, given that a number of trade union leaders had been killed by paramilitary groups. The crucial question was thus whether the conclusion of the DCFTA would not send a wrong signal to Colombia that the EU does not really care about the human rights situation in the country.

Already during his hearing in January 2010, the Commissioner designated for Trade, Karel De Gucht, promised to the EP's Trade Committee that he would consult with MEPs before signing the agreement. And indeed, regular exchanges took place before the agreement was signed on 26 June 2012. In the debate on ratification, the Commission responded favourably to the idea of the EP's rapporteur, Mr. Lange, to request from the Colombian government a specific action plan to improve public safety in the country and improve the human rights situation of activists, in particular.

Another related issue is looming on the horizon in the DCFTA negotiations with Canada. Here, the challenge is the opposite. As a long-established democracy based on the rule of law, Canada may have reservations to accept the full tool-kit of the EU's human rights clauses. In particular, the non-execution clause, which directly links the non-implementation of an essential element in the agreement (including human rights) with suspension, could raise questions. So negotiators have the task to find appropriate formulations which, on the one hand, do not lead to undue finger-pointing and, on the other hand, leave the credibility of the EU's human rights policy intact.

4.2 Sustainable development

A similar conflict transpires occasionally with respect to the sustainable development chapter. As described above, the current formulation consciously avoids establishing a hard enforcement mechanism. While labour or environmental standards constitute substantive treaty law, they are not 'essential elements' whose violation would justify the suspension of the agreement by the other side. This constitutes a remarkable difference to the human rights clauses, which are expressly designated as essential. In the European Parliament, this difference gave rise to some controversy, and in its thematic resolution on the matter, the Parliament expresses the hope to strengthen the enforcement mechanism of the clause.¹⁵ However, on the other side of the equation stands the Union's treaty partner. Recent negotiations have demonstrated that a further elevation of the sustainable development enforcement mechanism is hardly feasible.

¹⁵ EP resolution of 25 November 2010 on 'Human rights, social and environmental standards in international trade agreements', para 13, reaffirmed by EP resolution of 27 September 2011 on a 'New trade policy for Europe under the EU 2020 strategy', para 6.

4.3 The protection of intellectual property rights and the freedom of the internet

A very visible clash between the European Parliament, on the one hand, and the Commission and the Council, on the other hand, occurred with respect to the protection of intellectual property rights and its relation to the freedom of the internet. The EU had backed an US-Japanese initiative to negotiate an Anti-Counterfeiting Trade Agreement (ACTA) back in 2006. Official negotiations started in 2008 together with Switzerland, Mexico, Singapore, Australia, New Zealand and Korea. The participants promised to step up enforcement action against counterfeit goods, generic medicines and copyright infringements on the internet.

In June 2011, the Commission adopted two proposals: one on the signing¹⁶ and one on the conclusion¹⁷ of ACTA. It proposed that the Union should not exercise its shared competence on criminal enforcement so as to underline that the Member States had negotiated that part of the agreement under their national responsibility. Hence, it would also be for both the Union and all Member States to sign and conclude the text. On 16 December 2011, the Council adopted by unanimity the decision to sign ACTA on behalf of the Union,¹⁸ and indeed, a Union representative actually signed ACTA on 26 January 2012 in Tokyo. At the same time, representatives from all Member States with the exception of Cyprus, Estonia, Germany, the Netherlands and Slovakia also put their signature under the text.

The fact that a number of Member States did not sign the agreement although they had voted in favour of EU signature just a month ahead already demonstrates that significant developments had occurred in the meantime. In fact, an unprecedented wave of internet protests and demonstrations in Eastern European and German cities expressed huge discontent of activists with the agreement. In particular, the interaction of the agreement with the freedom of the internet was questioned, as was the lack of clarity of a number of provisions. A critical academic opinion of January 2011¹⁹ further fuelled the debate, as did an opinion of the EU data protection supervisor raising doubts about the compatibility of the agreement with the EU's data protection principles.²⁰ Against that background, the Commission decided in February 2012 to request an opinion of the European Court of Justice on the question whether the agreement is compatible with the Treaties and in particular with the Charter of Fundamental Rights of the European Union. The legal brief was submitted to the Court on 10 May 2012. Irrespective of this request and despite a call from Trade

¹⁶ COM(2011) 379 final.

¹⁷ COM(2011) 380 final.

¹⁸ See Press Release 18708/11 of the 3137th Council meeting on 15-16 December 2011, at p. 43.

¹⁹ Opinion of European Academics on Anti-Counterfeiting Trade Agreement available at <http://www.iri.uni-hannover.de/tl_files/pdf/ACTA_opinion_200111_2.pdf>.

²⁰ Opinion of the European Data Protection Supervisor, 24 April 2012, available at <http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Opinions/2012/12-04-24_ACTA_EN.pdf>.

Commissioner De Gucht to await the Court's opinion, the European Parliament continued with the consent procedure. In fact, also pointing to a petition of over 2.8 million online petitioners arguing against ACTA and the negative advice of INTA *rapporteur* David Martin, an overwhelming majority of MEPs voted against the agreement in the plenary on 9 July 2012. As a consequence, most Member States terminated their ratification procedure as well.

The consequences of this debacle could then be felt directly in the DCFTA negotiation agenda. Internet activists reproached the Commission with using 'ACTA clauses' in the bilateral context with Canada, and thus with preparing to introduce ACTA 'through the backdoor'. In order to avoid such appearances the Commission reviewed the entire IPR chapter in its ongoing negotiations. However, the most sensitive sub-chapter on criminal enforcement is in the hands of the Presidency, and it is up to Member States to decide on the future approach to be taken. The entire discussion may even lead to a complete disappearance of this topic from future DCFTAs. This, in turn, might eliminate another reason for concluding a DCFTA as a 'mixed agreement',²¹ which is in any case an oddity in the trade field.

4.4 Relation to the multilateral framework

Finally, MEPs are regularly concerned about the relation of the EU's DCFTAs with the multilateral framework. In this respect, a legal and a political dimension need to be distinguished. From a purely legal point of view, none of the DCFTAs poses any serious question. They cover 'substantially all trade' within the meaning of Article XXIV GATT and V GATS, and are thus compatible with the relevant WTO rules. As the WTO committee entrusted with the supervision of bilateral or regional free trade agreements of WTO members still works on consensus, a sweeping statement of self-empowerment is sufficient. This can be witnessed by Article 1.1(2)(a) and (b) of the EU-Korea FTA. According to those provisions, the objectives of the Agreement are to liberalise and facilitate trade in goods and services 'in conformity with Article XXIV GATT (...) and Article V GATS'.

The more pertinent question is whether a continued push for such 'compatible' agreements would not nevertheless undermine the political foundation of the WTO. Would not the interest to conclude a multilateral agreement vanish completely if all the big players, such as the EU, the US, India, China and Brazil were linked through bilateral agreements? The political reply is probably not straightforward. The EU applied a sort of 'moratorium' on new FTAs when the Doha Round was launched in 2001, but lifted it in 2006 in the above-mentioned new trade strategy. In my view, this did not contribute to a slowing down of the Doha negotiations. Having assumed office in 2010, EU Trade Commissioner De Gucht tried in parallel to revitalise the round by putting an EU proposal on market access for non-agricultural goods on the table in June 2011. The rejection of this proposal by the United States and China was in no

²¹ On the legal questions surrounding such 'mixed agreements' more generally, see C. Hillion and P. Koutrakos (eds.) *Mixed Agreements Revisited* (Oxford: Hart Publishing 2010).

way linked to the EU's bilateral agenda with other countries. Rather, it can be hoped that an ambitious set of free trade agreements can set the pace and demonstrate that trade liberalisation is still workable. Similarly, with respect to services, the EU remained faithful to the multilateral anchor by demanding that any plurilateral initiative in the field should build on the GATS definitions and structure. Hence, even if only a few WTO members would be ready to further liberalise trade in services, such step ahead would be open to the other WTO members joining at a moment which is more appropriate for them.

5. CONCLUSION

The Deep and Comprehensive Free Trade agreements of the European Union can by now be regarded as an established practice. They have gone a long way from focusing on pure tariff elimination on the import of goods to covering vast regulatory areas. In that sense, they enter the realm of 'law-making treaties' in a specialised area of international law. While most of the topics have already been covered by multilateral (GATT, GATS, TBTA, SPSA, SCMA) or plurilateral (GPA) agreements in the WTO, the bilateral practice further refines these international rules. Moreover, some parts of a DCFTA address new subjects that may influence the development of special branches of international law – e.g., sustainable development clauses may strengthen in particular international environmental law.²² On the other hand, as the recent attempt to agree additional rules to the TRIPS agreement through ACTA has failed, comparable rule-making via bilateral DCFTAs seems to be excluded. This reminds us of one important internal parameter of the EU's DCFTA policy: it can push the envelope only so far as the European Parliament is willing to use trade policy as a political tool.

²² F. Hoffmeister, 'Der Beitrag der Europäischen Union zur Entwicklung des besonderen Völkerrechts', in Obwexer (ed.), 'Die Europäische Union im Völkerrecht', *Europarecht*, Beiheft 2/2012, p. 227 (242).

LINKING TRADE LIBELISATION, STANDARISATION AND DEVELOPMENT: SANITARY AND PHYTOSANITARY MEASURES IN THE ECONOMIC PARTNERSHIP AGREEMENTS BETWEEN THE EU AND ACP STATES

Gracia Marín Durán*

1. INTRODUCTION

The aim of this paper is to explore the linkages between trade liberalisation, standardisation and development through treatment of sanitary and phytosanitary (SPS) measures in the Economic Partnership Agreements (EPAs) that have been concluded, or are being negotiated, between the European Union (EU) and seven regional groupings of African, Caribbean and Pacific (ACP) States under the framework of the Cotonou Partnership Agreement.¹ The chapter begins by introducing the key regulatory linkages, and inherent tensions, between SPS regulation and trade liberalisation, highlighting the need to strike a delicate balance between at times conflicting policy goals, as well as the specific challenges faced when countries at different levels of development are involved, such as the EU and the ACP States. It then turns to analysing the SPS provisions in the EPAs, focusing on that concluded with the CARIFORUM States in October 2008² as the only final EPA provisionally applied at the time of writing, while comparisons will be made with interim EPAs (iEPAs) signed with other ACP regions or individual countries therein.³ The EPAs will be as-

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¹ Partnership Agreement between the Members of the African, Caribbean and Pacific Group of States of the one part and the European Community and its Member States of the other *OJ* [2000] L317/3 (Cotonou Agreement), Arts. 36-37. This marks the latest, but significantly novel, stepping-stone in a cooperation process spanning several decades between the EU and the ACP while its immediate predecessor is the Lomé IV-bis Convention (*OJ* [1998] L156/3), the very origins of this long-standing contractual cooperation are to be traced back to the Yaoundé I (*OJ* [1964] L93/1431) and Yaoundé II (*OJ* [1970] L 282/2) Conventions. On the evolution of EU-ACP trade relations, see K. Arts and A. K. Dickson (eds.), *EU Development Cooperation – From Model to Symbol?* (Manchester University Press 2004); O. Babarinde and G. Faber (eds.), *The European Union and Developing Countries: the Cotonou Agreement* (Martinus Nijhoff 2005); JA McMahon, *The Development Cooperation of the EC* (Kluwer, 1998), ch. 2; B. Martenzuck, 'From Lomé to Cotonou: The ACP-EC Partnership Agreement in a Legal Perspective' 5(4) *European Foreign Affairs Review* 2000, p. 461.

² Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other [2008] *OJ* L289/3 (CARIFORUM EPA); 'Notice concerning the provisional application of the CARIFORUM-EC Economic Partnership Agreement' *OJ* [2008] L352/62.

³ Interim Partnership Agreement between the European Community, of the one part, and the Pacific States, of the other part, [2009] *OJ* L272/2 (Pacific iEPA); Interim Agreement with a view to an Economic Partnership Agreement between the European Community and its Member States,

essed against multilateral rules on SPS matters in the World Trade Organisation (WTO), and notably the Agreement on the Application of Sanitary and Phytosanitary Measures⁴ concluded as part of the Uruguay Round ‘single undertaking’. A key question that arises is what is the added-value of EPAs in dealing with the interface between SPS regulation, trade liberalisation and development: are they, in fact, a success or a missed opportunity in building upon existing WTO disciplines? In addressing this question, emphasis is placed on two areas where complementary action at the bilateral/regional level is specifically envisaged in the SPS Agreement itself, namely: equivalence recognition (as a means to limit the trade restrictive effects of diverging SPS measures) and provision of financial/technical assistance to developing and least-developed countries (as a means to address supply-side constraints in meeting SPS requirements). In this regard, comparisons will be made with another free trade agreement (FTA) concluded between the EU and another (more advanced) developing country: the Association with Chile,⁵ which contains comprehensive SPS provisions that are quite unique in EU FTA outside the enlargement context.⁶

2. SPS PROVISIONS IN EPAS: STRIKING A DELICATE BALANCE

Sanitary and phytosanitary standards and their associated conformity assessment procedures are generally considered a specific category of technical barriers to trade (TBT) in light of their purpose –that is, the protection of human, animal or plant life or health from food-borne risks and risks from pests and diseases – and are often addressed separately in trade agreements, including in the WTO Agreement.⁷ As a special category of non-traditional market access barrier, SPS measures have become an increasingly important, and controversial, issue in international trade relations, notably due to their close link with trade in agricultural and food products which has been notoriously difficult to liberalise. As of 30 September 2011, over 10,000 SPS measures have been

of the one part, and the Central Africa Party, of the other part [2009] *OJ* L57/2 (Central Africa iEPA); Stepping stone Economic Partnership Agreement between Côte d’Ivoire, of the one part, and the European Community and its Member States, of the other part *OJ* [2009] L59/2 (Western Africa iEPA); Interim Agreement with a view to an Economic Partnership Agreement between the European Community and its Member States, of the one part, and the SADC EPA States, of the other (SADC iEPA), available at <http://ec.europa.eu/trade/wider-agenda/development/economic-partnerships/negotiations-and-agreements/#_sadc>.

⁴ Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), Annex 1.A to the Agreement establishing the World Trade Organization (WTO Agreement), signed in Marrakesh on 15 April 1994.

⁵ Agreement establishing an Association between the European Community and its Member States, of the one part, and the Republic of Chile, on the other part *OJ* [2002] L352/3 (Chile AA).

⁶ *Ibid.*, Annex IV ‘Agreement on Sanitary and Phytosanitary Measures Applicable to Trade in Animals and Animal Products, Plant Products and other Goods and Animal Welfare’.

⁷ A more general Agreement on Technical Barriers to Trade (TBT Agreement) is also annexed to the WTO Agreement, Annex 1A.

notified to the WTO, of which 370 regular notifications (4.2% of the total) and 49 emergency notifications (3.7% of the total) were submitted by the EU.⁸

This proliferation of SPS measures can be seen as the natural outcome of the exercise of the sovereign right of States to protect public health within their territories which is universally recognised, including under WTO law,⁹ as is their discretion in setting the level of protection against SPS risks that they deem appropriate to ensure within their territories.¹⁰ And yet, there are inherent tensions between this vitally important objective of public health protection and that of promoting trade liberalisation. At the most basic level, a risk exists that SPS measures are misused as tools of ‘disguised protectionism’, which has gained importance as traditional barriers to agricultural trade (e.g., tariffs, quotas) shielding domestic producers from foreign competition have been progressively reduced or eliminated under the WTO Agreement on Agriculture.¹¹ But even when adopted for entirely legitimate, non-protectionist, health protection purposes, SPS measures can significantly, and at times unnecessarily, restrict international trade. This is due to the large differences that exist in SPS regulatory systems from one country to another, which are a reflection of the different factors that regulators take into account (e.g., consumer preferences, industry interests, geographic and climatic conditions, financial and technical resources, etc.) when enacting SPS measures. Nonetheless, this regulatory divergence can act as a formidable barrier on market access as producers are required to adjust their products to the different SPS requirements on their export markets.

SPS disciplines in trade agreements thus act on the interface between the two important but at times conflicting policy objectives of public health protection and trade liberalisation, and attempt to strike a delicate balance between them. Indeed, the basic purpose of the WTO SPS Agreement is to maintain the sovereign right of any WTO member to provide the level of health protection it deems appropriate, while ensuring that the exercise of this right is not misused for protectionist purposes and does not result in ‘unnecessary’ barriers to the trade with other members.¹² Promoting regulatory convergence among trading partners appears in turn as an important device to reduce the trade barriers posed by legitimate (non-protectionist) SPS measures. But how exactly can this be achieved without compromising the right of each party to choose and enforce its desired level of protection within its territory?

⁸ WTO Committee on Sanitary and Phytosanitary Measures, ‘Overview of the Implementation of the Transparency Provisions of the SPS Agreement – Note by the Secretariat’ (G/SPS/GEN/804/Rev.4), 13 October 2011 (2011 Transparency Note), pp. 3 and 6.

⁹ WTO SPS Agreement, Art. 2.1.

¹⁰ See, e.g., *European Communities – Measures Concerning Meat and Meat Products (EC – Hormones)*, Appellate Body Report WT/DS26/AB/R, adopted 13 February 1998, para. 172; *European Communities – Measures Affecting Asbestos and Asbestos-containing Products*, Appellate Body Report WT/DS135/AB/R, adopted 5 April 2001, para. 168.

¹¹ WTO Agreement, Annex I A. See further, J. McMahon, *The WTO Agreement on Agriculture – A Commentary* (Oxford University Press 2006).

¹² SPS Agreement, Art. 2, see further section 3.2 below.

The most ambitious approach is, of course, *harmonisation* which implies the adoption of uniform standards and conformity assessment procedures among trading partners. However, regulatory uniformity in the area of SPS measures is often difficult to achieve, or even undesirable, in light of the differences that exist across countries in terms of health policy priorities and regulatory capacities.¹³ Alternatively, the trade restrictive effects of divergent SPS requirements can be limited through the technique of *equivalence*, whereby SPS regulations of other countries are recognised as equivalent to domestic ones even if they differ in content, provided that they achieve the same level of protection. Therefore, under this second approach, regulatory convergence among trading partners is only sought in terms of the results (protection levels), while regulatory diversity is in principle accepted in relation to the means used (standards and procedures).

The balancing of trade liberalisation and health protection goals is further complicated by the fact that the market access effects of SPS regulations are not equally felt by all countries: this will depend, first of all, on the relative importance of the agricultural sector for export revenue earnings in a particular country, but also and crucially, on its capacity (and that of its producers) to comply with the SPS measures of its trading partners. SPS compliance capacity is largely dependent on the human, technical and financial resources available at the level of both the public sector and the private industry, and thus varies for countries at different levels of development. It is widely recognised, including in the WTO SPS Agreement,¹⁴ that developing and least-developed countries face special constraints and additional costs in building the necessary regulatory infrastructure to meet SPS requirements on their export markets. At the same time, it is equally accepted that these supply-side constraints of developing countries should not jeopardise the right of an importing country to enact and enforce regulations that are necessary to protect public health within its territory. Yet, the gap in compliance capacity between developed and developing countries, does add a new development dimension to our balancing exercise: the need to assist developing countries in *building capacity* to meet the legitimate (non-protectionist) SPS requirements of their trading partners.

Against this background, the EPAs between the EU and the ACP States provide an obvious case study for exploring the balance between trade liberalisation, SPS standardisation and development for several reasons. First of all, these agreements represent the first attempt at regional trade integration between countries at diametrically different levels of development, with the two extremes being the EU on the one side, and some of the poorest and most vulnerable countries in the world on the ACP side.¹⁵ Secondly, exports of ag-

¹³ See with specific reference to developing countries, G. Mayeda, 'Developing Disharmony? The SPS and TBT Agreements and the Impact of Harmonization on Developing Countries' 7(4) *Journal of International Economic Law* 2004, p. 737.

¹⁴ SPS Agreement, Arts. 9 and 10 providing for special and differential treatment for developing and least-developed WTO members; see further section 4 below.

¹⁵ Forty-two out of the 48 countries classified by the UN as least-developed countries belong to the ACP Group of States (which currently has 79 members), and many ACP countries also

ricultural commodities and agri-food products are of great importance to many ACP countries¹⁶ which, with the exception of South Africa,¹⁷ already benefit from generous preferences granted by the EU on a non-reciprocal basis under the Cotonou Agreement and previous conventions.¹⁸ Consequently, the potential for significant market access improvements under the EPAs lies mostly in addressing non-traditional barriers to trade, including SPS measures. Third, the EU and the ACP,¹⁹ as well as international organisations,²⁰ have highlighted the increasing scope and complexity of SPS measures as a key obstacle to ACP exports of agricultural commodities and agri-food products in accessing the EU market.²¹

To be sure, the EU cannot be challenged on its right to protect public health within its territory just because ACP countries lack the capacity to meet its SPS requirements, but a question arises nonetheless as to whether the EU is willing to enable and facilitate compliance by its trading partners. Indeed, to what extent have EPAs fulfilled their promise as 'development instruments'²² in the field of SPS measures? Do they seek to improve market access opportunities for the ACP countries *vis-à-vis* existing WTO disciplines by effectively address-

fall within the UN-based categories of 'small island developing States' and 'land-locked States'. Similarly, an important number of ACP countries are found within the UNDP category of 'low human development' in terms of the 2011 Human Development Index, see: UNDP, Human Development Report 2011 (November 2011), pp. 129-130, available at <http://www.undp.org/content/undp/en/home/librarypage/hdr/human_developmentreport2011.html>.

¹⁶ According to EU statistics, EU agricultural imports from all ACP countries (including South Africa) amounted to €13.2 billion in 2011 (15.4% of total), available at <<http://ec.europa.eu/trade/creating-opportunities/bilateral-relations/regions/africa-caribbean-pacific/>>. On the socio-economic importance of agriculture for the ACP countries and for their trade relations with the EU, see A. Alpha and V. Fautrel, 'Negotiating Economic Partnership Agreements: Agriculture' *ECDPM InBrief No13C* (Centre for Development Policy Management, April 2007).

¹⁷ The participation of South Africa in the Cotonou Agreement is subject qualifications, including the non-application of its trade and development finance provisions (Annex VI, Protocol 3). EU-South Africa trade and economic cooperation is governed by the pre-existing bilateral Agreement Trade, Development and Cooperation between the European Community and its Member States, of the one part, and the Republic of South Africa, of the other part OJ [1999] L311/3.

¹⁸ It has been estimated that about 97% of ACP exports already entered the EU market duty and quota free in 2006, see C. Stevens, M. Meyn and J. Kennan, 'EU Duty – And – Quota Free Market Access: What is it Worth for the ACP Countries?' *Overseas Development Institute* February 2008, p. vii.

¹⁹ EU-ACP Group of States, 'Intra-ACP Strategy Paper and Multiannual Indicative Programme 2008-2013', 13 March 2009 (Intra-ACP Strategy Paper 2008-2013), p. 3, available at <http://ec.europa.eu/development/icenter/repository/strategy_paper_intra_acp_edf10_en.pdf>.

²⁰ With specific reference to African countries, see United Nations Conference on Trade and Development, *Economic Development in Africa 2008 – Export Performance Following Trade Liberalisation: Some Patterns and Policy Perspectives* (UNCTAD/ALDC/AFRICA/2008), 15 September 2008, pp. 49-50; World Bank, 'Economic Partnership Agreements and the Export Competitiveness of Africa' 4627 *Policy Research Working Paper* May 2008, p. 3.

²¹ In this regard, the heterogeneity of ACP countries must certainly be remembered, as it impacts on the individual capacity of these countries to adapt to, and overcome the trade restrictive effects of, such requirements. However, such a circumstance-specific analysis is not plausible within the scope of this paper.

²² Council of the European Union, 'Conclusions on the Economic Partnership Agreements' 19-20 November 2007, para. 1.

ing their supply-side constraints and limiting the trade restrictive effects of EU SPS measures? As a first step towards answering these questions, the next section turns to examining SPS provisions in the EPAs.

3. SPS PROVISIONS IN EPAS: CONTENT AND KEY IMPLICATIONS

3.1 Scope and objectives

Most of the EPAs concluded thus far between the EU and ACP regions or individual countries deal with SPS measures,²³ but only two (the CARIFORUM EPA and the SADC iEPA) do so in a separate chapter under the title on trade in goods,²⁴ while the others contain a joint chapter covering also technical barriers to trade more generally.²⁵ In all cases, however, SPS measures are treated as a subcategory of technical regulations and subject to specific rules. All EPAs²⁶ under consideration borrow the WTO definition of SPS measures distinguishing them from the broader category of TBT measures according to their purpose, namely those aimed at: (i) the protection of human, animal, or plant life or health against risks in food or feed as well as risks from pests and diseases; (ii) the prevention and limitation of other damage from the entry, establishment or spread of pests.²⁷ Some EPAs limit the scope of application of their SPS rules to measures ‘in so far as they affect trade between the Parties,’²⁸ which seem to be a stricter requirement than that found in the WTO SPS Agreement encompassing SPS measures that ‘*may*, directly or indirectly, affect international trade.’²⁹

The objectives of these SPS chapters reflect the need to strike a careful balance between the recognition of the Parties’ right to protect health *within* their territories, on the one hand, and the liberalisation and promotion of trade in agricultural and food products *between* them, on the other. For instance, the SPS chapter of the CARIFORUM EPA aims to: (i) ‘facilitate trade between the

²³ Note that the iEPAs with EAC and ESA countries refer to SPS measures in a *rendez-vous* clause, in which the Parties agree to continue negotiations in this area: EAC iEPA, Art. 37(c); ESA iEPA, Art. 53(c).

²⁴ CARIFORUM EPA, Chapter 7, Title I, Part II; SADC iEPA, Chapter 9, Title I, Part II.

²⁵ E.g., Pacific iEPA, Chapter 5, Part II; Central Africa iEPA, Chapter 4, Title III, Part II; West iEPA, Chapter 4, Title III, Part II.

²⁶ CARIFORUM EPA, art. 54; Pacific iEPA; Art. 33; SADC iEPA, Art. 58; Central Africa iEPA, Art. 42; West Africa Coast, Art. 38.

²⁷ SPS Agreement, Annex A, para. 1. Note that the definitions refer to the protection of health or prevention of other damage ‘within the territory of the [WTO] member’, thus excluding measures aimed at extraterritorial health protection from the scope of the agreement. WTO Panels have favoured a broad interpretation of these definitions, see P. van den Bossche, *The Law and Policy of the World Trade Organization – Text, Cases and Materials* (OUP 2008), pp. 835-6.

²⁸ CARIFORUM EPA, Art. 54(1); Pacific iEPA, Art. 33(1); Western Africa iEPA, Art. 38(1).

²⁹ This requirement appears easy to fulfil, as any SPS measure that applies to imports can be said to ‘potentially’ affect international trade, and it is not necessary to demonstrate that it has an ‘actual’ effect on trade: see *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, Panel Report WT/DS291/R, adopted 21 November 2006, para. 7.435.

Parties while maintaining and increasing the capacity of the Parties to protect plant, animal and public health' and (ii) 'improve the capacity of the Parties to identify, prevent and minimise unintended disruptions or barriers to trade' between them 'as a result of the measures necessary to protect plant, animal and public health' within their territories.³⁰ In addition, three of the EPAs explicitly recognise that the EU and the ACP partners differ in their development levels and thus ability to comply with SPS requirements, and include among their objectives assistance to the ACP regions in building (public and private) capacity in relation to SPS measures.³¹ The CARIFORUM EPA, in particular, places an emphasis on 'ensuring compliance with SPS measures of the [EU] Party'.³² A commitment is also made to assist strengthening regional cooperation on SPS matters at ACP level,³³ with the CARIFORUM EPA going further in supporting intra-CARIFORUM harmonisation of SPS measures with a view to 'facilitating recognition of equivalence of such measures with those existing in the [EU] Party'.³⁴

3.2 Reaffirmation of WTO disciplines

As in most other free trade agreements concluded by the EU outside the enlargement context,³⁵ WTO rules provide the basis of the SPS provisions in the EPAs under examination. In line with the Cotonou Agreement,³⁶ the EPA Parties 'reaffirm their rights and obligations' under the WTO SPS Agreement.³⁷ What are then these WTO 'rights' and 'obligations' reiterated in the EPA context? And in particular, what do these entail for regulatory convergence between the EU and the ACP EPA Parties in the field of SPS measures?

³⁰ CARIFORUM EPA, Art. 53(a) and (b). Similar provisions are found in: SADC iEPA, Art. 57(1), with stronger undertaking to ensure that SPS measures 'shall apply only to the extent necessary to protect human, animal or plant health or life in accordance with the SPS Agreement'; Pacific iEPA, Art. 34(1) and (3); Central Africa iEPA, Art. 40; West Africa iEPA, Art. 37.

³¹ SADC iEPA, Art. 57(4); Pacific iEPA, Art. 34(3) and (4). Note that no reference is made to assistance for ACP capacity-building among the objectives of the Central Africa iEPA (Art. 40) and West Africa iEPA (Art. 37).

³² CARIFORUM EPA, Art. 53(d).

³³ SADC iEPA, Art. 57(2); Pacific iEPA, Art. 34(2). Note that no reference is made to the promotion of regional cooperation on SPS matters at ACP level among the objectives of the Central Africa iEPA (Art. 40) and West Africa iEPA (Art. 37).

³⁴ CARIFORUM EPA, Art. 53(c).

³⁵ For an overview, see B. Rudloff and J. Simons, 'Comparing EU Free Trade Agreements – Sanitary and Phytosanitary Standards' *ECDPM InBrief No 6B* (European Centre for Development Policy Management, July 2004). This is also the case in FTAs concluded by the EU more recently, see, e.g., Free Trade Agreement between the European Union and its Member States of the one part, and the Republic of Korea, of the other part, signed on 6 October 2010, *OJ* [2011] L 127/6 (EU-Korea FTA), Art. 5.4.

³⁶ Cotonou Agreement, Art. 48.

³⁷ CARIFORUM EPA, Art. 52; SADC iEPA, Art. 56(1), with less strict reaffirmation of the 'principles and objectives' of the SPS Agreement; Pacific iEPA, Art. 36, with stronger commitment to 'apply' the SPS Agreement; Central Africa iEPA, Art. 41; West Africa iEPA, Art. 36.

With regards to 'rights', we find most significantly in the SPS Agreement, unlike in the General Agreement on Tariffs and Trade (GATT),³⁸ an express recognition of the sovereign right of WTO members 'to take sanitary and phytosanitary measures necessary for the protection of human, animal, or plant life or health',³⁹ and to choose the level of protection they wish to guarantee within their territories once the existence of a risk has been established in accordance with the SPS Agreement.⁴⁰ In principle therefore, the SPS Agreement does not set minimum standards of protection,⁴¹ but allows WTO members to determine their own SPS standards as well as the methods for assessing compliance with such standards. The exercise of this right is not, however, unlimited but subject to a series of substantive and procedural disciplines. In essence, the basic limitations on WTO members' right to take SPS measures are.⁴²

- *Necessity requirement*: SPS measures shall be applied 'only to the extent necessary to protect human, animal or plant life or health'.⁴³ This necessity requirement is further fleshed out in the obligation on WTO members to ensure that their SPS measures 'are not more trade restrictive than required to achieve their appropriate level of sanitary and phytosanitary protection, taking into account technical and economic feasibility'.⁴⁴
- *Scientific requirement*: SPS measures shall be based on 'scientific principles' and not maintained 'without sufficient scientific evidence'.⁴⁵ This scientific requirement is further reinforced by the obligation on WTO members to ensure that their SPS measures are based on an appropriate risk assessment.⁴⁶ Proof of an actual risk, not merely a theoretical risk, to human, animal, or plant life or health must therefore be shown scientifically in order to secure the legality of SPS measures under WTO law. Yet, the SPS Agreement is also cognisant of the fact that science does not always have clear and unambiguous answers to all health regulatory questions, and thus provides

³⁸ Under the GATT, references to 'measures necessary to protect human, animal, or plant life or health' are only found under the 'General Exceptions' clause (Article XX(b)), and the regulating WTO member thus bears the burden of proof of justifying such measures if these are found inconsistent with other GATT rules (e.g., Articles I, III and XI). On this point see, van den Bossche, *supra* note 27, p. 842.

³⁹ SPS Agreement, Art. 2.1.

⁴⁰ *Ibid.*, Annex A, para. 5.

⁴¹ This contrasts with the approach of the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS) –another WTO agreement equally venturing into 'behind-the-border' regulatory matters– which does lay down mandatory minimum standards of intellectual property protection and enforcement.

⁴² For a more extensive examination, see van den Bossche, *supra* note 27, pp. 842-870; J. Scott, *The WTO Agreement on Sanitary and Phytosanitary Measures: A Commentary* (OUP 2007), chapters 3-4.

⁴³ SPS Agreement, Art. 2.2.

⁴⁴ *Ibid.*, Art. 5.6.

⁴⁵ *Ibid.*, Art. 2.2.

⁴⁶ *Ibid.*, Arts. 5.1-5.3 and Annex A, para. 4.

for the possibility to take –under certain conditions– provisional SPS measures where scientific evidence is insufficient.⁴⁷

- *Non-discrimination requirement*: SPS measures shall not be applied in a manner that ‘unjustifiably discriminates between Members where identical or similar conditions prevail, including between their own territory and that of other Members,’ nor in a manner which would constitute ‘a disguised restriction on international trade’.⁴⁸

In addition, the SPS Agreement establishes detailed rules on *control, inspection and approval* procedures that are put in place by WTO members to assess compliance with their SPS requirements, with a view to ensuring that these procedures are not more lengthy and burdensome than is reasonable and necessary and do not discriminate against imports.⁴⁹ Furthermore, the SPS Agreement addresses *transparency and exchange of information* in relation to SPS measures through three broad categories of obligations. First, WTO members are required to promptly publish all adopted SPS regulations and allow for a reasonable period for adaptation by producers in exporting countries to the new measure (except in urgent circumstances), as well as to notify in advance draft regulations which depart from internationally agreed SPS standards so as to allow time for comments from other WTO members.⁵⁰ Second, they are obliged to provide information, upon request, regarding the reasons for their SPS measures where such measures are not based upon international standards or no relevant international standards exist.⁵¹ Third, WTO members need to create the necessary infrastructure to carry out their transparency obligations, including in the form of establishing a National Notification Authority (responsible for implementing the notification requirements)⁵² and an Enquiry Point (responsible for answering all reasonable questions and providing relevant documents upon request).⁵³

Some EPAs contain individual provisions specifically confirming the Parties’ commitment to implement the transparency obligations set out in the SPS

⁴⁷ Ibid., Art. 5.7.

⁴⁸ SPS Agreement, Art. 2.3. This basic discipline reflects the GATT non-discrimination obligations of most-favoured-treatment and national treatment, and is complemented by a more specific prohibition on arbitrary or unjustifiable distinctions in the levels of SPS protection chosen by a WTO member in different situations, where such distinctions lead to discrimination or disguised restrictions on trade (Art. 5.5 SPS Agreement).

⁴⁹ SPS Agreement, art. 8 and Annex C. It is not the place here to examine these WTO rules in detail, see among others van den Bossche, *supra* note 27, pp. 873-875; Scott, *supra* note 42, chapter 5.

⁵⁰ Ibid., Art. 7 and Annex B, paras. 1-2 and 5. See also: WTO SPS Committee ‘Recommended Procedures for Implementing the Transparency Obligations of the SPS Agreement (Article 7)’ (G/SPS/7/Rev.2), 20 June 2002, which replaced those adopted in 2002; and for an overview of implementation performance and outstanding issues, see 2011 Transparency Note (*supra* note 8).

⁵¹ SPS Agreement, Art. 5.8.

⁵² Ibid., Annex B, para. 10. A list may be found on the SPS Information Management System, launched in October 2007 to assist WTO members in the formidable task of keeping track of all notified SPS measures at <<http://spsims.wto.org/>>.

⁵³ SPS Agreement, Annex B, para. 3. A list may be found as *supra* note 52.

Agreement,⁵⁴ albeit greater availability of information may not necessarily translate into a better understanding by ACP partners and their exporters of the SPS requirements that their products must meet on the EU market.⁵⁵ The CARIFORUM EPA and the SADC iEPA go further in encouraging prior notification of *all* proposed SPS measures (whether or not based on relevant international standards) that may affect inter-regional trade,⁵⁶ but it remains to be seen whether this would enable adjustments to be made to legislative proposals in response to concerns raised by trading partners.

As to regulatory convergence, the SPS Agreement promotes, but does not oblige, *harmonisation of SPS measures* around existing international standards (guidelines or recommendations),⁵⁷ and in particular those developed by the following three international standard-setting bodies: (i) the Codex Alimentarius Commission (CAC) with respect to food safety; (ii) the World Organisation for Animal Health (formerly International Office for Epizootics, OIE) and (iii) the Secretariat of the International Plant Protection Convention (IPPC) in the area of plant health.⁵⁸ Most notably, WTO members are encouraged to ‘conform’ their SPS measures to relevant international standards by means of a presumption of WTO-consistency, which is a significant advantage in case of a measure being challenged in WTO dispute settlement proceedings.⁵⁹ Yet importantly, WTO members remain free to take SPS measures that deviate from existing international standards and result in a higher level of protection, in so far as these measures comply with the scientific justification and other requirements of the SPS Agreement.⁶⁰ This reflects the aforementioned recognition of the right of WTO members to choose the level of SPS protection they deem appropriate within their territories.

None of the EPAs under consideration lays down stricter harmonisation obligations than those just seen in the SPS Agreement. While specific reference is also made to the three main international standard-setting bodies in most EPAs,⁶¹ nothing prevents the Parties to choose a higher level of health protection than that achieved by existing international standards provided that they can justify their deviating SPS measures by means of an appropriate risk as-

⁵⁴ CARIFORUM EPA, Art. 57; SADC iEPA, Art. 60(1)-(2); Pacific iEPA, Art. 40(1).

⁵⁵ For a critical discussion of EU practice, see C. Downes, ‘The Impact of WTO Transparency Rules: Is the 10,000th SPS Notification a Cause for Celebration? – A Case Study of EU Practice’ 15(2) 1 *Journal of International Economic Law* 2012. More generally, see D. Prévost, ‘Sanitary, Phytosanitary and Technical Barriers to Trade in the Economic Partnership Agreements between the European Union and the ACP Countries’ 6 *ICTSD Issue Paper* (International Centre for Trade and Sustainable Development) August 2010, pp. 43-45.

⁵⁶ CARIFORUM EPA, Art. 57; and SADC iEPA, Art. 61(1) on the agreement to create an ‘early-warning system’ to ensure that the SADC iEPA States are informed in advance of new SPS measures that may affect their exports to the EU.

⁵⁷ SPS Agreement, Art. 3.1.

⁵⁸ *Ibid.*, Annex A, para. 3(a)-(c).

⁵⁹ *Ibid.*, Art. 3.2. In essence, this results in a heavier burden of proof on the complaining party to demonstrate a violation of the SPS Agreement, see Appellate Body Report in *EC – Hormones*, paras 102 and 170; van den Bossche, *supra* note 27, pp. 850-1.

⁶⁰ SPS Agreement, Art. 3.3.

⁶¹ That is, the CAC, OIE and IPPC: CARIFORUM EPA, Art. 52; SADC iEPA, Art. 56(1); Central Africa, Art. 42(2); West Africa, Art. 38(2).

assessment. There is therefore no drive towards harmonisation in the EPAs as a means to create regulatory convergence between the EU and the ACP in the field of SPS legislation, and any restrictive effects of divergent SPS requirements on inter-regional trade would need to be dealt with by other means.

In the absence of harmonisation, *recognition of equivalence* of different SPS measures is 'key to permitting the maintenance of regulatory diversity, while at the same time promoting market integration.'⁶² For this reason, the SPS Agreement sets out certain obligations for WTO Members with regard to the recognition of equivalence, which form part of those reaffirmed in the EPA context. In particular, WTO members are required to accept different SPS measures as equivalent to their own if the exporting Member 'objectively demonstrates' to the importing Member that its measures achieve the latter's chosen level of protection.⁶³ Notwithstanding its legally-binding character, the implementation of this provision to date leaves much to be desired, partly due to the lack of detail regarding the substantive criteria and procedure on the basis of which equivalence of SPS measures ought to be 'objectively demonstrated' (by the exporting Member) and assessed (by the importing Member). To remedy this lacuna and of relevance to our discussion, the SPS Agreement encourages the conclusion of formal agreements on equivalence recognition, by requiring WTO members to enter into consultations, upon request, to this end but there is no obligation to actually conclude such an agreement.⁶⁴

An obligation of effort, rather than result, is explicitly reiterated in the CARIFORUM EPA, whereby the Parties 'agree to consult with the aim of achieving *bilateral* arrangements on the recognition of the equivalence of specified SPS measures.'⁶⁵ The bilateral character of such arrangements seems, however, to undermine the overall objective of promoting regional harmonisation of SPS measures at CARIFORUM level.⁶⁶ The Pacific iEPA goes slightly further: after reiterating 'the importance of making operational' the equivalence provisions of the SPS Agreement,⁶⁷ the EU 'agrees to give due consideration to reasonable requests' from the Pacific States to examine the equivalence of their SPS measures in areas of particular export interest to them.⁶⁸ Yet, what form such consideration may take is left unspecified. All in all, there is no concerted effort in the EPAs towards enabling the recognition of equivalence of divergent SPS measures between the EU and ACP States, beyond what is already provided for within the WTO framework.⁶⁹

⁶² Scott, *supra* note 42, p. 164.

⁶³ SPS Agreement, Art. 4(1).

⁶⁴ SPS Agreement, Art. 4(2).

⁶⁵ CARIFORUM EPA, Art. 56(2).

⁶⁶ See sections 3.1 above and 3.3 below.

⁶⁷ Pacific iEPA, Art. 37, including the 2004 Equivalence Decision (*infra* note 86).

⁶⁸ *Ibid.*, Art. 37(2) and Appendix IIIA listing priority products for export from Pacific Party to EU.

⁶⁹ The SADC iEPA is even more vague in noting the Parties agreement 'to promote bi-regional collaboration aiming at recognition of appropriate levels of protection in SPS measures' (Art. 57(3)).

3.3 Additional provisions: Intra-ACP harmonisation and EU-ACP cooperation

The SPS provisions in the EPAs go further than a simple reaffirmation of WTO disciplines in two notable respects. The first relates to the promotion of *intra-regional harmonisation* of SPS measures. As noted earlier, there is no further attempt in the EPAs *vis-à-vis* the SPS Agreement to encourage harmonisation of SPS requirements *between* the EU and the ACP. Yet, some of the EPAs do support harmonisation of SPS standards and procedures *within* the ACP regions concerned. For instance, in the CARIFORUM EPA, the Parties ‘agree on the importance of establishing harmonised SPS measures’⁷⁰ both in the EU and between the CARIFORUM States themselves, and there is an undertaking by the EU to assist its CARIFORUM partners in achieving such regulatory harmonisation.⁷¹ In a similar vein, the SADC iEPA notes the agreement of the Parties to ‘cooperate in facilitating regional harmonisation of [SPS] measures and the development of appropriate regulatory frameworks and policies within and between the SADC EPA States, thereby enhancing intra-regional trade and investment,’⁷² and contains a list of priority products and sectors for regional harmonisation.⁷³ Stronger provisions on regional harmonisation are found in the Central Africa iEPA. First, there is a time limit to intra-regional harmonisation: the Central African Party undertakes to harmonise SPS (and TBT) measures intra-regionally within four years of the entry into force of the agreement, and lists priority products for such harmonisation.⁷⁴ In addition, the Central African Party ‘agree on the need to harmonise import conditions applicable to [EU] products’, and pending such regional harmonisation, ‘a [EU] product legally placed on the market of a signatory Central African State *may* also be legally placed on the market of all other signatory Central African States without any further restrictions or administrative requirements’⁷⁵ – an attempt to export the EU internal market principle of assimilation⁷⁶ to the Central African region but limited to products of EU (and not all third-countries) origin. Thus, while intra-regional harmonisation of SPS measures may well serve the EPA overarching objective of promoting regional trade and economic integration among the ACP States concerned, it would also benefit the EU’s commercial interests by lowering market access costs for its own exporters to each of the ACP regions through compliance with a common set of SPS requirements.

A second aspect where EPAs seek to expand upon WTO rules is the promotion of *cooperation* between the EU and ACP Parties on SPS matters, involving

⁷⁰ CARIFORUM iEPA, Art. 56(2).

⁷¹ *Ibid.*, Art. 53(c).

⁷² SADC iEPA, Art. 64(2). See also West Africa iEPA, Art. 43(2)(c), setting among the areas for cooperation the promotion of harmonised SPS measures intra-regionally on the basis of the relevant international standards.

⁷³ SADC iEPA, Appendix IA.

⁷⁴ Central Africa iEPA, Art. 46(1) and Appendix IA.

⁷⁵ *Ibid.*, Art. 46(2).

⁷⁶ Art. 28(2) TFEU; Case C-41/76 *Donckerwolcke v. Procureur de la République* [1976] ECR I-1921 (referring to former Art. 9(2) Treaty of Rome).

the provision of EU *financial and technical assistance* in recognition of the gaps that exist between their respective capacity to comply with, and benefit from, SPS rules. Four of the five EPAs under examination,⁷⁷ recognise the importance of inter-regional cooperation on SPS (and TBT) issues,⁷⁸ and identify specific priorities for cooperation. Among those commonly listed are: (i) establishing a framework for the exchange of information and sharing of expertise between the Parties;⁷⁹ (ii) reinforcing intra-ACP regional integration, including through the promotion of harmonised SPS regulatory systems within each region,⁸⁰ (iii) capacity-building in the public and private sectors of ACP partners to comply with international SPS standards and procedures,⁸¹ and in the case of the Western Africa iEPA with EU SPS requirements;⁸² (iv) supporting the participation of ACP partners in international standard-setting bodies.⁸³

It follows from the above examination that the added-value of EPAs in creating supplementary disciplines to those already existing at WTO level is rather limited in scope, and these additional provisions often take the form of statements of objectives and 'best-endeavour' commitments. But is this necessarily something to regret? In which ways, if any, can EPAs be considered a missed opportunity for improving existing multilateral disciplines? The next section discusses a number of instances where EPAs could have been more ambitious at addressing the deficiencies of the SPS Agreement that are of particular interest to the ACP countries, and indeed where the SPS Agreement itself encourages further action to facilitate implementation at the bilateral/regional level.

4. SPS PROVISIONS IN EPAs: A MISSED OPPORTUNITY?

A first area where EPAs can be considered a missed opportunity,⁸⁴ and of most relevance to our discussion, is in addressing (some) of the obstacles faced in the implementation of the equivalence provisions of the SPS Agreement dis-

⁷⁷ The Pacific iEPA only refers to the Parties' agreement to apply 'where necessary and possible' the special and differential treatment provisions of the SPS Agreement (*infra* note 106), including to the Pacific States that are not WTO members (Art. 36(4)).

⁷⁸ CARIFORUM EPA, Art. 59(1); SADC iEPA, Art. 64(1); Western African iEPA, Art. 43(1). The Central African iEPA (Art. 47) only lists priority areas for cooperation, namely: (i) the promotion of regional harmonisation for priority products in Appendix IA and (ii) improvement of quality and competitiveness of priority products in Appendix IB for export to EU.

⁷⁹ CARIFORUM EPA, Art. 59(2)(b); Western Africa iEPA, Art. 43(2)(a).

⁸⁰ CARIFORUM EPA, Art. 59(2)(a); SADC iEPA, Art. 64(2) and Appendix IA listing priority products; Western Africa, Art. 43(2)(b).

⁸¹ CARIFORUM EPA, Art. 8(v) and 59(2)(c); SADC iEPA, Art. 64(3)(d)-(f)

⁸² Western iEPA, Art. 43(2)(c)-(d).

⁸³ CARIFORUM EPA, Art. 59(2)(d); SADC iEPA, Art. 64(3)(g); Western Africa iEPA, Art. 42. This is in line with the SPS Agreement (Art. 10(4)), and seeks to address current imbalances in membership and participation between developed and developing countries in these bodies, see Mayeda, *supra* note 13, pp. 751-52.

⁸⁴ Another area where the EPAs have been considered a missed opportunity is the issue of 'regionalisation' or 'zoning and compartmentalisation', which is particularly important for large developing countries as it allows for adaptation of SPS measures to differing regional conditions in the exporting country (Art. 6 SPS Agreement). See further, Prévost, *supra* note 55, pp. 37-40.

cussed earlier, which were also recognised at the launch of the current multi-lateral trade negotiations at the Doha Ministerial Conference in 2001.⁸⁵ Since then, efforts have been made in the WTO SPS Committee to operationalise these provisions with the adoption of the 2004 Equivalence Decision,⁸⁶ particularly in response to the concerns raised by developing-country Members regarding their difficulties in having the equivalence of their SPS measures accepted by importing developed-country Members often demanding ‘sameness’ rather than ‘equivalence’ of SPS standards and conformity assessment procedures.⁸⁷ The Equivalence Decision provides detailed guidelines for both exporting Members requesting the recognition of equivalence and for the importing Members to whom such request is addressed, but mostly framed in hortatory terms. There was therefore potential for the EPAs to build and improve upon these guidelines, particularly in light of the long-standing trading relationship between the EU and the ACP⁸⁸ which provides the basis for developing the necessary level of familiarity and trust in each other’s SPS regulatory systems. This point is indeed stressed in the 2004 Equivalence Decision, which encourages the importing WTO Members to adopt an accelerated procedure for equivalence recognition in cases of ‘historic’ trade relations.⁸⁹ And yet, as previously noted, the EPAs fail to establish concrete criteria and procedures and for recognising equivalence of different SPS measures between the EU and the ACP partners.

Interestingly, a more ambitious effort at promoting equivalence recognition is exemplified by the Association Agreement between the EU and Chile,⁹⁰ which sets out in detail a consultation process with a view to ensuring an ‘objective demonstration’ of equivalence by the exporting Party as well as an ‘objective assessment’ of this demonstration by the importing Party.⁹¹ In particular, the agreement establishes time limits for consideration of equivalence requests by the importing Party,⁹² clarifies how equivalence of SPS measures can be ‘ob-

⁸⁵ WTO Ministerial Conference (Fourth Session), ‘Decision on Implementation Issues and Concerns’ (WT/MIN(01)/17) adopted in Doha on 14 November 2001 (Doha Decision on Implementation), para. 3.3.

⁸⁶ WTO Committee on Sanitary and Phytosanitary Measures, ‘Decision on the Implementation of Art. 4 of the Agreement on the Application of Sanitary and Phytosanitary Measures’ (G/SPS/19/Rev.2), 23 July 2004 (2004 Equivalence Decision), which revised that adopted in October 2001; see also ‘Notification of Determination of the Recognition of Equivalence of Sanitary and Phytosanitary Measures’ (G/SPS/7/Rev.2/Add.1), 25 July 2002, which recommends procedures for notification.

⁸⁷ 2004 Equivalence Decision, preamble, para. 5 and 8.

⁸⁸ *Supra* note 1.

⁸⁹ SPS Equivalence Decision, para. 5. The importance of experience and trust based on historic trade has also been recognised in the FAO/WHO Joint Codex Alimentarius Commission, ‘Guidelines on the Judgement of Equivalence of Sanitary Measures Associated with Food Inspection and Certification Systems’ (CAC/GL 53–2003), Section 4, 7(j).

⁹⁰ *Supra* note 5.

⁹¹ Chile AA, Annex IV, Art. 7(2).

⁹² *Ibid.*, Arts. 7(3)-(4). As a general rule, the importing Party shall finalise the assessment of equivalence within six months after receiving the request from the exporting Party, which follows the time period recommended in the 2004 SPS Equivalence Decision (preamble, para. 3).

jectively demonstrated' and 'objectively assessed',⁹³ identifies priority products and sectors for equivalence recognition,⁹⁴ and requires the importing Party to provide a reasoned explanation in cases of non-recognition.⁹⁵ The agreement further emphasises the provision of technical assistance by the importing Party where necessary to enable the exporting Party to identify and implement SPS measures which could be recognised as equivalent – albeit this is expressed in soft-law terms ('may provide') and as a mutual (rather than EU versus Chile) undertaking.⁹⁶

While there may be valid reasons why the EU has difficulties to enter into similar equivalency arrangements as of yet with the ACP countries, whose SPS regulatory systems may not in most cases be comparable to that of Chile,⁹⁷ a more concerted effort could have been made, in the least, to institutionalise regulatory cooperation on SPS matters within EPAs. Indeed, it is recognised that the complexity of 'deep integration' provisions in trade agreements, such as SPS issues, requires the creation of strong institutional mechanisms that can manage the dynamics of the implementation process and address identified challenges in a flexible manner over time. The EPAs do require the Parties to designate 'Competent Authorities' responsible for the implementation of the SPS chapters at the national/regional level,⁹⁸ but no joint EU-ACP body is created to deal exclusively with SPS matters at the EPA level,⁹⁹ unlike the SPS Committee established within the WTO.¹⁰⁰ Instead, the committee with general competence for trade matters under the EPAs is also entrusted with the tasks of monitoring and reviewing the implementation of the relevant SPS provisions.¹⁰¹ The possibility of establishing a specialised SPS committee,

⁹³ Chile AA, Annex IV, Appendix VI, para. 4.

⁹⁴ Ibid., Annex IV, Appendix V.A.

⁹⁵ Ibid., Annex IV, Art. 7(7) and Appendix VI, para. 5.

⁹⁶ Ibid., Annex IV, Art. 7(7).

⁹⁷ M. Doherty, 'Negotiating Economic Partnership Agreements – Sanitary and Phytosanitary Measures' *ECDPM InBrief No13A* (European Centre for Development Policy Management, June 2006), p. 5.

⁹⁸ CARIFORUM EPA, Art. 55; SADC iEPA, Art 59; Pacific iEPA, 38; Central Africa iEPA, Art. 43; Western Africa iEPA, Art. 39.

⁹⁹ This contrasts with the institutional approach taken towards environmental and social provisions, whereby a specialised committee is established to oversee their implementation and a specific procedure provided for settling disputes on these matters: see, e.g., CARIFORUM EPA, Arts. 189 and 195, and discussion in G. Marín Durán and E. Morgera, *Environmental Integration in the EU's External Relations – Beyond Multilateral Dimensions* (Hart 2012), pp. 106-108.

¹⁰⁰ The SPS Committee was established as a regular forum for consultations, with the mandate to carry out the functions necessary for the implementation of the SPS Agreement and the furtherance of its objectives, in particular with respect to harmonisation (SPS Agreement, Art. 12.1). In terms of this mandate, the SPS Committee has adopted various decisions and other documents (including the 2004 Equivalence Decision), available at <http://www.wto.org/english/tratop_e/sps_e/decisions06_e.htm>.

On the SPS Committee, see further Scott, *supra* note 42, chapter 2.

¹⁰¹ That is, the Trade and Development Committee in the CARIFORUM EPA, Art. 230; the Trade and Development Committee in the SADC iEPA, Art. 62; the Trade Committee in the Pacific iEPA, Art. 41; the EPA Committee in the Central Africa iEPA, Art. 92; and the EPA Committee in the Western Africa iEPA, Art. 73.

composed of regulatory officials from each side with appropriate technical expertise is, nonetheless, provided for in some of the EPAs.¹⁰²

A move in this direction would seem important in supporting efforts towards achieving recognition of equivalence of SPS measure between the EU and the ACP, which is highly dependent on the existence of an institutional mechanism that facilitates regular dialogue, exchange of information, mutual learning and confidence-building among SPS regulatory authorities from each side.¹⁰³ It would also seem beneficial in promoting an amicable and cooperative resolution of SPS-related trade concerns that may arise between EPA Parties. Once again, the EU Association with Chile provides a case in point: a specialised ‘Joint Management Committee for Sanitary and Phytosanitary Matters’ is established as a forum for regular consultations and information exchange between representatives of the Parties with specific responsibility for SPS measures, and is mandated to monitor and review the implementation of SPS provisions, including those on equivalence recognition,¹⁰⁴ and where necessary to make recommendations for modifications to the Association Council.¹⁰⁵

From a development perspective, a final but critical benchmark for evaluating the added-value of EPAs is, of course, the extent to which they entail stricter commitments on the part of the EU towards supporting ACP capacity-building in the area of SPS regulation, *vis-à-vis* those already undertaken under the WTO SPS Agreement. Under that agreement, WTO members ‘agree to facilitate’ the provision of technical and financial assistance to developing-country members, either bilaterally or through international organisations, which can be aimed, *inter alia*, at helping these countries to comply with SPS requirements on their export markets.¹⁰⁶ However, this ‘best-endeavour’ obligation is not easily enforceable in WTO dispute settlement proceedings and has led to poor implementation in practice.¹⁰⁷ Indeed, this and other WTO provisions on special and differential treatment for developing-country members that are similarly couched in hortatory language are being reviewed under the Doha negotiations, with a view to ‘strengthening them and making them more precise, effective and operational.’¹⁰⁸ In addition, a concern that has been raised in the WTO SPS Committee is that, even when provided, such assistance is often

¹⁰² CARIFORUM EPA, Art. 230.4(a); SADC iEPA, Art. 96.4; Pacific iEPA, Art. 68.4(a).

¹⁰³ This is, for instance, recognised in the 2004 Equivalence Decision, preamble para. 10.

¹⁰⁴ Chile AA, Annex IV, Arts. 7(3)-(4).

¹⁰⁵ *Ibid.*, Art. 89(3) and Annex IV, Art. 16.

¹⁰⁶ SPS Agreement, Art. 9(1). In addition, in a situation where a WTO Member’s SPS measure requires substantial investments from an exporting developing-country Member, the former ‘shall consider providing’ technical assistance to allow the developing country concerned to maintain or increase its market opportunities for the product concerned (Art. 9(2)). Other forms of special and differential treatment for developing countries are provided for in Article 10, but again couched in hortatory language and interpreted in WTO case law as not prescribing a particular result: see van den Bossche, *supra* note 27, pp. 880-884.

¹⁰⁷ Prévost, *supra* note 55, pp. 50-51.

¹⁰⁸ WTO Ministerial Conference (Fourth Session) ‘Ministerial Declaration’ (WT/MIN(01)/DEC/1) adopted in Doha on 14 November 2001 (Doha Declaration), para. 44; and Doha Decision on Implementation, para. 3.6. See also WTO Committee on Sanitary and Phytosanitary Measures, ‘Report on Proposals for Special and Differential Treatment’ (G/SPS/35), 7 July 2005.

donor-driven rather than needs-driven: '[as] development objectives of developed countries (as donors) overlap with their commercial interest (as trading partners) they may be prone to decide what type of assistance to provide according to their own interests rather than those of the recipient countries.'¹⁰⁹ Against this background, are the EPAs any more promising in terms of securing predictable and demand-driven technical assistance from the EU?

As we have seen, most of the EPAs emphasise the importance of interregional cooperation on SPS matters and specify priority areas for cooperation that have been jointly agreed by the Parties. None of the EPAs, however, creates a specific mechanism for financing such cooperation or monitoring its effectiveness. Instead, the implementation of EPA cooperation activities is to be primarily conducted under the general development cooperation framework established by the Cotonou Agreement,¹¹⁰ and particularly the European Development Fund (EDF),¹¹¹ which is the major financing instrument underpinning EU-ACP (except for South Africa) cooperation.¹¹² Unlike other EU budget-based financing instruments,¹¹³ the allocation and disbursement of EDF resources is implemented within the framework of an international agreement and subject to procedures that provide for an active involvement and consensus of ACP stakeholders.¹¹⁴ These procedural guarantees can thus contribute to rendering EU technical and financial assistance more responsive to the specific SPS needs of the ACP regions concerned. In terms of predictability, the Cotonou Agreement is exceptional in providing for contractual commitments on the overall budget available for EU-ACP cooperation,¹¹⁵ but funding allocations among the various cooperation activities, including SPS matters, are not fully specified. Nevertheless, the EU has been supporting ACP capacity-building to address supply-side constraints in meeting its SPS requirements.

¹⁰⁹ WTO Committee on Sanitary and Phytosanitary Measures, 'Background Document from the Standard and Trade Development Facility for the Global Review of Aid for Trade: Note by the Secretariat' (G/SPS/GEN/812), 22 November 2007, para. 18 and 20.

¹¹⁰ Cotonou Agreement, Part IV 'Development Finance Cooperation' and Annexes I-IV.

¹¹¹ The EDF is the oldest geographic instrument of EU external assistance and not part of the EU budget, but funded through direct contributions from the EU Member States.

¹¹² EU assistance to South Africa is channelled through (another) Regulation (EC) 1905/2006 of the European Parliament and of the Council establishing a financing instrument for development cooperation [2006] OJ L348/41.

¹¹³ For an examination of the different EU development cooperation instruments, see G. Marín Durán, 'Environmental Integration in the EU Development Cooperation: Responding to International Commitments or Its Own Policy Priorities?' in E. Morgera (ed.), *The External Environmental Policy of the European Union: EU and International Law Perspectives* (CUP, October 2012).

¹¹⁴ Cotonou Agreement, Annex IV. Programming of EDF resources is carried out on the basis of 'country-strategy papers' (or 'regional strategy papers') and national (or regional) indicative programmes that are jointly drawn up by the EU and the ACP State(s) concerned and 'shall be adopted by common agreement' (Arts. 2, 4(2), 8 and 10(2)). Projects and other cooperation programmes are then implemented through joint appraisal within the EU-ACP Development Finance Committee Cooperation, and are subject to a 'financing agreement' between the EU Commission and the ACP State(s) concerned (Arts. 15 and 17).

¹¹⁵ Cotonou Agreement, Annex I 'Financial Protocol', stipulating a total budget of €13.5 billion for the 9th EDF.

Before EPAs were concluded, a number of programmes were financed under the 9th EDF (2000-2007), including notably:¹¹⁶ the Pesticide Initiative, launched in 2001 in response to problems of compliance of ACP exporters with EU rules on maximum residue levels for pesticides in horticultural products (€33.5 million); the Fisheries Programme, launched in 2003 in order to address ACP exports' difficulties in complying with the EU sanitary rules in this sector (€42 million); the TradeCom Facility, launched in 2005 and aimed, *inter alia*, at building institutional capacity to address SPS (and TBT) barriers to trade (€50 million) and the Strengthening Food Safety Systems, launched in 2007 to support the establishment of risk-based food and feed safety systems for exports products in ACP countries in line with international and EU regulatory requirements (€30 million).¹¹⁷

The current 10th EDF (2008-2013) has been endowed with increased resources to support, *inter alia*, the ACP signatories in implementing the EPAs,¹¹⁸ but again no particular budgetary commitment is made in the area of SPS cooperation. As a result, the EPAs fall short of making implementation of SPS commitments conditional upon the provision of timely and appropriate assistance by the EU – this will ultimately depend on the negotiating dynamics within the Cotonou development cooperation framework. The EPAs have not therefore fully redressed the imbalance found in the SPS Agreement between the 'bound commitments to implement' SPS disciplines taken by developing-country WTO members in exchange of 'unbound commitments for assistance' in capacity-building on the part of developed members.¹¹⁹

5. CONCLUSIONS

As we have seen, SPS provisions in the EPAs seek, as does the SPS Agreement, to strike a delicate balance between the objectives of public health protection, trade liberalisation and development considerations. And yet, they fall short of achieving a *better* balance than that currently found under WTO law, particularly from a development perspective. In their current form, EPAs do little to address the inadequacies in existing WTO rules in areas that are of utmost importance to ACP countries, even where complementary action at the bilateral/interregional level is explicitly encouraged in the SPS Agreement. In the few steps taken to go beyond WTO disciplines, EPAs provisions remain

¹¹⁶ These are programmes available at an all-ACP level, and are complemented by programmes directed at a specific ACP region or country. For more information <<http://ec.europa.eu/trade/wider-agenda/development/aid-for-trade/programmes/>>. Note also that individual EU Member States have extensive capacity-building programmes in ACP countries.

¹¹⁷ Intra-ACP Strategy Paper 2008-2013, *supra* note 19 pp. 16-17; see also, C. Chemnitz and D. Günther, 'Ensuring Development Friendly Economic Partnership Agreements (EPAs): Recognition of SPS Measures within Negotiation Procedures' (Deutsche Gesellschaft für Technische Zusammenarbeit, 2006), pp. 11-13.

¹¹⁸ EU-ACP Council of Ministers, 'Decision 1/2006 specifying the multiannual financial framework for the period 2008 to 2013 and modifying the revised ACP-EC Partnership Agreement' [2006] OJ L247/22, stipulating a total budget of almost €22 billion for the 10th EDF.

¹¹⁹ Prévost, *supra* note 55, p. 10.

limited in scope and generally vague in content. In particular, no concrete attempt was made at operationalising equivalence recognition as a means to bring about regulatory convergence and facilitate interregional trade between the EU and its ACP partners, nor to set up the necessary cooperation and institutional mechanisms to achieve this goal over the longer term. On this background, two questions appear pertinent as concluding remarks.

First of all, what is, if any, the legal significance of introducing SPS provisions in EPAs, or in any other regional trade agreement, if not to add to and fill gaps in existing WTO rules? In most cases, the reaffirmation of WTO disciplines in EPAs is limited to underscoring the Parties' intentions to comply with their existing multilateral obligations. Yet importantly, an enforcement of such obligations through the EPA arbitration procedures is in principle excluded.¹²⁰ Nonetheless, some EPAs could also extend the application of the SPS Agreement to a number of ACP countries that are not currently members of the WTO, and would thus not otherwise be bound by these WTO rules.¹²¹ Notably in case of the Pacific iEPA, such an extension of WTO disciplines to non-members is subject to the recognition by the EU of the capacity constraints that the ACP countries concerned may face with regard to compliance in the short-term.¹²²

There is a second, and arguably most fundamental question: aside from the specific EPA context, is regulatory convergence in the area of SPS measures, in fact, a policy objective of the EU? While the development constraints and other complexities that have surrounded the EPA negotiations may have prevented the elaboration of more ambitious SPS chapters thus far,¹²³ this is by no means an isolated example in EU preferential trade agreements. Indeed, only very rarely do such EU agreements contain individual provisions that go beyond WTO rules in the sphere of SPS measures, including in relation to harmonisation and equivalence recognition. As discussed, the Association Agreement with Chile is rather an exception in EU practice outside the EU enlargement context (and perhaps in a near future, the EU Neighbourhood Policy context),¹²⁴ including under more recent agreements such as the 2010

¹²⁰ CARIFORUM EPA, Art. 222(1) providing that arbitration bodies shall not adjudicate disputes on each Party's rights and obligations under the WTO covered agreements. Arguably, the situation is different when the 'rights' and 'obligations' under the WTO covered agreements are taken upon and form part of the EPAs, which would explain the additional provision (art. 222(2)) excluding parallel initiation of dispute settlement proceedings in relation to the same measure under the both forums. Similar provisions are found in: SADC iEPA, Art. 88; Pacific iEPA, Art. 66; Central Africa iEPA, Art. 86; West Africa iEPA, Art. 65.

¹²¹ This is notably the case of the Pacific iEPA (Art. 36(2)) if signed by Cook Islands, Kiribati, Micronesia, Nauru, Niue, Palau, Samoa and Tuvalu. The situation of the Bahamas (a WTO observer) under the CARIFORUM EPA is less clear.

¹²² Pacific iEPA, Art. 36(3).

¹²³ See, however, Prévost, *supra* note 55, p. 56, referring to a more promising proposal submitted by the ESA countries that borrows from the SPS provisions of the EU-Chile AA, including on the issue of equivalence recognition.

¹²⁴ This policy envisages the forging of a 'special relationship' with at present 16 of the EU's closest neighbours, 'founded on the values of the Union' and seeking an alignment of third-country legislation with the EU *acquis*. See Commission, 'Communication on Wider Europe – Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours'

EU-Korea Free Trade Agreement.¹²⁵ In fact, achieving regulatory convergence in the field of SPS measures does not figure as a priority in key policy documents outlining the directions of the EU's external trade policy, including most notably the 2006 Global Europe Strategy,¹²⁶ unlike for other 'behind-the-border' regulatory matters presently falling within (e.g., intellectual property rights) or outside (e.g., environmental and labour protection) the scope of WTO law.¹²⁷ This can be explained by several regulatory factors including, as we have seen, the universally-recognised sovereign right to protect public health at the level each State considers appropriate to ensure within its territory, coupled with the long-recognised difficulties in establishing SPS requirements that are appropriate for countries with different health priorities and regulatory capacities. However, the Union's ambivalent commercial interests may certainly also account for the lack of a more ambitious approach to regulatory convergence in this policy field: as a leading exporter of agricultural products, the EU may well have a stake in promoting regulatory convergence of SPS measures in order to facilitate access for its own exporters on third-country markets, whereas as the world's largest importer of these products, it may equally have an interest to keep its own SPS requirements higher and different from those of its trading partner suppliers.¹²⁸

COM(2003) 104 final, Brussels 11 March 2003, endorsed by the Council, 'Conclusions on Wider Europe – Neighbourhood' (10369/03), Luxembourg, 16 June 2003; see also Art. 8 TEU.

¹²⁵ See *supra* note 35.

¹²⁶ Commission, 'Communication on Global Europe – Competing in the World. A Contribution to the EU's Growth and Jobs Strategy' COM (2006) 567 final, Brussels 4 October 2006, endorsed by the Council, 'Conclusions on Global Europe – Competing in the World' (14799/06) 13 November 2006, see discussion by Hoffmeister; see also the more recent, Commission, 'Communication on Trade, Growth and World Affairs – Trade Policy as a Coherent Component of the EU's 2020 Strategy' COM (2010) 612, Brussels 9 November 2010.

¹²⁷ For a discussion of the 'trade and sustainable development' chapter of the EU-Korea FTA, dealing with environmental and labour standards, see G. Marín Durán, 'Innovations and Implications of the Trade and Sustainable Chapter in the EU-Korea Free Trade Agreement' in J. Harrison (ed.), *Legal Framework for strengthening Trade and Economic Relations* (Edinburgh University Press 2013), chapter 8.

¹²⁸ On EU external trade in agricultural products, see Commission, 'Agricultural Trade in 2011: the EU and the World', 1/12 *MAP Newsletter* May 2012.

EU REGULATORY POLICY AND THE WTO

Tamara Perišin*

1. INTRODUCTION

The European Union's (EU) regulatory policy has significant external trade effects. This is true both of market deregulation occurring through the Treaty rules on fundamental freedoms as applied by the courts, and of market re-regulation performed by EU legislative institutions. It is well known that some types of internal market rules (e.g., mutual recognition and minimum harmonisation) have a positive effect both on the EU's internal and external trade, while others (e.g., strict harmonisation) create obstacles to external trade.¹

Taking account of these external trade effects of internal measures is a part of good decision-making, for creating both domestic and global efficiency.² This does not suggest that the EU should always try to satisfy the interests of its trading partners or that it should fear challenges. The EU can, in pressing matters, even deliberately use its market power to promote certain non-trade interests outside its territory by blocking the access of goods and services to its market that do not meet its standards.³ However, the EU's unilateral action can always lead to the unilateral action of other countries as well as to disputes, primarily within the World Trade Organization (WTO). This paper focuses on the external trade effects of measures that might be considered by other WTO members as being WTO-illegal. This paper looks at the extent to which EU institutions take account of WTO compliance and the possibility of a WTO challenge in the process of regulating and deregulating.

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¹ See S. Weatherill, 'Maximum versus Minimum Harmonization: Choosing between Unity and Diversity in the Search for the Soul of the Internal Market', in N. Nic Shuibhne and L. Gormley (eds.), *From Single Market to Economic Union: Essays in Memory of John A Usher* (Oxford: Oxford University Press 2012); T. Perišin, *Free Movement of Goods and Limits of Regulatory Autonomy in the EU and WTO* (The Hague: T.M.C. Asser Press 2008).

² See D.H. Regan, 'What Are Trade Agreements For? – Two Conflicting Stories Told by Economists, with a Lesson for Lawyers', 9(4) *Journal of International Economic Law* December 2006, pp. 951-988.

³ See M. Cremona, 'The Single Market as a Global Export Brand', *European Business Law Review* 2010, pp. 663-680.

2. TAKING ACCOUNT OF THE EXTERNAL EFFECTS AND WTO COMPLIANCE OF REGULATION

There are numerous ways in which the EU could gain information about the external effects of its measure, particularly about other WTO members' attitudes, even before the adoption of a measure. One way of doing this is through the EU's own process of preparing legislation when its legislature can consult various interest groups, the public, etc. It is important to include at this stage all relevant actors, including other countries. The jurisprudence of the Appellate Body even suggests that a lack of consultation in the pre-legislation stage with certain WTO members on a non-discriminatory basis may in itself represent a violation of WTO obligations.⁴ Another way of gaining information about other WTO members' positions is through institutionalised procedures in the WTO. For example, this kind of information exchange about the effects of the measure happens in the SPS committee. When a WTO member plans to adopt an SPS measure, then other WTO members can express their views and concerns within the SPS committee.⁵ All this contributes to EU legislation being drafted in a WTO-consistent manner.

There is indeed a significant number of examples where EU decision-makers have analysed a proposed or an existing measure to check its WTO compliance in order to avoid litigation with another WTO member. Quite recently, for example, some steps were taken for the adoption of an EU ban on food products derived from cloned animals' offspring,⁶ but this ban was never proposed. It seems that the Commission and the Council had concerns about its WTO compatibility,⁷ although there were even disagreements between the EU institutions (which leaked).⁸

The question arises whether the tendency of taking external effects and WTO law into account is on the rise or declining. This paper does not attempt to offer a complete analysis of all the EU measures affecting trade, checking whether WTO compliance was taken into account in the legislative or judicial

⁴ *United States – Import Prohibitions on Certain Shrimp and Shrimp Products*, Report of the Appellate Body, WT/DS58/AB/R, 12 October 1998, paras. 167-176; *United States – Import Prohibitions on Certain Shrimp and Shrimp Products*, Recourse to Art. 21.5 of the DSU by Malaysia, Report of the Appellate Body, WT/DS58/AB/RW, 22 October 2001, paras 122, 134.

⁵ J. Scott, *The WTO Agreement on Sanitary and Phytosanitary Measures* (Oxford: Oxford University Press 2007), pp. 57-58.

⁶ European Commission, 'Report from the Commission to the European Parliament and the Council on Animal Cloning for Food Production', Brussels, 19.10.2010, COM(2010) 585 final.

⁷ Euractiv, 'EU cloning ban dispute turns to trade, consumers', 12 May 2011 available at <<http://www.euractiv.com/cap/eu-cloning-ban-dispute-turns-tra-news-504753>>; B. Casassus, 'Europe fails to reach deal on cloned meat', *Nature* 29 March 2011, available at <<http://www.nature.com/news/2011/110329/full/news.2011.192.html>>; Ch. Dunmore, 'EU talks on food from cloned animals collapse', *Reuters*, 29 March 2011, available at <<http://www.reuters.com/article/2011/03/29/us-eu-food-clones-idUSTRE72S1SL20110329>>.

⁸ European Parliament News, 'Parliament issues urgent call to regulate cloned foods', 11 May 2011, available at <<http://www.europarl.europa.eu/news/en/pressroom/content/20110506IPR18894/html/Parliament-issues-urgent-call-to-regulate-cloned-foods>>; EUBusiness, 'Leaked EU Council paper reveals cloned food restrictions were possible', 11 May 2011, available at <<http://www.eubusiness.com/Members/BEUC/cloned-food-2>>.

process. However, the paper includes case studies in two fields – animal welfare and the environmental effects of air transport. These build upon studies conducted by de Búrca and Scott in 2000.⁹ De Búrca and Scott used two examples, one from each of these fields, to show the WTO's effects on the EU's legislative and judicial decision-making (respectively). This paper builds on these authors' two examples, and contrasts each of them with a newer example in the same substantive field and at the same stage of decision-making (legislative or judicial).

2.1. Case study – animal welfare

The EU does not have competence to regulate on the basis of animal welfare. However, if the EU regulates an area on the basis of another competence, it has to take into account animal welfare protection.¹⁰ Most frequently, measures adopted in the field of the internal market are the ones used to achieve a high level of protection of other interests, including animal welfare. The high level of protection of non-trade interests turns these internal market measures into *de facto* obstacles to the importation of goods from outside the EU that do not meet the EU's high standards. If such a measure is challenged within the WTO, the EU has to explain what the aim of the measure is (either at the stage of determining the *prima facie* breach or at the stage of justification). The aim which will be relevant for the WTO is not the one which was predominantly relevant for the legal basis in the EU (establishment and functioning of the internal market), but rather the incidental aim of the measure, such as public health, environment, animal welfare, etc.

Two pieces of legislation will be analysed to assess whether the EU takes into account WTO compliance when adopting marketing bans which seek to achieve a high level of animal welfare. These are the Cosmetics Directive¹¹/Regulation¹² as the older example (discussed by de Búrca, Scott¹³) and the Seal Products Regulation¹⁴ as the newer example. Both of these measures were adopted on the basis of internal market competence,¹⁵ but have significant (and in the latter case dominant) external trade effects.

⁹ G. de Búrca and J. Scott, 'The Impact of the WTO on EU Decision-making', in G. de Búrca and J. Scott (eds.), *The EU and the WTO – Legal and Constitutional Issues* (Oxford: Hart 2003), pp. 1-30, also available as *Harvard Jean Monnet Working Paper* 06/00, at <<http://ftp.infoeuropa.euroid.pt/database/000036001-000037000/000036584.pdf>> .

¹⁰ Arts. 13 and 114(3) TFEU.

¹¹ Council Directive 76/768/EEC of 27 July 1976 on the approximation of the laws of the Member States relating to cosmetic products, *OJ* [1976] L 262/169.

¹² Regulation (EC) No 1223/2009 of the European Parliament and of the Council of 30 November 2009 on Cosmetic Products, *OJ* [2009] L 342/59. Certain parts of the Regulation will enter into force before 2013.

¹³ De Búrca and Scott, *supra* note 9, pp. 6-12.

¹⁴ Council Regulation (EC) 1007/2009 of the European Parliament and of the Council of 16 September 2009 on trade in seal products *OJ* [2009] L 286/36.

¹⁵ The original Cosmetics Directive was adopted on the basis of then Art. 100 EC (now 115 TFEU). At the time of the adoption of the original Cosmetics Directive, the Article which is now 114 TFEU (ex 95 EC post-Amsterdam, ex 100a pre-Amsterdam) did not yet exist, but the Directive's

The older example, the Cosmetics Directive, was originally adopted in 1976 and regulated the composition, labelling and packaging of cosmetic products. Since then, the Directive has been amended several times and has recently been recast by the Cosmetics Regulation which will come into force in 2013. One of the important amendments was adopted in 1993.¹⁶ This amendment added to the list of prohibited cosmetic products 'ingredients or combinations of ingredients tested on animals'.¹⁷ The entry into force of this provision was originally set for 1 January 1998, but it was postponed several times. In 2000, de Búrca and Scott's case study on the amendments of the Cosmetics Directive identified that one of the reasons for the EU legislature to be postponing the entry into force of the marketing ban of products derived from animal testing was the EU regulator's desire to make the measure WTO compliant.¹⁸ This was not the official reason mentioned in the Directive's amendments, but it was expressed in the Commission's answers to the European Parliament.¹⁹ The Commission stated the following:

It is the Commission's view that it cannot unilaterally impose the Community's welfare-based production standards on third countries. For example, WTO rules do not permit the Community to prohibit imports of cosmetic products on the sole ground that they have been tested on animals, even if the Community imposes such an animal-testing ban for marketing of Community products. Rather than proceeding to an import ban of such products, the Community should focus on the creation of multilateral standards for animal welfare. The Community should first try to convince its trading partners to modify their policies in the direction it thinks appropriate. Consumers in Europe should, moreover, be in a position to make an informed choice about the animal welfare aspects of the products they buy, for example through labelling schemes. Given that animal welfare is becoming increasingly relevant in terms of international trade, this issue may in the future be raised in the WTO context. The possibility of amending WTO rules to address welfare concerns more generally will be addressed in the context of the determination of the Community's negotiating objectives for the next stage of the WTO negotiations.²⁰

As de Búrca and Scott explained at the time,²¹ this was a very cautious move of the EU legislature. It was certainly not clear at that time (nor is it now) that a trade ban on products not complying with animal welfare standards would be contrary to WTO rules. There was and is plenty of room to argue that such

amendment on animal testing discussed below was adopted precisely on that legal basis. The Seal Products Regulation was also adopted on the basis of Art. 114 TFEU.

¹⁶ Council Directive 93/35/EEC of 14 June 1993 amending for the sixth time Directive 76/768/EEC on the approximation of the laws of the Member States relating to cosmetic products, *OJ* [1993], L 151/32.

¹⁷ The provision then became Art. 4(1)(i) Cosmetics Directive.

¹⁸ De Búrca and Scott, *supra* note 9, pp. 6-12.

¹⁹ E-0949/98 *Written Question to the Commission 'Impact on animal protection of the GATT/WTO'* by Mark Watts (PSE), 30 March 1998; and *Answer to Written Question E-0949/98 given by Sir Leon Brittan on behalf of the Commission*, 7 May 1998. See on this de Búrca and Scott, *supra* note 9, p. 8.

²⁰ *Answer to E-0949/98*, *ibid.*

²¹ De Búrca and Scott, *supra* note 9, pp. 9-12.

a measure is in accordance with WTO law. It is thus unclear whether WTO compliance was indeed a reason for postponing the entry into force of the provision, or whether there was another interest involved. De Búrca and Scott mentioned then (in subtle terms) that this might be comparable to the Member State action known as ‘blame it on Brussels’, where Member States ‘point to the constraints of EC membership to justify an unpopular measure adopted at home’, but that in this case it was the EU itself which was hiding behind the alleged constraints of WTO membership.²² However, what is relevant for the present purposes is that WTO compliance formed part of the political debate and it was taken into account in the legislative process.

The newer example, the Seal Products Regulation, tells a somewhat different story. In 2007, two years before the EU rules on this matter were adopted, Belgium and the Netherlands adopted legislation banning trade in seal products. This led to Europe-wide discussion on seal hunting to see whether an EU ban was needed.²³ Canada reacted promptly to the Belgian and Dutch measures and the same year requested consultations with the EC, which constituted the first step in a WTO challenge.²⁴ At the time, one might have reasonably assumed that the WTO challenge would make the EU legislature reluctant to adopt a piece of EU legislation on the matter. However, this assumption would soon be proven wrong. In 2009, Regulation 1007/2009 was adopted banning the placing of seal products on the market (with narrow exceptions for indigenous communities, marine management and importation for personal use).²⁵ This total ban is currently being challenged both within the EU by interested individuals on the grounds that it breaches the principles of conferred competences, subsidiarity, proportionality and fundamental rights, and also within the WTO by Canada and Norway given that it raises concerns about possible protectionism and other types of irrationalities, permissible justifications, necessity, etc. (about which this paper cannot go into a detailed analysis, and concerning which I have written elsewhere).²⁶ European parliamentarians did not

²² Ibid., pp. 11-12.

²³ See European Food Safety Authority, *Scientific Opinion on Animal Welfare Aspects of the Killing and Skinning of Seals* available at <http://www.efsa.europa.eu/EFSA/efsa_locale-1178620753812_1178671319178.htm>; European Parliamentary Questions, available at <http://www.europarl.europa.eu/sidesSearch/sipadeMapUrl.do?PROG=QP&SORT_ORDER=DA&S_REF_QP=%25&S_RANK=%25&F_MI_TEXT=seal&MI_TEXT=seal&LEG_ID=6&L=EN>; H. Spongenberg, ‘Canada Starts Trade Dispute with the EU Over Seals’, *EUobserver*, 27 September 2007, available at <<http://euobserver.com/9/24853>>.

²⁴ *European Communities – Certain Measures Prohibiting the Importation and Marketing of Seal Products (Complainant: Canada)*, DS369 25 September 2007.

²⁵ Seal Products Regulation, *supra* note 14.

²⁶ Currently pending EU cases are: C-583/11 P, *Inuit Tapiriit Kanatami and Others v. Parliament and Council*, OJ [2012] C 58/3; T-526/10, *Inuit Tapiriit Kanatami and Others v. Commission*, action brought on 9 November 2010 OJ [2011] C 13/34. Currently pending WTO disputes are: *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products* (Complainant: Canada), DS400 2 November 2009; *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products* (Complainant: Norway), DS401 5 November 2009.

For an analysis of these disputes and the issues raised, see T. Perišin, ‘Is the EU Seal Products Regulation a Sealed Deal? – EU and WTO Challenges’, (forthcoming); R. Howse and

ask much about WTO compliance before the adoption of the Regulation.²⁷ Following the adoption of the Regulations and the challenges, the Commission was asked some questions concerning WTO compliance, but it merely replied that it would defend the measure.²⁸ It is true that, once a measure is challenged, no answer of the Commission recognizing WTO-compliance problems is politically feasible.

What one can see from the legislative history of the Cosmetics Directive and the Seal Products Regulation is a stark difference in the attitude of the EU legislature towards WTO compliance. On the one hand, the entry into force of the marketing ban of cosmetic products and ingredients tested on animals was postponed on the ground that the measure might not be WTO compliant. In that case, the EU was excessively cautious as there was and still is plenty of room to defend that measure against any WTO challenges. On the other hand, the EU adopted the seal products ban for which there are more compelling arguments that it might not be WTO compatible.²⁹ Furthermore, at the time the EU seal products ban was being adopted, Canada had already submitted a WTO complaint against the EC, challenging the comparable measures of Belgium and the Netherlands.

This limited comparison of the older and newer example cannot lead to a general conclusion that the EU legislature is becoming more indifferent to WTO compliance, but it does show an interesting shift in attitude. The study also suggests that the attitude towards WTO compliance differs between EU institutions. In both instances, it seems that the Commission was aware of WTO obligations. In the case of the Cosmetics Directive, problems with WTO compli-

J. Langille, 'Permitting Pluralism: The Seal Products Dispute and Why the WTO Should Permit Trade Restrictions Justified by Non-Instrumental Moral Values', 37 *Yale Journal of International Law* 2, 2012, pp. 367-432; and P. L. Fitzgerald, "'Morality" May Not Be Enough to Justify the EU Seal Products Ban: Animal Welfare Meets International Trade Law', 14 *Journal of International Wildlife Law & Policy* 2011, pp. 85-136; F. De Ville, 'Explaining the Genesis of a Trade Dispute: The European Union's Seal Trade Ban', 34 *Journal of European Integration* 2012, pp. 37-53; L. Ankersmit, J. Lawrence and G. Davies, 'Diverging EU and WTO Perspectives on Extraterritorial Process Regulation', *Minnesota Journal of International Law Online* spring 2012, available at <<http://ssrn.com/abstract=2007098>>; X. Luan and J. Chaisse, 'Preliminary Comments on the WTO Seals Products Dispute: Traditional Hunting, Public Morals and Technical Barriers to Trade', 22 *Colorado Journal of International Environmental Law and Policy* 2, winter 2011, pp. 79-121.

²⁷ Two MEPs posed a question on the WTO dispute to the Commission E-0373/08 *Written Question to the Commission 'The challenge of seal bans in the WTO' by Jens Holm (GUE/NGL) and Kartika Tamara Liotard (GUE/NGL)*, 4 February 2008.

²⁸ For a full list of parliamentary questions on seals and WTO compliance in the 7th parliamentary term, see <http://www.europarl.europa.eu/sidesSearch/sipadeMapUrl.do?L=EN&PROG=QP&SORT_ORDER=DA&S_REF_QP=%&S_RANK=%&MI_TEXT=seal+and+wto&F_MI_TEXT=seal+and+wto&LEG_ID=7>; and in particular see E-002592/2011 *Question for written answer to the Commission 'Measures against the annual commercial seal hunt in Canada' by Bart Staes (Verts/ALE)*, 17 March 2011; E-003975/11 *Question for written answer to the Commission 'Seal culling in Canada' by Oreste Rossi (EFD)*, 29 April 2011; *Joint answer to written questions E-002592/11, E-003975/11 given by Mr Potočnik on behalf of the Commission*, 29 June 2011; E-003088/2012 *Question for written answer to the Commission 'CETA Agreement' by Cristiana Muscardini (PPE)*, 21 March 2012; *Answer given to written question E-003088/2012 by Mr De Gucht on behalf of the Commission*, 3 May 2012.

²⁹ Perišin, *supra* note 26.

ance were explicitly mentioned by the Commission in its answers to the European Parliament. In the case of the Seal Products Regulation, WTO compliance might not have been explicitly mentioned in the public documents, but the Commission's proposal for the Regulation, which one could argue was easily WTO-compliant, was very different from the finally adopted Regulation. The original Proposal for the Regulation³⁰ shows that the intention of the Commission was not to introduce a 'total' ban, but a conditional one. Seal products obtained through hunting and skinning which observed certain animal welfare standards and which were properly certified and labelled would have been permissible in the EU. The conditional ban proposed by the Commission was probably in accordance with WTO rules and would probably not have even led to a WTO challenge. However, this originally planned conditional ban was never adopted, as amendments to the proposal were added by various committees within the European Parliament.³¹ In contrast to the conditional ban, the total ban (with narrow exceptions for indigenous communities, marine management and individual imports) has many weaknesses (about which I have written elsewhere³²). This would suggest that the Commission is more aware of or that it cares more about the EU's WTO obligations than does the European Parliament. This might change given the European Parliament's new role in the CCP envisaged by the Lisbon Treaty. It remains to be seen whether the European Parliament will become more sensitised to external trade and WTO law.

2.2. Case study – air transport's environmental effects

Transport is an area which has significant effects on both internal and external trade, and the EU has special competences in this field. Transport also has significant effects on the environment, so EU rules on transport frequently seek to achieve a high level of environmental protection as well.

This case study looks at two pieces of legislation in the field of air transport which sought to achieve a high level of environmental protection, but they presented obstacles to the business activities of airlines and thus led to challenges. These are the Regulation on Civil Subsonic Jet Planes,³³ as the older example used by de Búrca and Scott,³⁴ and the Aviation Emissions Directive

³⁰ Proposal for a Regulation of the European Parliament and of the Council concerning trade in seals products, 2008/0160 (COD).

³¹ For a detailed analysis of the Regulation's legislative history, see de Ville, *supra* note 26.

³² Perišin, *supra* note 26.

³³ Council Regulation (EC) No. 925/1999 of 29 April 1999 on the registration and operation within the Community of certain types of civil subsonic jet aeroplanes which have been modified and recertificated as meeting the standards of volume I, Part II, Chapter 3 of Annex 16 to the Convention on International Civil Aviation, third edition (July 1993), *OJ* [1999] L 115/1. The Regulation was subsequently superseded by Directive 2002/30/EC of the European Parliament and of the Council of 26 March 2002 on the establishment of rules and procedures with regard to the introduction of noise-related operating restrictions at Community airports, *OJ* [2002] L 085/40.

³⁴ De Búrca and J. Scott, *supra* note 9, pp. 12-16.

as the newer example.³⁵ The study of both the older and the newer piece of legislation focuses not on the legislative histories (as in the previous section on animal welfare), but on the disputes.

The older dispute concerned the Regulation on Civil Subsonic Jet Planes which raised the noise standard for civil subsonic jet planes so that only planes complying with the strict rules of Chapter 3 of the Chicago Convention on International Civil Aviation (CCICA) could register and operate in the EU (where previously compliance with CCICA Chapter 2 was sufficient).³⁶ The Regulation also imposed an additional technical requirement that re-engined planes needed to have 'engines with a by-pass ratio of less than 3'.³⁷ The Regulation was challenged by the company Omega Air before UK and Irish courts.³⁸ Omega Air claimed that its re-engined planes met the CCICA Chapter 3 noise standards and that they should be allowed to register and operate in the EU without meeting the additional technical requirement concerning the by-pass ratio.³⁹ In Omega Air's view, this additional technical requirement going beyond the international standard was disproportionate and was based on inadequate reasons.⁴⁰ The national courts referred questions to the ECJ concerning the validity of the Regulation, inquiring whether the mentioned provision of the Regulation breached the duty to provide reasons and the principle of proportionality, all in the light of possible rights that individuals might have under the GATT and TBT.⁴¹ By that time, it had already been settled that WTO law does not have a direct effect in the EU.⁴² However, the issue arose whether WTO obligations were relevant for determining a breach of the duty to provide reasons and the principle of proportionality. The ECJ, however, restated that WTO rules cannot be used to assess the legality of EU legislation, except in cases where the challenged piece of legislation is 'intended to implement a particular obligation assumed in the context of the WTO, or where the Community measure refers expressly to precise provisions of the WTO agreements'.⁴³ What is relevant in this case is that WTO compliance was invoked before the ECJ.

³⁵ Directive 2008/101/EC of the European Parliament and of the Council of 19 November 2008 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community, *OJ* [2009] L 8/3.

³⁶ Art. 2(2) Regulation 925/1999 defines 'recertificated civil subsonic jet aeroplane', and Art. 3 Regulation 925/1999 prescribes that such planes cannot be registered in EU Member States.

³⁷ Art. 2(2) Regulation 925/1999.

³⁸ Joined Cases C-27/00 and C-122/00, *Omega Air and Others*, [2002] ECR I-2569.

³⁹ *Ibid.*, paras 37, 38.

⁴⁰ *Ibid.*, paras 39-45, 54-61.

⁴¹ *Ibid.*, paras 40, 41.

⁴² Within the WTO, the idea that WTO law should have a direct effect was rejected during the Uruguay round, and this was also held by the Panel in *United States – Sections 301-310 of the Trade Act of 1974* WT/DS152/R par. 7.72. Before the *Omega Air* case, many cases on the effect of WTO law in the EU had already been decided, e.g., *Case C-21-24/72, International Fruit Company v. Produktschaap voor Groenten and Fruit*, [1972] ECR 1219; *Case 70/87, Fediol v. Commission*, [1989] ECR 1781; *Case C-69/89, Nakajima v. Council*, [1991] ECR I-2069; *Case 280/93, Germany v. Commission*, [1994] ECR 4873; *Case C-149/96, Portugal v. Council*, [1999] ECR I-8395.

⁴³ *Omega Air*, *supra* note 38, paras 93, 94.

A more recent dispute concerning air transport's environmental effects deals with the Aviation Emissions Directive. The Directive sets up a system according to which airlines are required to purchase allowances for all their emissions on flights into or from the EU (including emissions caused above open seas, another country, or at an airport in another country). Unlike the mentioned Regulation on civil subsonic jet planes, this Directive does not directly regulate planes. However, it does affect the provision of air transport services and indirectly affects the type of planes which companies will use (trying to adjust engines, plane weight, etc., in order to lower their fuel consumption and emissions). The Directive was challenged before the ECJ by a number of US airlines on the grounds of being contrary to customary international law and certain international agreements, but the Court found the Directive to be valid.⁴⁴ What is interesting for this paper is that WTO law is not mentioned anywhere in the case – either by the parties, by the AG⁴⁵ or by the Court itself. It is true that the GATS explicitly excludes air transport services from its scope,⁴⁶ but there might be parts of WTO law which would still be applicable to the case. For example, studies by Bartels and Howse show that there might be parts of the GATT which would apply because the Directive limits trade in goods, and that the GATS could apply to the extent that the Directive restricts services other than air transport, e.g., tourism.⁴⁷ In addition, some WTO officials have mentioned that it would be difficult, but not impossible, to bring a successful case before the WTO on this measure.⁴⁸ However, this point was not even mentioned in the EU's judicial procedure.

A conclusion which one might draw from a comparison of these two cases is that since the ECJ had ignored WTO law arguments in previous disputes, it is reasonable behaviour of the parties not to invoke such arguments in a later case. However, one wonders whether the ECJ's indifference to the compliance of measures with WTO rules is prudent. Parties having lost a dispute in the EU could now turn to other available fora. Obtainable information suggests that

⁴⁴ Case C-366/10, *Air Transport Association of America and Others v. Secretary of State for Energy and Climate Change*, judgment of 21 December 2011.

⁴⁵ Opinion of Advocate General Kokott in C-366/10, *Air Transport Association of America and Others v. Secretary of State for Energy and Climate Change*, delivered on 6 October 2011. AG Kokott mentions WTO law incidentally when explaining the effects of international law in the EU legal order (paras 70, 71, 100).

⁴⁶ GATS Annex on Air Transport Services.

⁴⁷ L. Bartels, 'The Inclusion of Aviation in the EU ETS: WTO Law Considerations; Trade and Sustainable Energy Series', with a Commentary by Professor R. Howse, NYU School of Law, Issue Paper No. 6, International Centre for Trade and Sustainable Development (Geneva 2012). See also M. Gehring, 'Air Transport Association of America v. Energy Secretary before the European Court of Justice: Clarifying Direct Effect and Guidance for Future Instrument Design for a Green Economy in the EU', 12 *University of Cambridge Faculty of Law Legal Studies Research Paper Series* 2012, available at <<http://ssrn.com/abstract=2063254>>. For an analysis of the EU aviation emissions scheme and the principle of common but differentiated responsibilities and respective capabilities, see J. Scott and L. Rajamani, 'EU Climate Change Unilateralism International Aviation in the European Emissions Trading Scheme', available at <<http://www.indiaenvironmentportal.org.in/files/file/EU%20Climate%20Change%20Unilateralism.pdf>>.

⁴⁸ Reuters, 'EU Aviation Carbon Spat Seen Unlikely to Reach WTO', available at <<http://www.reuters.com/article/2012/06/01/us-wto-aviation-carbon-idUSBRE8500WQ20120601>>.

interested companies are persuading their governments to initiate disputes within the WTO.⁴⁹ Regardless of whether it ever comes to a WTO dispute and whether the EU would be successful in such a case, the question remains whether the ECJ should in some way take WTO compliance into account so as not to force parties to seek a remedy in other fora.

3. CONCLUSION

The EU's official documents frequently emphasise that it is committed to international trade, especially to the WTO's multilateral trading system.⁵⁰ However, while this might be one of the features of the EU's external policy, its internal measures can often be adopted and upheld without much consideration for this external policy. This paper has involved two case studies – one on legislative regulatory policy in the field of internal market measures with a high level of animal welfare protection, and the other on judicial policy in the field of air transport measures with a high level of environmental protection. While these studies are not broad enough to offer general conclusions, it is interesting that both show that in recent examples less account has been taken of WTO law and of the effects of measures on other WTO members. The studies also indicate a difference between the EU institutions in their sensitivity towards WTO compliance and the effects of measures on other WTO members. The Commission, which, through its external activities, especially the common commercial policy, is most exposed to contacts with third countries and the WTO, has also revealed most sensitivity to the external effects of measures and to WTO compliance when proposing internal regulation. The regulatory and de-regulatory actions of other institutions have shown less interest for the WTO compliance of measures and for their external effects.

The consequence of not taking into account other WTO members' views on a measure's external effects and WTO compliance may include the unilateral action of another WTO member or a WTO dispute. A WTO dispute gives the EU the possibility of persuading a Panel or an AB of its position and in this way influencing the development of WTO law.⁵¹ The EU has on many occasions been successful in advocating regulator-friendly strategies in the WTO (e.g.,

⁴⁹ B. Beary, 'Climate Change – Aviation Emissions Spat May End Up at WTO, Says Expert', *Europolitics*, 25 May 2012, available at <<http://www.europolitics.info/external-policies/aviation-emissions-spat-may-end-up-at-wto-says-expert-art335116-46.html>>; 'EU Aviation Emissions Levy Ruled Lawful by European Court as Measure Enters into Force', 16/1 *Bridges Weekly Trade News Digest* 11 January 2012, available at <<http://ictsd.org/i/news/bridgesweekly/123063/>>.

⁵⁰ See, e.g., *Trade Policy Review – Report by the European Union – Revision*, WT/TPR/G/248/Rev.1, 28 July 2011; Speech of Commissioner De Gucht at the Plenary Session of the WTO Ministerial Conference, December 2011, webcasting at <http://gaia.world-television.com/wto/2011/min11_webcast_e.htm#eec>.

⁵¹ See F. Hoffmeister, 'The Contribution of EU Practice to International Law', in M. Cremona (ed.), *Developments in EU External Relations Law* (Oxford: Oxford University Press 2008), pp. 37-127.

in *EC – Asbestos*⁵²). However, there are also other instances where the EU had not entirely convinced the Panel or the AB of its position and ultimately lost WTO disputes. For the EU internally, it is particularly problematic if it loses a case on a measure which has a legitimate aim, but which was not drafted in a WTO-consistent way (e.g., in *EC – Hormones*⁵³). In these situations, it may be possible to amend the legislation in a WTO-consistent way, but this is not always feasible. The EU can then find itself in a situation where it is exposed to retaliation or where it has to offer alternative concessions to its trading partners (as indeed happened in the hormones saga). These are the kind of disputes which can be avoided if WTO law and the views of third countries are more seriously taken into account during internal decision-making processes.

⁵² *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, Report of the Panel, WT/DS135/R, 18 September 2000; *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, Report of the Appellate Body, WT/DS135/AB/R, 12 March 2001.

⁵³ *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, Complaint by the United States, Report of the Panel, WT/DS26/R/USA, 18 August 1997; *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, Complaint by Canada, Report of the Panel, WT/DS48/R/CAN, 18 August 1997; *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, Report of the Appellate Body, WT/DS26/AB/R, WT/DS48/AB/R, 16 January 1998.

THE EU'S INTERNATIONAL REGULATORY POLICY, DEMOCRATIC ACCOUNTABILITY AND THE ACTA: A CAUTIONARY TALE

Marise Cremona

1. INTRODUCTION¹

This paper offers a short and inevitably limited comment on the difficult question of the legitimacy and accountability of international regulatory law-making by examining the debate surrounding the negotiation by the EU of the Anti-Counterfeiting Trade Agreement (ACTA), and in particular the role played by the European Parliament, one of the legislators in the EU's multilevel system.

The EU is mandated, in its external relations, to 'promote multilateral solutions to common problems' and to 'work for a high degree of cooperation in all fields of international relations, in order to ... promote an international system based on stronger multilateral cooperation and good global governance'.² Its ambition is to play a central role in global standard-setting. The Commission's 2006 Global Europe strategy set as an objective of EU trade policy 'to play a leading role in sharing best practice and developing global rules and standards'.³ This objective has two dimensions: on the one hand, the EU must take account of global 'best practice' when developing regulatory and other standards. On the other hand, the EU should engage in cooperation at multilateral as well as bilateral level to ensure that European norms are a reference for global standards. The Commission has argued that EU regulatory standards are well-placed to become a reference point for global standards.⁴ But EU regulatory leadership cannot be taken for granted outside its neighbourhood.⁵ Regulatory partnerships with respect to specific sectors and key partners are increasingly important to the EU's involvement in international regulatory initiatives.

¹ This is a revised and updated version of 'International Regulatory Policy and Democratic Accountability: the EU and the ACTA' in M. Cremona et al. (eds.), *Reflections on the constitutionalization of international economic law - Liber amicorum*, Ernst-Ulrich Petersmann (Brill, forthcoming 2013). Parts of the analysis are taken from M. Cremona, 'Expanding the Internal Market: an external regulatory policy for the EU?' in S. Blockmans et al., (eds.) *The EU and Global Governance* (OUP 2013).

² Art. 21(1) and 21(2)(h) TEU.

³ Commission Communication 'Global Europe: Competing in the World', COM(2006) 567, 4 October 2006, p. 7.

⁴ 'The external dimension of the single market review', SEC(2007) 1519 (Commission staff working document accompanying the Commission's Communication on 'A single market for 21st century Europe' COM(2007) 724 final).

⁵ 'Trade as a Driver of Prosperity', SEC(2010) 1269 (Commission staff working document accompanying the Commission's Communication 'Trade, Growth and World Affairs – Trade Policy as a core component of the EU's 2020 strategy', COM(2010) 612, 9 Nov. 2010), p. 40.

In assessing the EU's ability to fulfil its mandate to promote multilateral cooperation and good global governance, the literature has generally and understandably focused on the EU's capacity to influence international norm-setting *vis-à-vis* the other major international players, its effectiveness as an international actor compared to other powers, and the impact of policy (in)coherence resulting from policy differences between Member States.⁶ But the success of EU external regulatory policy depends not only on its ability to influence the outcome of international negotiations, but also on the reaction to those outcomes of its own domestic constituencies, and in particular the European Parliament. In creating a degree of parallelism between internal legislative procedures and external treaty-making, the Treaty of Lisbon moved decisively away from the classic balance of power in EU international treaty negotiation between the Commission as negotiator and the Council as the institution which concludes the treaty. Under Article 218(6)(a)(v) TFEU the conclusion of a treaty by the Council requires the consent of the European Parliament, *inter alia*, where the agreement covers fields to which the ordinary legislative procedure applies. These fields range from regulation within the internal market to trade policy. In order to deliver on its policy priorities, the Commission has to convince not only its negotiating partners, not only the Member States in the Council, but also the European Parliament, and this in turn brings to the fore the role of public opinion. In fact, the conclusion – and not only the implementation – of an international treaty which is legislative in nature becomes subject to a legislative process. At the same time its negotiation at the international level, especially in the case of multilateral treaties, is still subject to the conventions of classic treaty-making – especially confidentiality and intergovernmental bargaining.

In the case of the ACTA the EU bargained hard and got a result that the Commission viewed as a success – a treaty that apparently reflected the EU's approach and its concerns – but it was unable to sell this result back home to the European Parliament, nor to the publics who influenced both the European Parliament and the Member States, partly because of the sense of secrecy and hidden negotiation, and what was perceived as a lack of public debate (until too late). Even the inclusion of the Member States as parties (the decision to conclude the ACTA as a mixed agreement) did not defuse the problem. The EU negotiators were on the defensive, not with respect to their negotiating partners, but with respect to the domestic audience, and this audience, through the European Parliament, now has the power to reject the outcome.

This is not the place for a detailed assessment of ACTA in terms of either its contribution to enforcement of intellectual property rights (IPR) or the protec-

⁶ See for some recent examples, M. Poiars Maduro (ed.) 'An EU Agenda for Global Governance', *RSCAS Policy Papers* 2011/01; A. Ripoll Servent and A. MacKenzie, 'The European Parliament as a "Norm Taker"? EU-US Relations after the SWIFT Agreement', *17 European Foreign Affairs Rev.* 2012, p. 71; S. De Jong and S. Schunz, 'Coherence in European Union External Policy before and after the Lisbon Treaty: The Cases of Energy Security and Climate Change', *17 European Foreign Affairs Rev.* 2012, p. 165; M. Dee, 'Standing Together or Doing the Splits? Evaluating European Union Performance in the Nuclear Non-proliferation Treaty Review Negotiations', *17 European Foreign Affairs Rev.* 2012, p. 189.

tion of fundamental rights.⁷ But what does its negotiation tell us about the EU as a player in global governance? What does it tell us about the ability of the EU to develop and then prosecute effectively an external regulatory policy and the relationship between that policy and its internal regulatory strategies?

2. THE EU AND THE NEGOTIATION OF THE ACTA

Enforcement of IPR has been identified as a priority for EU trade policy at least since 2004 and the EU's external policy on IPR enforcement illustrates clearly the link between its current trade policy objectives and the competitiveness of EU industry.⁸ In a Communication on IPR of May 2011 the Commission declared:

'The increase in international trade has put the spotlight on the international dimension of IPR. Globalisation provides Europe with immense opportunities to export and trade in its IP intensive products, services and know-how to third-countries. At the same time, the growth in IP infringements creates the need to focus on a robust global enforcement strategy, in accordance with fundamental rights.' Thus '[t]he consolidation and streamlining of the governance of IPR should go hand in hand with strengthening enforcement tools both on the EU and international levels.'⁹

The Commission's approach to the enforcement of intellectual property rights in third countries was first elaborated in its 2004 Strategy for the Enforcement of IPR in Third Countries,¹⁰ followed by the 2006 *Global Europe* Communication,¹¹ and the Communication on *Trade, Growth and World Affairs* in November 2010.¹² EU policy has operated – as with regulatory policy more generally – at a number of levels:

- working with accession countries and neighbourhood states to include enforcement of IPR in accession partnerships and Action Plans;¹³

⁷ See for example K. Weatherall, 'ACTA as a New Kind of International IP Law-Making', 12 *PIJIP Research Paper* 2010, American University Washington College of Law, Washington, DC; A. X. Fellmeth, 'The Anti-Counterfeiting Trade Agreement in the Public Eye', 24/8 *Insights* American Society of International Law, 24 June 2011.

⁸ See for example COM(2010) 612 final, *supra* note 5, p. 14.

⁹ Commission Communication, 'A Single Market for Intellectual Property Rights', 24 May 2011, COM (2011) 287 final.

¹⁰ Strategy for the enforcement of intellectual property rights in third countries, *OJ* 2005 C 129/3.

¹¹ COM(2006) 567 final, *supra* note 3.

¹² COM(2010) 612 final, *supra* note 5.

¹³ See for example Council Decision 2008/157/EC of 18 February 2008 on the principles, priorities and conditions contained in the Accession Partnership with the Republic of Turkey, *OJ* 2008 L 51/4. Joint Staff Working Document 'Eastern Partnership Roadmap 2012-13: the bilateral dimension', SWD (2012) 109 final, 15 May 2012, accompanying the Joint Communication from the Commission and the High Representative, 'Eastern Partnership: A Roadmap to the autumn 2013 Summit' JOIN (2012) 13 final.

- seeking to include chapters on IPR enforcement in bilateral trade agreements;¹⁴
- reinforcing cooperation and dialogue on IPR enforcement;¹⁵
- dialogue with key countries (e.g., China,¹⁶ Thailand,¹⁷ Russia,¹⁸ Brazil¹⁹);
- regulatory cooperation with the USA²⁰ and Japan;²¹
- capacity building within the context of development policy,²² and allocating technical assistance resources to enforcement.

The Strategy incorporates both multilateral and bilateral dimensions, while declaring that it is not intended to impose the EU's approach on third countries, nor to propose a one-size-fits-all approach to IPR enforcement.²³

Among these initiatives, the EU has taken part in the negotiations for an international Anti-Counterfeiting Trade Agreement (ACTA) which aims, according to its preamble, 'to provide effective and appropriate means, complementing the TRIPS Agreement, for the enforcement of intellectual property rights'. The ACTA negotiations were launched in June 2008 and concluded in November 2010, the EU and its Member States participating with 10 other countries: Australia, Canada, Japan, Korea, Mexico, Morocco, New Zealand, Singapore, Switzerland and the United States.²⁴ The Council adopted a decision on the signing of the ACTA on 15-16 December 2011,²⁵ and the Agreement was signed by the EU and 22 of its Member States on 26 January 2012.²⁶ It was proposed that the Agreement would be concluded by the EU and its Member States as a mixed agreement,²⁷ so that in addition to conclusion by the EU it would need to be ratified by each Member State. In addition, the consent of the Parliament is required under Article 218(6)(a)(v) TFEU before the Council may conclude the ACTA. That consent was withheld in July 2012 leaving the future of the

¹⁴ See for example Free Trade Agreement between the EU and its Member States and the Republic of Korea OJ 2011 L 127/6, Art. 1.1(2)(e) and Arts. 10.1-10.69.

¹⁵ *Ibid.*, Art. 10.69.

¹⁶ Action plan on customs cooperation regarding IPR enforcement signed with China in 2009.

¹⁷ Report on the First EU-Thailand IPR Dialogue, Bangkok, Thailand, 25 February 2011, tradoc. 147855; the second IPR dialogue meeting was held on 24 February 2012.

¹⁸ Within the framework of the EU-Russia Common Economic Space and more recently the Partnership for Modernisation launched at the EU-Russia Summit in June 2010.

¹⁹ Report on 4th EU-Brazil IPR Dialogue, 6 December 2011, tradoc. 149473.

²⁰ See for example the Transatlantic IPR Portal, available at <http://ec.europa.eu/enterprise/initiatives/ipr/index_en.htm>.

²¹ For example, Agreement between the EC and Japan on cooperation and mutual administrative assistance in customs matters OJ L 62, 6.3.2008, p. 24; EU-Japan Action Plan on IPR Protection and Enforcement 2004.

²² Global Europe, *supra* note 3, p. 13; see also COM(2010) 612, *supra* note 5, p. 14.

²³ DG Trade 'Report on Evaluation of the Intellectual Property Rights Enforcement Strategy in Third Countries', November 2010. Tradoc. 147053.

²⁴ In what follows, references to provisions of the ACTA will be to the finalised text: Council doc. 12196/11, 23 August 2011, available at <<http://register.consilium.europa.eu/pdf/en/11/st12/st12196.en11.pdf>>.

²⁵ Council doc. 12192/1/11, REV 1.

²⁶ The ACTA was not signed by Germany, Cyprus, Estonia, the Netherlands and Slovakia. In total 31 states plus the EU have signed the ACTA.

²⁷ Proposal for a Council Decision on the conclusion of the ACTA, COM(2011) 380 final.

agreement (at least for the EU) in considerable doubt.²⁸ It seems now to be accepted that the EU will not conclude the ACTA and that it is unlikely to come into force.

The ACTA has been controversial, both in the USA and in the EU; in the EU the controversy has related to both substance and procedure. It has centred on the European Parliament, with five committees involved,²⁹ and two opinions from the Parliament's Legal Service, unusually made public.³⁰ The European Data Protection Supervisor (EDPS) has issued two own-initiative Opinions on the ACTA.³¹ It has also involved civil society: a group of European academics issued an opinion on the draft agreement in February 2011, calling upon the EU institutions, and in particular the European Parliament, to consider a number of issues relating to fundamental rights and to trade in generic drugs; the Commission published a response.³² The Parliament received a petition signed by 2.4 million people calling for the ACTA's rejection on the ground that it threatens the freedom of the internet.³³ The Commission defended the ACTA, publishing its replies to the many questions it received from MEPs,³⁴ and in February 2012 decided to refer the ACTA to the Court of Justice (CJEU) under Article 218(11) TFEU, for an opinion on its compatibility with the EU Treaties and the Charter of Fundamental Rights. In announcing the Commission's legal submissions to the CJEU, Trade Commissioner De Gucht said

²⁸ European Parliament legislative resolution of 4 July 2012 on the draft Council decision on the conclusion of the Anti-Counterfeiting Trade Agreement, 12195/2011 – C7-0027/2012 – 2011/0167(NLE)) P7_TA-PROV(2012)0287. So far only Japan has ratified the ACTA; it will come into force once ratified by six countries.

²⁹ The international trade (INTA) committee as lead committee, together with the legal affairs, civil liberties, industry, and development committees; the EP also commissioned a report on the ACTA: 'The Anti-Counterfeiting Trade Agreement (ACTA): An Assessment', EXPO/B/INTA/FWC/2009-01/Lot7/12, published June 2011.

³⁰ In July 2011 the EP's Legal Affairs Committee asked the EP Legal Service for an opinion on the compatibility of the ACTA with the Treaties, general principles of EU law and the existing *acquis*, including the ECHR and the Charter of Fundamental Rights; a further request was made on 4 October 2011. The two opinions of October and December 2011 were later made public by the Legal Affairs Committee: SJ-0501/11 of 5 October 2011 and SJ-0661/11 of 8 December 2011, available at <http://lists.act-on-acta.eu/pipermail/hub/attachments/20111219/59f3ebe6/attachment-0010.pdf>.

³¹ Opinion of the European Data Protection Supervisor on the current negotiations by the European Union of an Anti-Counterfeiting Trade Agreement (ACTA), 22 February 2010, OJ 2010 C 147/1; Opinion of the European Data Protection Supervisor on the proposal for a Council decision on the conclusion of the Anti-Counterfeiting Trade Agreement, 24 April 2012 (Summary) OJ 2012 C 215/7.

³² The academics' opinion is available here <http://www.iri.uni-hannover.de/tl_files/pdf/ACTA_opinion_110211_DH2.pdf>.

For the Commission's response, see tradoc. 147853, 27 April 2011.

³³ The petition's text read, 'To all Members of the EU Parliament: As concerned global citizens, we call on you to stand for a free and open Internet and reject the ratification of the Anti-Counterfeiting Trade Agreement (ACTA), which would destroy it. The Internet is a crucial tool for people around the world to exchange ideas and promote democracy. We urge you to show true global leadership and protect our rights.' See <<http://www.europarl.europa.eu/news/en/headlines/content/20120220FCS38611>>.

³⁴ Tradoc. 149102, covering the period January 2010 – January 2012.

Considering that tens of thousands of people have voiced their concerns about ACTA, it is appropriate to give our highest independent judicial body the time to deliver its legal opinion on this agreement. This is an important input to European public and democratic debate.³⁵

However in December 2012 the Commission announced that it was withdrawing the request for an opinion, thereby signalling that there was no political will to seek Parliament's approval a second time.

3. COMPETENCE AND LEGAL BASIS

The ACTA calls itself a trade agreement, and as far as the EU is concerned it was negotiated and signed under Article 207 TFEU, the external trade policy competence. Not only does this external competence now require the consent of the European Parliament to international agreements, since internal legislation on trade policy is adopted under the ordinary legislative procedure; it is also an exclusive competence of the EU.³⁶ Nevertheless, the ACTA was negotiated, and was to have been concluded by the Member States alongside the EU, as a mixed agreement. The reason for this is the part of the agreement that deals with criminal enforcement. These provisions, which form a specific section and are not merely incidental to the rest of the agreement, would fall under Article 83(2) TFEU, a matter of shared competence.³⁷ However the Commission decided not to propose that the EU should exercise this competence:

[T]he Commission has opted not to propose that the European Union exercise its potential competence in the area of criminal enforcement pursuant to Article 83(2) TFEU. The Commission considers this appropriate because it has never been the intention, as regards the negotiation of ACTA, to modify the EU *acquis* or to harmonise EU legislation as regards criminal enforcement of intellectual property rights.

³⁵ The request for an opinion was officially made on 10 May 2012; unusually, the Commission published a summary of its request and its arguments: tradoc. 149464.

³⁶ Article 3(1)(e) TFEU.

³⁷ Article 83(2) TFEU provides in part: 'If the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures, directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned'. Note however the view of AG Kokott that provisions on criminal enforcement in an international Convention on the protection of providers of certain audio-visual and information society services do not require, or justify, a specific legal basis where the agreement as a whole falls within the CCP: 'In isolation, confiscation measures and the related international cooperation may indeed be classified under the policy area of judicial cooperation in civil and criminal matters. However, as has already been mentioned, the confiscation measures and the related international cooperation here are not the primary object of the Convention. Because the focus of the Convention is in the area of commercial policy, the signing of the Convention as a whole must be based solely on Article 207 TFEU. Recourse to other legal bases, such as Article 83(2) TFEU, is not permitted.' (opinion of AG Kokott in case C-137/12 *European Commission v. Council*, case pending, opinion of 27 June 2013, para. 82, footnotes omitted). Even were this view to be accepted, and the agreement concluded by the EU alone under Article 207 as its sole legal basis, implementation of the clauses on criminal enforcement could be undertaken by the Member States.

For this reason, the Commission proposes that ACTA be signed and concluded both by the EU and by all the Member States.³⁸

The Commission's reasons were no doubt related to the recent history of a legislative proposal for criminal enforcement of IPR, which was eventually abandoned.³⁹ There were hints that the conclusion of the ACTA by the EU alone would appear to lead to harmonisation by stealth, or so-called 'policy laundering'; in other words that the EU would commit itself externally to introducing criminal sanctions which had not been agreed internally at EU level. In the terms of an EP Resolution of 2010, 'the on-going EU efforts to harmonise IPR enforcement measures should not be circumvented by trade negotiations which are outside the scope of normal EU decision-making processes'.⁴⁰ In its defence of ACTA the Commission argued that this competence balance will not change: 'There is not yet an EU *acquis* in terms of penal sanctions for IPR infringements, but instead 27 national laws and this will not be modified by ACTA'.⁴¹ The criminal provisions were thus negotiated not by the Commission but by the Presidency on the basis of common positions of the Member States adopted unanimously in the Council, and they would be implemented by the Member States unless and until EU legislation in the field were to be adopted.

None of this precludes, of course, a future decision within the EU to revive the criminal enforcement directive. The Commission has argued that 'further harmonising IP rules within the EU would enhance the Commission's capacity to negotiate on behalf of the EU stronger IP commitments with our key trading partners'.⁴² It may be felt to be necessary to align national legislation, especially if ACTA-based provisions on criminal enforcement are included in FTAs, and third countries expect a uniform approach to implementation from the EU side. Thus, while the extent of existing EU internal regulation influences its ability to negotiate externally, regulatory norms agreed at an international level will of course impact on internal EU regulatory policy.

4. AMBIGUITY AND FLEXIBILITY: THE ACTA AND THE EU ACQUIS

The ACTA builds upon TRIPS, and its focus is on enforcement of IPR. It contains provisions on customs and border controls, civil and criminal enforcement mechanisms, and the internet. It is not supposed to be concerned with defining

³⁸ COM(2011) 380 final, *supra* note 27. See F. Hoffmeister, 'The European Union's common commercial policy a year after Lisbon – Sea change or business as usual?' in P. Koutrakos (ed.), *The European Union's external relations a year after Lisbon*, CLEER Working Paper 2011/3, p. 84.

³⁹ COM(2006) 168 final. For the withdrawal of the proposal, see OJ 2010 C 252/7.

⁴⁰ EP resolution of 10 March 2010 on the transparency and state of play of the ACTA negotiations, P7_TA(2010)0058.

⁴¹ P. Velasco Martins, DG Trade, Civil Society Meeting on the ACTA, 25 March 2011, tradoc. 147947.

⁴² COM(2010) 612 final, *supra* note 5, p. 14.

(or creating) IPR,⁴³ although the distinction between defining IPR and defining the scope of protection may not be easy to draw: if a particular action is declared under specific circumstances not to be an infringement, is this a restriction of the right, or of the remedy?⁴⁴ This distinction may be important in relation to the liability of internet service providers,⁴⁵ in relation to trade in generic drugs, where domestic laws and/or TRIPS provide specific exemptions;⁴⁶ and also in the context of 'fair usage' exceptions.⁴⁷

There has been debate over the extent to which the ACTA may require modification of the current EU *acquis*.⁴⁸ The ambiguity results from what ACTA does not contain as much as what it does: it is argued that the ACTA is not precise enough on issues which concern the balance between the protection of intellectual property rights and fundamental rights such as due process, freedom of expression and privacy in relation to enforcement in the digital environment, giving rise to the risk of 'unintended consequences'.⁴⁹ The Commission argues that, on the contrary, ACTA's flexibility allows the EU to imple-

⁴³ Art. 3 ACTA provides '1. This Agreement shall be without prejudice to provisions in a Party's law governing the availability, acquisition, scope, and maintenance of intellectual property rights. 2. This Agreement does not create any obligation on a Party to apply measures where a right in intellectual property is not protected under its laws and regulations.'

⁴⁴ B.T Yeh, Memorandum to Senator Wyden, 29 October 2010, p. 3. See also P. Velasco Martins, *supra* note 41, 'Exceptions and derogations consist in lawful uses and not infringements to IPR. They can hence not be affected by the agreement'.

⁴⁵ Directive 2000/31/EC (E-Commerce Directive) OJ 2000 L 178/1, Arts. 12-15; Directive 2001/29/EC (Copyright in the Information Society Directive) OJ 2001 L 167/10, Art. 8. See also Art. 27.2 and note 13 ACTA.

⁴⁶ Where TRIPS provides exceptions: Doha Declaration on TRIPS and Public Health, 14 Nov. 2001; Decision of 30 August 2003 on the implementation of para. 6 of the Doha Declaration. Here the ACTA allows some flexibility since parties are not required to introduce customs controls or criminal sanctions for patent infringements: Art. 13, note 6 and Art. 23. In addition, Art. 1 of ACTA is a 'non-derogate' clause with respect to TRIPS obligations, and Art. 2.3 provides that the objectives and principles of Part I of TRIPS, especially Arts. 7 and 8, will apply to the ACTA.

⁴⁷ Fair usage has been an issue in the context of the provision for criminal enforcement in cases of an IPR infringement 'on a commercial scale'. In response to criticism that this is not specific enough in excluding fair usage, it is argued by the Commission that fair usage activities are encompassed in the definition of an infringement: they are considered 'legitimate "exceptions" and therefore do not fall under the scope of the criminal enforcement provisions of ACTA, since this applies only to certain illegal activities (piracy and counterfeiting), practiced wilfully and on a commercial scale. In fact, these exceptions are totally outside the scope of ACTA, which, as an enforcement agreement, only applies to infringing activities, not to legal ones'; Commission response to Academics' Opinion, *supra* note 32.

⁴⁸ In particular, Regulation 1383/2003 on customs action against goods suspected of infringing certain intellectual property rights OJ 2003 L 196/7, and Directive 2004/48/EC on the enforcement of intellectual property rights, OJ 2004 L 195/16. Other relevant directives are Directive 2001/29 and Directive 2000/31/EC (*supra* note 45). See also Council Resolution of 25 September 2008 on a comprehensive European anti-counterfeiting and anti-piracy plan OJ 2008 C 253/1; Council Resolution of 16 March 2009 on the EU Customs Action Plan to combat IPR infringements for the years 2009 to 2012 OJ 2009 C 71/1.

⁴⁹ D. Martin, 'Explanatory Statement to draft recommendation to the Parliament's International Trade Committee', doc. 2011/0167(NLE), PE486.174v02-00, 12 April 2012, p. 6. Martin concludes: 'Given the vagueness of certain aspects of the text and the uncertainty over its interpretation, the European Parliament cannot guarantee adequate protection for citizens' rights in the future under ACTA.'

ment it with due regard to its existing enforcement structures and fundamental rights protection.

As the Legal Service of the Parliament has pointed out, in examining the relationship between the ACTA and EU law we need to distinguish between compatibility with the Treaties and EU primary law on the one hand, and impact on the EU secondary law *acquis* on the other hand. The difference reflects the position of international agreements concluded by the EU. Such agreements may not derogate from the Treaties or other primary law such as the Charter of Fundamental Rights,⁵⁰ but there is no legal bar to concluding an international agreement which requires amendment of existing secondary law or the introduction of new internal rules – indeed Article 216(2) TFEU provides that the institutions are bound by such agreements. Whether the EU should enter into an agreement which does require an amendment of existing EU secondary law is a political decision to be taken by the institutions involved in establishing the negotiating mandate, conducting the negotiation, and ultimately concluding the agreement.

The Commission is adamant that the ACTA would not require any amendment of the *acquis*: the agreement will not need implementation at EU level since IPR enforcement standards in the EU are higher than (or at least equal to) those in the ACTA and, as we have seen, the provisions on criminal enforcement will be implemented by the Member States.⁵¹ The European Parliament's Legal Service also took the view that there is no inconsistency between the ACTA and the EU's existing *acquis*.⁵² Two issues in particular were discussed. First, the provision on effective border enforcement in Article 13 ACTA is expressly subject to domestic law and to TRIPS;⁵³ thus it can be argued that its application to the EU would at present only concern pirated and counterfeit goods since EU legislation currently only encompasses border measures for these IPR infringements.⁵⁴ Second, Article 27(4) ACTA refers to the possibility of granting the competent authorities the power to order an online service provider to disclose to a right-holder information sufficient to identify a subscriber whose account was allegedly used for an infringement. Since this is a voluntary provision (a Party 'may provide'), as it operates in accordance with the Party's laws and regulations, and since it must be implemented 'in a manner that avoids the creation of barriers to legitimate activity, including electronic commerce, and, consistent with that Party's law, preserves fundamental

⁵⁰ See Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council and Commission*, [2008] ECR I-06351, paras 285 and 306-9. C.f. also Art. 218(11) TFEU.

⁵¹ P. Velasco Martins, *supra* note 41. See also COM(2011) 380, *supra* note 27, 'ACTA does not modify the EU *acquis*, because EU law is already considerably more advanced than the current international standards'.

⁵² See *supra* note 30.

⁵³ According to Article 13 ACTA, each party must provide 'as appropriate, and consistent with its domestic system of intellectual property rights protection and without prejudice to the requirements of the TRIPS Agreement, for effective border enforcement of intellectual property rights'.

⁵⁴ Regulation 1383/2003, *supra* note 48. For a proposal to amend this Regulation and widen its scope see COM(2011) 285 final.

principles such as freedom of expression, fair process, and privacy', the Parliament's Legal Service took the view that there is no conflict with EU data protection law. In addition, other obligations established by Article 27 ACTA in relation to IPR enforcement in the digital environment are, by virtue of Article 27(8), 'without prejudice to the rights, limitations, exceptions, or defences to copyright or related rights infringement under a Party's law'.

On the other hand, the EDPS Opinion on the ACTA addresses 'possible undue and unacceptable side effects' in the implementation of the ACTA.⁵⁵ The EDPS, while recognising the voluntary nature of some of the provisions on IPR in the digital environment – especially those in Article 27(3) and (4) that concern the provision of information by internet service providers on their subscribers and on cooperation between service providers and right holders, which might involve monitoring of internet usage – argues that they may have an effect on the future development of the law at EU and Member State level, especially if they are implemented by third country parties to ACTA.⁵⁶ The EDPS also sees a risk of fragmented implementation by Member States as a result of the imprecision of these provisions, 'which in turn will run the high risk of inappropriate or insufficient respect of data protection requirements within the EU'.⁵⁷

Imprecision and the possibility of different interpretations raise the question: could the ACTA, on the basis of Article 216(2) TFEU, over-ride provisions in EU secondary legislation (e.g., on data protection)? The Commission, in its reference to the CJEU, takes the view that the ACTA would not be directly effective; it would thus not be directly applied by courts in the EU and control over its interpretation will lie with the legislatures (EU and national) implementing the agreement. Ultimately, it is for the Court of Justice to determine the direct effect or not of specific provisions of any international agreement.

What of compliance with the EU Treaties and primary law? This was the question posed by the Commission to the CJEU: 'Is the envisaged Anti-Counterfeiting Trade Agreement (ACTA) compatible with the Treaties and in particular with the Charter of Fundamental Rights of the European Union?' The Commission argued that the flexibility of ACTA is helpful here, rather than problematic: 'ACTA provides flexibility, for example through voluntary ('may') provisions, sufficiently broad language and frequent clauses requiring an implementation only "in accordance with [the] law and regulations" of the ACTA parties. Wherever ACTA leaves the Union such flexibility, the Union must choose the implementation which is compatible with the Treaties and in particular the Charter'.⁵⁸

The Parliament's Legal Service opinion agreed with this assessment, finding that ACTA does not impose any obligations that are incompatible with EU fundamental rights. Some of the more controversial draft clauses in this respect (e.g., the so-called 'three strikes' rule) were abandoned during negotiations.

⁵⁵ Opinion of the EDPS, 24 April 2012, *supra* note 31, para. 11; C.f. the 'unintended consequences' referred to by D. Martin, the INTA Committee rapporteur, *supra* note 49.

⁵⁶ Opinion of the EDPS, 24 April 2012, *supra* note 31, paras 32-36.

⁵⁷ *Ibid.*, para. 35.

⁵⁸ Commission summary, see *supra* note 35.

The criminal enforcement provisions will be implemented by the Member States and in so doing they are bound by their own constitutional laws and fundamental rights.

Certainly there is nothing to prevent the EU from inserting (as it does) due process requirements into its own legislation and ensuring that it complies with fundamental rights, but the point made by the critics is that these safeguards are not written into ACTA itself, and although there are general provisions on due process (Article 6.2) and proportionality (Article 6.3) neither they nor the 'fundamental principles such as freedom of expression, fair process, and privacy' referred to in Article 27(2) are fully defined. So, the ACTA may permit such 'good practice' but does not require it; it requires the adoption of enforcement provisions while failing to specify clearly the concomitant safeguards.

This permissive rather than prescriptive approach to fundamental rights may not be so problematic for parties with solid fundamental rights protection in their own domestic constitutional laws, and courts who would not hesitate to accord priority to those rights when assessing the implementation of an international obligation.⁵⁹ But not all states have such protection and this raises broader questions over the use of international treaties to regulate at a global level, especially where the regulation concerns the liability of individuals.

5. THE ACTA AND GLOBAL GOVERNANCE OF IPR

How is the ACTA related to the EU's policy on international IPR enforcement? The argument that bilateral agreements have paved the way for the ACTA is probably more demonstrable in the case of recent US PTAs⁶⁰ than for the EU, since it is only in the EU-CARIFORUM Economic Partnership Agreement (EPA) and the EU-South Korea FTA that substantial IPR chapters have been included (and the CARIFORUM states were not ACTA negotiators). Chapter 10 of the EU-South Korean FTA is intended to 'complement and specify the rights and obligations between the Parties under the TRIPS Agreement'. It refers to a number of international conventions on IPR, and contains provisions on enforcement, including criminal enforcement, which reflect the ACTA. It also goes further than ACTA in containing substantive provisions relating to duration of authors' rights and the scope of broadcasting rights, as well as provisions on geographical indications. In such a case, where an FTA partner is a party to ACTA the Commission argued that the ACTA would 'complement and reinforce' the commitments in the FTA.⁶¹ It might also be easier to negotiate an

⁵⁹ C.f. Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council and Commission*, *supra* note 50; C-584/10P *Kadi II*, judgment of 18 July 2013.

⁶⁰ Weatherall, *supra* note 7, p. 10: several parties to ACTA negotiations have FTAs with the USA (Singapore, Morocco, Australia, Korea). Weatherall argues that in the case of Australia, the changes already made to Australian IPR enforcement as a result of the US-Australian FTA made it easier to accept the ACTA – and also made it easier to accept a US (as opposed to EU) approach to ACTA.

⁶¹ Answer given by De Gucht on behalf of the Commission to Question E-6187/10 by Elisabeth Köstinger, 15 Sept. 2010.

IPR chapter in a future trade agreement with countries that have already committed to ACTA (e.g., Singapore).

On the other hand, for other ACTA parties with whom the EU has an earlier generation FTA with limited IPR provisions, such as Morocco and Mexico, the ACTA would have represented a significant upgrading of commitment on IPR enforcement.

Since both the USA and the EU have stressed that the ACTA would not require any change to their own domestic laws,⁶² this does (given the likely parties) raise issues as to its purpose. Countries that pose real problems of IPR infringement (such as China⁶³) are perhaps not likely to become parties. The EU insists that it will not put pressure on third countries to sign up to ACTA as a condition of concluding a FTA (unlike membership of the WTO, which has *de facto* become a pre-condition for a FTA with the EU) nor seek to include accession to ACTA as a commitment in the FTA itself (unlike, for example, the WIPO Copyright Treaty or the Berne Convention⁶⁴).⁶⁵ However it might be possible to persuade countries that are not parties to the ACTA that it represents a new 'global standard' which could provide a basis for an IPR chapter in a FTA, as a more palatable alternative to using the EU *acquis* as a model. In the Commission's view, the ACTA will help to establish an agreed minimum – more extensive than TRIPS and based on both US and EU regulatory approaches – on which to base any further international regulation:

The Anti-Counterfeiting Trade Agreement (ACTA) aims to establish a comprehensive international framework – a catalogue of 'best practices' – that will assist its members to effectively combat the infringement of IPRs. When agreed and implemented, ACTA will effectively introduce a new international standard, building on the WTO TRIPS agreement.⁶⁶

Thus, one view would present an IPR enforcement ratchet working through a cycle of bilateral – multilateral/plurilateral (TRIPS then ACTA) – bilateral agreements.⁶⁷ Not only might the ACTA support the inclusion of IPR enforcement in new bilateral FTAs, it might also, as a plurilateral agreement, help progress

⁶² As we have seen the EU argues that the ACTA is already fully implemented by current EU legislation. The US has put some stress on Art. 2.1 of ACTA whereby 'Each Party shall be free to determine the appropriate method of implementing the provisions of this Agreement within its own legal system and practice', arguing that this allows the US to continue to apply existing domestic exceptions and limitations to IPR enforcement.

⁶³ In 2010, 85% of all IPR infringing articles detained by EU customs came from China: Opinion of the Committee on International Trade for the Committee on the Internal Market and Consumer Protection on the proposal for a regulation of the European Parliament and of the Council concerning customs enforcement of intellectual property rights (COM(2011) 285 – C7-0139/2011 – 2011/0137(COD)), 30 January 2012.

⁶⁴ For example see EU-Albania SAA, Art. 73 and Annex V; EU-CARIFORUM EPA, Articles 143.1 and 147.1.

⁶⁵ Answer given by De Gucht on behalf of the Commission, 31 March 2011 to Question E-1654/2011 by David Martin. See also Commission's reply to the Academics' Opinion on this point relating to 'pressure', *supra* note 32.

⁶⁶ COM(2010) 612 final, *supra* note 5, p. 14.

⁶⁷ Weatherill, *supra* note 7, p. 9.

towards a multilateral agreement that would bind more countries, including those that are the major sources of counterfeit goods.⁶⁸

The ACTA may be innovative in providing a framework of international rules on enforcement of IPR but it suffers from a number of weaknesses.

First, its flexibility and its number of optional ('may' as opposed to 'shall') provisions. The Commission argued that these represent a 'catalogue of best practices', however as already mentioned they also make it possible to envisage an implementation of ACTA which does not give adequate protection to fundamental rights, insofar as these are not embedded in the agreement itself.

Second, at least for the US and the EU, the ACTA does not 'ratchet up' IPR protection – Weatherall argues that the chapter of ACTA on enforcement in the digital environment, which was originally drafted by the US and based on its FTA model, was significantly amended to bring it closer to the EU model.⁶⁹ And the EU, as we have seen, was keen to ensure that no change to its own *acquis* would be needed.

Third, although the EU has proved relatively successful in helping to shape the new rules in such a way that they 'fit' already-existing EU rules, the ACTA does not really provide innovative solutions to the challenges IPR faces *de facto* from (for example) the digital environment; it does not seek to challenge the existing IPR paradigm and was not intended to do so.

Finally, the ACTA was only agreed to by the EU and a limited group of like-minded states, and its reception by the European Parliament means that the possibility of even EU participation has almost vanished.

This last point illustrates a further challenge to pursuing regulatory objectives via international treaties, in particular when a large-scale multilateral convention is not feasible. Despite the hope that more countries will finally accede to ACTA it was negotiated by a relatively small group; in practice very few developing countries took part in shaping an agreement which the Commission hoped would become a reference point for good practice and which might become a *de facto* standard. Plurilateral agreements such as the ACTA may represent a choice between (in the case of limited participation) preaching to the converted and (where wider participation is sought) exerting pressure on developing countries to adopt EU/US approaches to regulation. It is not easy to see a solution to this dilemma.

And since the procedure for negotiating treaties is not the same as for the adoption of domestic legislation, the use of treaties to shape new regulatory norms may give rise to the charge of so-called policy laundering. Here we return to the basic procedural complaint of the European Parliament: the lack of transparency in the negotiation process and limited possibilities for Parliamentary input.

⁶⁸ Weatherall, *supra* note 7, p. 15.

⁶⁹ Weatherall, *supra* note 7, pp. 17-18, citing Michael Geist, 'U.S. Caves on Anti-Circumvention Rules in ACTA', Michael Geist Blog (July 19, 2010), available at <<http://www.michaelgeist.ca/content/view/5210/125/>>. An example would be the definition of 'technological protection measure' in the anti-circumvention provisions: Article 27.5, *supra* note 14, as well as the scope of the criminal provisions.

6. TRANSPARENCY IN NEGOTIATING LEGISLATIVE TREATIES

The European Parliament expressed concern during the ACTA negotiations over the lack of information on the negotiating text, pointing out that in due course it would need to consent to the agreement.⁷⁰ In its 10 March 2010 Resolution on ACTA the Parliament 'Deplore[d] the calculated choice of the parties not to negotiate through well-established international bodies, such as WIPO and WTO, which have established frameworks for public information and consultation'.⁷¹ The Commission argued that the negotiation of international trade agreements is generally confidential since the parties do not wish their negotiating positions to be made public in advance of the final result, but that within those constraints it had in fact kept the Parliament informed of the progress of negotiations.

As is frequently the case in such plurilateral trade-related negotiations, the ACTA parties have agreed that negotiating documents would only be made public when an unanimous decision in that sense is taken by the countries participating in the negotiations. For the time being, certain participants to the negotiation remain opposed to disclosing the documents, since the text is still under negotiation. Under these circumstances, where compromises still have to be found between different countries, and where arbitrations still have to be made at country level as to the final position to be taken in the negotiations, it is not unusual that negotiations are kept confidential for a certain time.⁷²

The Parliament's Resolution of November 2010 does recognise the efforts that have been made by the Commission and the greater transparency of the later stages of negotiation.⁷³ Access to information by the Parliament is currently governed by inter-institutional agreement, the Framework Agreement between the Parliament and the Commission of October 2010.⁷⁴ According to this, Parliament is to be 'immediately and fully informed at all stages of the negotiation and conclusion of international agreements' in sufficient time for it to be able to express its views and for the Commission to take them into account, and the Commission and Parliament are to establish procedures and safeguards for the transmission of confidential information.⁷⁵ In cases where Parliamentary consent is required, the Parliament is to be given the same information as the

⁷⁰ EP resolution of 10 March 2010, *supra* note 40. See also EP declaration of 9 September 2010 on the lack of a transparent process for the Anti-Counterfeiting Trade Agreement (ACTA) and potentially objectionable content, P7_TA(2010)0317.

⁷¹ EP resolution of 10 March 2010, *ibid.*

⁷² Reply by Commissioner De Gucht on behalf of the Commission to Written Question E-0147/10 by Alexander Alvaro (ALDE); see also 'Transparency of ACTA Negotiations', MEMO 12/99, 13 February 2012.

⁷³ EP resolution of 24 November 2010 on the Anti-Counterfeiting Trade Agreement (ACTA), P7_TA(2010)0432.

⁷⁴ Framework Agreement on relations between the European Parliament and the Commission, 20 October 2010, P7_TA(2010)0366; paras 23-27 and Annex 3 deal with international negotiations; Annex 2 deals with Parliamentary access to classified information.

⁷⁵ *Ibid.*, paras 23-24.

Council.⁷⁶ This reflects Article 218(10) TFEU, which provides that 'The European Parliament shall be immediately and fully informed at all stages of the [treaty negotiation] procedure'.⁷⁷

Transparency affects not only the possibility of access by the Parliament to (for example) a negotiating mandate or a draft text, but also access by the general public, private individuals and NGOs. This is governed by the EU's transparency procedures.⁷⁸ Documents relating to international treaty negotiations sent by the Commission to the Parliament are subject to an obligation of non-disclosure where 'disclosure would undermine the protection of the public interest as regards ... international relations',⁷⁹ and the Parliament could not make such documents public without consulting the Commission, as their source, on the application of that exception.⁸⁰ Indeed, if the document is classified as secret, top secret or confidential, prior consent of its originator would be required.⁸¹

In July 2010 MEP Sophie In 't Veld brought an annulment action against the Commission's refusal to grant her full access to the ACTA negotiating documents.⁸² Her action was partially successful but the Court generally supported the Commission argument that public disclosure of negotiating positions and discussions during a negotiation would compromise the EU's position and be contrary to its interests. The Court argued that even if a treaty negotiation could be assimilated to a legislative process, this does not preclude the application of the exception to transparency based on the public interest in the effective conduct of international relations. The Court also stated:

That the conduct of negotiations for the conclusion of an international agreement falls, in principle, within the domain of the executive ... and that those negotiations do not in any way prejudice the public debate that may develop once the international agreement is signed, in the context of the ratification procedure.⁸³

The 2010 inter-institutional agreement and these cases on Regulation 1049/2001 clarify somewhat the position of the Parliament in international negotiations but do not make it easy to have a full public debate on draft texts or on the EU's

⁷⁶ *Ibid.*, Annex 3, para. 5.

⁷⁷ Given that the former Inter-institutional Agreement of 2001 (OJ 2001 C 121/122) also contained provision for the Parliament to be kept informed during negotiations, it might also be said that that the Article 218(10) TFEU is a reflection of that practice.

⁷⁸ Article 15(3) TFEU; Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents OJ 2001 L 145/43; for the Commission's proposal to amend this Regulation see COM(2011) 137.

⁷⁹ Regulation 1049/2001, *ibid.*, Art. 4(1)(a).

⁸⁰ *Ibid.*, Art. 4(4).

⁸¹ *Ibid.*, Art. 9.

⁸² Case T-301/10 *In 't Veld v Commission* judgment 19 March 2013. In an earlier case T-529/09 *In 't Veld v. Council*, judgment 4 May 2012, concerning the negotiation of the EU-US 'SWIFT' agreement and brought under Regulation 1049/2001 on public access to documents, the General Court granted access to an opinion of the legal service except insofar as the opinion revealed the possible content of the proposed agreement or the negotiating mandate of the Council. The Council has appealed (C-350/12P).

⁸³ Case T-301/10, para. 181.

negotiating position. In any event, the efforts made by the Commission in 2010 and 2011 in the case of the ACTA did not convince the Parliament. In April 2012 David Martin, rapporteur to the Parliament's International Trade (INTA) Committee, recommended that the ACTA should not be accepted by the Parliament as it stands,⁸⁴ and the INTA committee – being the lead Parliamentary committee for this issue – voted in June 2012 to reject the agreement,⁸⁵ four other Parliamentary committees (industry,⁸⁶ civil liberties,⁸⁷ development⁸⁸ and legal affairs⁸⁹) having also recommended rejection. Despite suggestions from the Commission that the Parliament should wait for the Court's opinion (requested in May 2012) before voting definitively, the proposal to conclude the ACTA was rejected in a plenary vote on 4 July 2012.⁹⁰

Immediately after the vote, EU Trade Commissioner De Gucht, while accepting the Parliament's choice and welcoming the debate created by the ACTA, said that the Court's opinion was still important: 'European citizens have raised these concerns and now they have the right to receive answers. We must respect that right.' Once the Court's opinion has been given, he said, the Commission would consult with its international partners on how to move forward. However the INTA Committee rapporteur said that he did not understand the Commission's proposal to return to the Parliament after the Court has given its opinion: 'if you're against ACTA, there is no point waiting for the ruling, because no matter what the court says, your position doesn't change. ... No assurances the Commission could give to the Parliament would change a legal text'.⁹¹ Indeed, as already noted, in December 2012 the Commission withdrew its request for an opinion on the agreement. This is not the first time that the Parliament has refused its consent to an international agreement, but a plurilateral agreement such as ACTA is harder to re-negotiate than a bilateral agreement.⁹² In practice it appears that any possibility of the EU concluding the ACTA has disappeared, and with it, probably, any possibility of the ACTA coming into force.

⁸⁴ See *supra* note 49.

⁸⁵ Recommendation of the Committee on International Trade, EP doc. 2011/0167(NLE), PE 486.174v03-00, 22 June 2012.

⁸⁶ EP doc. PE483.518v02-00, 5 June 2012.

⁸⁷ EP doc. PE 480.574v02-00 4 June 2012.

⁸⁸ EP doc. PE478.666v03-00, 5 June 2012.

⁸⁹ The draft opinion of rapporteur for the legal affairs committee recommended acceptance (PE 487.684v01-00, JURI_PA(2012)487684, 10 April 2012) but the committee voted against approval: EP doc. PE487.684v02-00, 4 June 2012.

⁹⁰ See *supra* note 28.

⁹¹ Interview with David Martin, available at <<http://www.europarl.europa.eu/news/en/headlines/content/20120220FCS38611/>>.

⁹² In February 2010 the Parliament refused its consent to the EU-US Agreement on the transfer of financial messaging data (the so-called SWIFT Agreement); following re-negotiation a revised agreement was approved by the Parliament in July 2010; see further J. Monar, 'The Rejection of the EU-US SWIFT Interim Agreement by the European Parliament – A Historic Vote and its Implications', 15 *European Law Rev.* 2010, 143; M. Cremona, 'Justice and Home Affairs in a Globalised World: Ambitions and Reality in the tale of the EU-US SWIFT Agreement', *Austrian Academy of Sciences Institute for European Integration Research*, Working Paper 04/2011.

7. CONCLUSION

The EU seeks to ensure that its trade policy supports EU exporters of goods and services, and that internal regulatory policy does not put EU enterprises at a disadvantage on third country markets. These goals have led to an emphasis on extending the regulatory dimension of trade agreements, on regulatory cooperation, the promotion of existing international standards, and EU leadership in developing new international standards which are at least consistent with EU standards. The EU's involvement in the negotiation of the ACTA is an example of such leadership. The EU, identifying weaknesses in IPR enforcement as a major problem for EU exporters and IP rights-holders, was keen to get an agreement which would build upon the TRIPS. At the same time it saw the need to ensure that the concerns of developing countries, especially over patents and imports of generic medicines, were addressed (whether they have been adequately reflected in the final text is one of the issues still subject to debate). The EU was also keen to ensure that the agreement would follow as closely as possible existing EU legislation on enforcement, and would not interfere with accepted EU exceptions, although it did not see the need to ensure that EU 'best practice' was incorporated in the form of binding commitments in the agreement itself: both the EU and the US preferred an agreement which would give them flexibility to maintain their own existing approaches.

Despite the existence of potential external competence over the criminal enforcement provisions of ACTA, in the absence of internal EU criminal enforcement legislation it was decided to conclude ACTA as a mixed agreement. The EU finds it easier to exercise its external regulatory competence where it has already worked out a position at the internal level, and once that position has been worked out, it will have an incentive not to engage in international commitments which represent a significant departure from the policy balance achieved internally. Indeed the Parliament's INTA Committee rapporteur suggested that the Commission should bring forward new legislative proposals to meet the challenge of ensuring effective IPR protection and its balance with fundamental rights: an 'internal' regulatory approach as an alternative – or at least a precursor – to external action.⁹³

Despite efforts to ensure that ACTA not only complied with EU primary law but also would not require changes to the existing internal *acquis*, Parliament rejected the final outcome. The history of ACTA, with its many specificities, demonstrates some of the questions raised by the new generation of international agreements that are essentially legislative in character.

First, within the EU's internal decision-making mechanisms Parliamentary consent 'parallels', but is a blunt instrument compared to, the ordinary legislative procedure. In a consent procedure, with its 'take it or leave it' dynamic, and even where Parliament is kept informed, there is less scope for debate and adjustment or the accommodation of different interests; this has already taken place at the international level and is difficult to replicate within the EU.

⁹³ See *supra* note 49.

Second, although in some cases there will be room for internal debate at the implementation stage, ACTA was presented as establishing regulatory goals while permitting but not requiring adherence to good practice in terms of due process and fundamental rights. In such a context it is instructive that the dissent to ACTA within the EU was founded in part on its possible implications for non-EU jurisdictions as well as the risks of differential implementation within the EU and different understandings of what it requires. To what extent, if at all, should such regulatory treaties make explicit reference to international human rights standards?

Thirdly, ACTA raises the issue of promoting to third countries regulation (*in casu*, criminal enforcement) which has not been agreed internally within EU structures.⁹⁴ Conclusion as a mixed agreement might quieten concerns within the EU that an international treaty is being used as a basis for ‘competence creep’, but may not alter a perception that the EU is involved in designing regulation intended to apply to others and not itself.

Some of the issues raised here are structurally embedded in the EU’s external decision-making processes (the operation of the Parliamentary consent procedure); some offer an example of the challenges faced by the EU as an international negotiator balancing Union interest and internal constitutional dynamics; and some reflect the broader concern over the legitimacy of regulating through international treaty-making. Nicolaïdis, for example, in referring to the indirect legitimacy of global governance which may be provided by national democracy and domestic politics, reminds us also of the limits to this indirect form of legitimacy: ‘in the end ... it fails to capture the collective imagination of citizen and civil society actors who do not trust politicians to hold a monopoly over legitimate transnational deal-making’.⁹⁵ The EU’s external regulatory policy, even where exercised through its trade competence, needs to be shaped by broadly-based debate. Scholars may appreciate the complexity and – sometimes – the elegance of the EU’s brand of multi-level law-making which allows the EU and its Member States to retain involvement in regulatory choices. But for the EU, seeking to become a leader in the design of international regulation, the indirect legitimacy that may be derived from national democratic institutions is rendered even less intelligible to its citizens when refracted through the EU’s own multi-layered decision-making system.

⁹⁴ C.f. C-246/07 *Commission v. Sweden* [2010] ECR I-03317.

⁹⁵ K. Nicolaïdis, ‘Towards Responsible Interdependence’ in M. Poiars Maduro (ed.), ‘An EU Agenda for Global Governance’, *RSCAS Policy Papers* 2011/01.

REGULATORY COOPERATION IN TRANSATLANTIC TRADE RELATIONS

Tamara Takács

1. INTRODUCTION

Regulatory differences have long been at the heart of and impacted EU-US economic relations. On various occasions since the early 2000 they even cumulated in full-fledged litigation before the World Trade Organization's dispute settlement forums.¹ Amongst those differences that led to formal WTO litigation, the Dispute Settlement Body ('DSB') authorised the US to impose trade sanctions to retaliate against the ban that the EU – for the health of its citizens – had introduced in 1988 on imports of beef treated with certain growth-promoting hormones. The more recent GMO dispute has still to date not been resolved, despite the WTO panel's finding in 2006 that the stringent EU measures had not been based on risk assessments satisfying the definition of the SPS Agreement and hence could be presumed to be maintained without sufficient scientific evidence. While the EU and the US take pride in the fact that only 2% of their trade is involved with actual litigation in Geneva, the clashes stemming from trade irritants have strained their trade relations, brought up seemingly irreconcilable differences, and their respective retaliations have been viewed as 'mini trade wars'.²

Disputes emerging from such regulatory differences characterised as non-tariff barriers to trade can be regarded as 'new-style disputes' as they go beyond 'classical' trade confrontations stemming from tariffs, subsidies and dumping and involve domestic laws adopted for legitimate purposes after democratic deliberation.³ These disputes are especially hard to resolve, because they involve wider issues of political concern or public interest, unlike traditional protectionist trade measures.⁴ Indeed, barriers resulting from regulatory policies have long been recognised as the 'most significant impediment' to trade and investment between the EU and the US.⁵

¹ Dispute DS26 European Communities – Measures Concerning Meat and Meat Products (Hormones); Dispute DS291 European Communities – Measures Affecting the Approval and Marketing of Biotech Products; Dispute DS389 European Communities – Certain Measures Affecting Poultry Meat and Poultry Meat Products from the United States.

² F. Breuss, 'Economic integration, EU-US trade conflicts and WTO Dispute settlement', 9 *European Integration Online Papers* (2005), at p. 2, available at <<http://eiop.or.at/eiop/pdf/2005-012.pdf>>.

³ M. D. C. Johnson, 'US-EU trade disputes: their causes resolution and prevention', European University Institute (2001), at p. 4, available at <<http://www.eui.eu/RSCAS/Research/Transatlantic/Johnson.pdf>>.

⁴ *Ibid.*

⁵ European Commission, 'EU-USA Regulatory Cooperation', available at <<http://ec.europa.eu/enterprise/policies/international/cooperating-governments/usa/regulatory-cooperation/>>.

Regulatory cooperation is ‘an umbrella concept that incorporates a broad range of activities. At the end of the spectrum are information exchanges and dialogues among regulators that are designed to build trust and confidence. At the other end of the spectrum are activities designed to harmonise regulatory approaches through acceptance of common principles and standards. In between are activities that involve varying degrees of intrusion into the autonomy of regulators.’⁶ Regulatory cooperation is aimed at divergent ways of regulating markets for both goods and services. The most serious barriers can take the form of redundant standards, testing, and certification procedures, requiring re-labelling, re-packaging or re-testing of products or services and creating additional costs associated with complying with two different sets of regulations and standards. While the purpose of many regulations is to protect consumers and the environment, divergent domestic regulations and standards can affect the competitive position of firms as well as many economic activities and sectors.

The transatlantic economy is regarded as the world’s most integrated economic relationship due to the remarkable extent of mutual investment relations, their economies account together for about half the entire world GDP and for nearly a third of world trade flows.⁷ Despite such high rate of integration within the transatlantic market, differences in regulatory approaches, standards, and philosophies have been identified to militate against the development of an even tighter and more integrated marketplace. Efforts aiming at the reduction of such regulatory differences have been at the centre of transatlantic economic cooperation, and addressed by various means and dialogues resulting in varying success. Creating stronger convergence in regulation is more actual and opportune than ever now that the economic crisis and its negative impact on both sides of the Atlantic directed focus on maximising bilateral trade (and investment) to spur growth and create jobs. Serious efforts have been exerted on both sides of the Atlantic to expand market access and trade liberalisation with respective bilateral and regional trade partners.⁸ Most recently, creating regulatory coherence and cooperation negotiations have been referred to as the ‘crown jewel’ of the Transatlantic Trade and Investment Partnership (‘TTIP’) negotiations.⁹ In addition, the EU’s Trade Policy Strategy 2020 incorporates as an explicit objective the intensification of relations with its most important trade partners (such as the US) for market access that goes beyond elimination of (already low) tariffs and regulatory convergence through mutual

⁶ R. J. Ahearn, ‘Transatlantic regulatory cooperation: background and analysis’, *CRS Report RL34717*, (24 August 2009), at p. 2, available at <<http://fpc.state.gov/documents/organization/64460.pdf>>.

⁷ European Commission, ‘Countries and Regions – United States’, available at <<http://ec.europa.eu/trade/policy/countries-and-regions/countries/united-states/>>.

⁸ See the ongoing Trans-Pacific Partnership negotiations (US) and for the status of the various negotiations by the EU, the European Commission Memo on ‘The EU’s bilateral trade and investment agreements – where are we?’ 1 August 2013, available at <http://trade.ec.europa.eu/doclib/docs/2012/november/tradoc_150129.pdf>. See further F. Hoffmeister in this volume.

⁹ See interview with João Vale de Almeida, Head of the EU Delegation to the United States, on TTIP, 7 September 2013, available at <<http://cepa.org/content/insider-view-head-delegation-eu-united-states-ambassador-jo%C3%A3o-vale-de-almeida>>.

recognition, harmonisation, equivalence and introduction of international standards.¹⁰

2. BRIDGING REGULATORY GAPS IN TRANSATLANTIC TRADE RELATIONS: WHY SO DIFFICULT? WHY SO IMPORTANT?

When one looks at the long-lasting trade disputes that ended up before the WTO dispute settlement forums, and the fact that none of them have resulted in actual compliance with the WTO rulebook (the Beef hormones case was solved by a trade liberalising compromise,¹¹ and the GMO dispute has still not received satisfactory resolution) it is apparent that the WTO dispute resolution system does not achieve regulatory convergence in every case, and bilateral regulatory policy coordination can thus be a useful mechanism to resolve such differences. These bilateral disputes involve clashes between domestic priorities, larger societal values and public preferences and interests favouring domestic regulation in the absence of international standards, which render dispute resolution all the more difficult.¹² Apart from clashes in public opinion, regulatory divergence can also stem from lack of coordination between regulators following existing legislation, which can at times be hard to change. At the centre of a highly politicised regulatory policy (which has resulted in trade clashes relating to agricultural products such as the Beef Hormones and the GMO disputes, the ongoing Poultry dispute and the recently arisen ractophamine-fed pork spat), is the US approach, a relatively science-based system of risk management adopting regulation only in case of identified risk — in contrast to the EU's precautionary principle,¹³ allowing for regulation before a danger has scientifically been proved to exist but where there are reasonable grounds for concern as to the risk of harm. While EU regulators prefer a precautionary approach leading to more stringent risk regulation, US officials tend to engage in science-based, cost-benefit analysis strategies that are widely supported by farmers and industries.¹⁴ As a result, the 'sensitive political bal-

¹⁰ 'Trade, growth and world affairs – Trade policy as a core component in the EU's 2020 Strategy', COM (2010) 612, available at <http://trade.ec.europa.eu/doclib/docs/2010/november/tradoc_146955.pdf>.

¹¹ 'USTR Announces Agreement with European Union in Beef Hormones dispute', available at <<http://www.ustr.gov/about-us/press-office/press-releases/2009/may/ustr-announces-agreement-european-union-beef-hormones->>.

¹² R. J. Ahearn, 'U.S. – European Union Trade Relations: Issues and Policy Challenges', *CRS Report*, (17 March, 2006), available at <<http://fpc.state.gov/documents/organization/64460.pdf>>.

¹³ The precautionary principle is to be relied upon when 'scientific information is insufficient, inconclusive, or uncertain and where there are indications that the possible effects on the environment, or human, animal or plant health may be potentially dangerous and inconsistent with the chosen level of protection.' See 'Communication from the Commission on the Precautionary principle', COM(2000) 1 final.

¹⁴ D. Vogel, *The Politics of Precaution: Regulating Health, Safety, and Environmental Risks in Europe and the United States* (Princeton: Princeton University Press, 2012), cited by S. I. Akhtar and V.C. Jones 'Proposed Transatlantic Trade and Investment Partnership (TTIP): In brief', 23 July 2013, *Congressional Research Service*, (23 July 2013), at p.7, available at <<http://www.fas.org/srg/crs/row/R43158.pdf>>.

ance' between legitimate public policy choices and regulatory autonomy on the one hand and on the other market access prescribed by trade liberalisation has on multiple occasions strained transatlantic economic relations.¹⁵

The rationale of regulatory cooperation therefore, would be to minimise divergences, or achieve mutual acceptance of divergences and reduce necessary regulatory burdens so as to facilitate trade and minimise trade frictions, while respecting the regulatory autonomy of each party. While the trade disputes already mentioned are often politically-charged their significant economic impact on exporters has been noted, and studies have found that eliminating NTBs would not only imply a reduction of costs for business but would also lead to an overall increase in GDP, the volume of exports and the national income. A study commissioned by the EU in 2009 indicated that eliminating even half of the non-tariff barriers to trade caused by regulatory divergences could increase transatlantic GDP by half a per cent, or by \$150 billion.¹⁶ A more recent economic impact assessment report noted that reducing non-tariff barriers is a crucial driver of the negotiations toward a comprehensive TTIP, and could amount to as much as 80% of the total potential gains of such a trade and investment deal.¹⁷ Thus regulatory issues going beyond classical market access liberalisation in the form of abolishing duties, carry the highest potential benefit in the trade negotiations. Beyond the impact of NTB elimination on the respective trade partners, i.e., the EU and the US, regulatory convergence in the form of harmonised standards and norms would help the transatlantic axis appear as a 'common normative power *vis-à-vis* third countries, in particular China'¹⁸ and other rising economic powers, and would contribute to the improvement of the multilateral trade system.

Domestically, in the US, an additional (political) pressure was exerted by the reconstituted Administrative Conference of the United States (ACUS), which in December 2011 adopted a new recommendation on international regulatory cooperation (Recommendation 2011-6),¹⁹ updating its 1991 recommendation on this subject, on the general premise that the predicates for international regulatory cooperation have only grown more robust and complex over the past 20 years. Among other things, the new ACUS recommendation encourages the executive office of the President to 'consider creating a high-level interagency working group of agency heads and other senior officials to provide

¹⁵ See M.A Pollack, 'The Political Economy of Transatlantic Trade Disputes', in E.-U. Petersmann and M.A. Pollack (eds.) *Transatlantic Economic Disputes, The EU, the US and the WTO* (Oxford: OUP, 2003) pp. 65-118.

¹⁶ 'Non-tariff measures in EU-US trade and investment – An economic analysis', Final report by ECORYS, (11 December 2009), available at <http://trade.ec.europa.eu/doclib/docs/2009/december/tradoc_145614.pdf>.

¹⁷ European Commission, 'Transatlantic trade and investment – the economic assessment explained', (September 2013), available at <http://trade.ec.europa.eu/doclib/docs/2013/september/tradoc_151787.pdf>.

¹⁸ European Council of Foreign Relations, 'European Foreign Policy Scorecard 2010/2011', available at <<http://www.ecfr.eu/scorecard/2010/usa/30>>.

¹⁹ Administrative Conference Recommendation 2011-6, 'International Regulatory Cooperation' adopted 8 December 2011, available at <<http://www.acus.gov/sites/default/files/documents/Recommendation%202011-6%20%28International%20Regulatory%20Cooperation%29.pdf>>.

government-wide leadership on, and to evaluate and promote, international regulatory cooperation.’ As a result, in May 2012, President Obama issued a new executive order endorsing much of the contents of Recommendation 2011-6, and its goal of regulatory harmonisation (especially to promote trade and competitiveness) consistent with federal agencies’ domestic missions (especially to protect health, safety, and the environment) with the ultimate aim ‘to reduce, eliminate, or prevent unnecessary differences in regulatory requirements’.²⁰

Regulatory cooperation has also been noted as the ‘most important element’ in the negotiations for a comprehensive TTIP, based on the preparatory work of the High Level Working Group on Growth and Jobs, launched in June 2013 and constituting the biggest trade and investment talks ever undertaken. However, already in 2012 at the Davos World Economic Forum the former EU Trade Commissioner Peter Mandelson noted that the EU-US deal ‘would have to focus not on tariffs but on very many non-tariff barriers, technical specifications, differences in regulation. They are the hardest things to agree and those two negotiating partners are the hardest to find an agreement’.²¹ The difficulty of striking a compromise over the stronghold of existing legislation in the most sensitive areas is witnessed by comments such as that of the current EU Trade Commissioner Karel De Gucht, who noted in relation to regulation in agriculture: ‘A future deal will not change the existing legislation. Let me repeat: no change.’²² In these circumstances, accompanied by added pressure from business organisations toward the removal of market distorting elements, tackling regulatory differences will shape the manner in which the EU and US carry on transatlantic economic relations.

As will be shown in this paper, efforts aimed at creating regulatory convergence are not new agenda points in EU-US economic relations. Attempts and ambitions directed at this object date back to the mid 1990s and since then have featured in discussions among regulators at the executive level,²³ in declarations, action points and agreements. While the instruments so far have been without legally binding character, the Court of Justice clarified (in relation to the Guidelines for Regulatory Cooperation and Transparency from 2002 – see section 3.2) that negotiations and adoption of instruments of regulatory cooperation between the EU and the US have to respect underlying principles of division of powers and institutional balance, as determined for common commercial policy, and be supported by the adequate legal basis for compe-

²⁰ The White House President Barack Obama, Executive order ‘Promoting International Regulatory Cooperation’, available at <<http://www.whitehouse.gov/the-press-office/2012/05/01/executive-order-promoting-international-regulatory-cooperation>>.

²¹ T. Vogel, ‘Crisis leads to push for transatlantic trade’, *European Voice* (6 May 2012).

²² D. Butler and D. Melvin, ‘New EU-US talks threatened by agriculture spat’, 23 March 2013, available at <<http://bigstory.ap.org/article/agriculture-disputes-threaten-new-us-eu-talks>>.

²³ The governance-side of transatlantic regulatory cooperation, including a lengthier overview of forums of dialogue and stakeholder participation is discussed in an extended version of this paper in T. Takács, ‘Transatlantic regulatory cooperation in trade: objectives, challenges and instruments of economic governance’, in D. Curtin and E. Fahey (eds), *A Transatlantic Community of Law: Legal Perspectives on the Relationship between the EU and US legal orders* (Cambridge University Press, forthcoming).

tence to negotiate and adoption.²⁴ Currently, working towards regulatory cooperation between the EU and US constitutes the most important cornerstone of the ongoing TTIP negotiations.

The paper gives an overview of the efforts aimed at creating compatible regulatory requirements or comparable policy responses by the EU and US as trading partners (3); discusses the role and status of regulatory cooperation in the ongoing TTIP negotiations so far (4); and outlines options and their implications so as to bridge regulatory differences (5).

3. OVERVIEW OF METHODS AND EXTENT OF TRANSATLANTIC REGULATORY COOPERATION

As has been noted, regulatory cooperation can take various forms and expand from mutual recognition to using common data sets, dialogues, information sharing, recognising common testing procedures, common labelling or product information, joint compliance and enforcement, referencing and developing common standards, joint regulatory development plans, and harmonisation. These methods allow for a differing extent of engagement between regulators, and a varying level of interference in domestic regulatory autonomy so as to remove existing, and prevent new market access diverting elements. In light of the remarkable volume of transatlantic trade and its economic significance for both parties, a number of initiatives have been developed representing various forms of regulatory cooperation.

3.1 Early initiatives

Transatlantic initiatives in trade and economic issues began in the 1980's with declarations of good intent that led to the Transatlantic Declaration in 1990.²⁵ The initial impetus for a transatlantic dialogue on regulatory standards was the intensive domestic harmonisation process that the establishment of the EU's Internal Market entailed, and the concomitant concerns of US exporters as regards anticipated market access impediments and competitive disadvantages in the face of aligned EU standards.²⁶ The subsequent *New Transatlantic Agenda* (NTA) (1995) aimed to reinvigorate and upgrade the bilateral relationship, foster transatlantic bilateral economic relations in the form of a *New Transatlantic Marketplace* and work towards the expansion of world trade, albeit without specific commitments and deadlines and thus with no political or legal force. Part of the NTA, a joint declaration adopted at the 1995 Madrid

²⁴ ECJ, Case C-233/02 *France v Commission* [2004] ECR I-2759 para. 40.

²⁵ The Transatlantic Declaration of 22 November 1990 states that the European Community and the United States 'will inform and consult each other on important matters of common interest, both political and economic, with a view to bringing their position as close as possible, without prejudice to their respective independence' Bulletin of the European Communities, 23 (11), point 1.5.3 (1990) Official title: Declaration on Relations between the European Economic Community and the United States.

²⁶ R. J. Ahearn, *supra* note 12, at p. 5.

Summit, added political support for strengthened regulatory cooperation, in particular by encouraging regulatory agencies to give high priority to cooperation with their respective transatlantic counterparts, so as to address technical and non-tariff barriers to trade resulting from divergent regulatory processes, and by conclusion of mutual recognition of conformity assessment (including certification and testing procedures) for certain sectors as soon as possible.²⁷

The *Transatlantic Economic Partnership* (TEP) was agreed in 1998 with the aim of furthering bilateral economic and trade relations. The TEP included a call for action to address technical barriers to trade in goods,²⁸ including an 'ambitious programme of regulatory cooperation designed to reconcile, if not eliminate, regulatory barriers to trade',²⁹ and cooperation among regulators to intensify economic ties and approach trade irritants, alongside the traditional process of trade negotiations and dispute resolution.³⁰

3.2 Consultation, dialogue and 'early warning' mechanisms between regulators

Following the EU-US Summit in Bonn in 1999 a *Joint Statement on Early Warning and Problem Prevention Mechanism* was adopted. This framework included an early warning system so as to help avoid non-tariff barriers to trade by identifying regulations that might result in a trade irritant, preferably at an early stage of the regulation drafting process. However, the subsequent emergence of disputes indicates that this coordination was insufficient to prevent trade irritants and rows. This was apparent with the instigation of the GMO dispute at the WTO in 2006, as biotechnology was exactly one of the areas where structured dialogue among regulators had been initiated already in 2000, within the Consultative forum on Biotechnology, with the aim of gradual convergence of regulatory standards and prevention of trade disputes.

Consecutive consultation-oriented initiatives still lacked actual political commitment, set deadlines, and binding goals. Adopted at the 2002 EU-US Summit, the *Guidelines for Regulatory Cooperation and Transparency* encouraged dialogue between EU and US regulators and agencies in government-to-government consultations on a voluntary basis in the form of regular consultation, exchange of data and information, as well informing one another at an early stage on planned new regulation, so as to enhance cooperation between regulators. In the absence of legal binding force, the primary function of the Guidelines is to 'enshrine political commitment to dialogue between EU and US

²⁷ EC Delegation to the US, New Transatlantic Agenda, 3 December 1995, EC-US Summit, Madrid.

²⁸ European Commission, DG Enterprise and Industry – International Affairs, 'EU-US Regulatory Cooperation', available at < http://ec.europa.eu/enterprise/policies/international/cooperating-governments/usa/regulatory-cooperation/index_en.htm>.

²⁹ M. Pollack, 'The New Transatlantic Agenda at Ten: Reflections on an Experiment in International Governance', 43(5) *JCMS* 2005, pp. 899-919 at p. 907.

³⁰ See G. Shaffer and M. Pollack, 'The Future of Transatlantic Economic Relations: Continuity Amid Discord', in D. Andrews *et al.* (eds.), *The Future of Transatlantic Economic Relations: Continuity Amid Discord*, (EUI – RSCAS 2005 this is the date in the website), pp. 3-9.

regulators', though so far 'little effort has been made to implement them'.³¹ Despite the regulatory cooperation commitments and especially the mutually accepted early warning system, legislations introduced unilaterally by both the EU and the US creating further divergence. The EU adopted the REACH Directive³² without meaningful dialogue with US stakeholders (despite the obvious impact the legislation has for the testing and approval of chemicals) and the US adopted the Sarbanes-Oxley Act on the reform of public accounting standards 'without taking into account EU views'.³³ Both these regulatory actions created an important barrier to commerce. In addition it has been noted that, in parallel with the initiatives directed at regulatory cooperation, European standards have become more stringent and comprehensive than US standards. The standards for the approval and labelling of genetically modified foods and seeds, for example, are far more stringent than in the US, and the REACH Directive made the European standards for the approval of existing and new chemical much more demanding than in the US. Another important and recent example is the EU legislation to impose restrictions on greenhouse gas emissions announced in 2008, and to levy emission-charges on all flights in or out of EU airports. This move has opened a highly contentious chapter in EU-US relations.³⁴

3.3 Mutual recognition agreements (MRAs)

Going beyond regulatory dialogue and consultation, mutual recognition agreements are methods of regulatory cooperation and can entail either the recognition of conformity assessment certification (certification tests) or the mutual recognition of relevant standards. Recognition of conformity assessment certification does not involve harmonisation and aligning of substantive standards, but is limited only to the recognition of each other's testing and certification of production processes, so that the product needs only be tested once. This was exactly the scope of the MRA from 1998 between the EU and US, which was

³¹ A. Meuwese, 'EU-US horizontal regulatory cooperation: Mutual recognition of impact assessment', in D. Vogel and J. Swinnen (eds.) *Transatlantic regulatory cooperation: the shifting roles of the EU, the US and California* (Cheltenham: Edward Elgar Publishing, 2011) pp. 249-264, at p.255.

³² Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, *OJ* [2006] L 396, 30.12.2006.

³³ R. J. Ahearn, *supra* 12, at p. 19.

³⁴ Although the EU offered to make concessions, in the form of suspending the application of the measure for a year, President Obama signed a bill in November 2012 shielding US airlines from complying with the EU's emission system in the aviation sector. See 'Obama shields US airlines from EU's carbon scheme', *EurActiv* (28 November 2012), available at <<http://www.euractiv.com/transport/obama-shields-us-airlines-eu-car-news-516299>>. For more information on the worldwide reception – including by the US – see S. Huber, 'The EU, international aviation and climate change – a case study for the EU as a global role model?', in W. Douma and S. van der Velde, *EU environmental norms and third countries: the EU as a global role model?* 5 *CLEER Working Papers* (2013), pp. 83-93 available at <http://www.asser.nl/Default.aspx?site_id=26&level1=14467&level2=14468>.

called for by the NTA and the regulatory cooperation ambitions laid down therein. The MRA entailed *recognition of the results* of conformity assessment procedures by identified certification bodies in the exporting country that could assess the conformity of goods in these sectors with standards in the destination country. However, the limited impact of these MRAs shows in the complete lack of legally binding, enforceable effect, and their limited scope in terms of sectoral coverage. The Annexes to this agreement covered six sectors (telecommunications and ICT equipment, pharmaceuticals, electronics, electromagnetic compatibility, sport boats and medical devices), and the regulators of each party are required by the conformity assessment procedures to accept the competence of the other party to conduct product testing, inspection and certification. While this form of mutual recognition as a method of regulatory cooperation can be of considerable significance for market access and is relatively easy to implement as – in contrast to recognition of standards – it does not concern the substance of regulation,³⁵ the implementation of these MRAs have proved problematic in a few sectors. Some of the independent US regulatory agencies were slow to implement recognition processes (for example the Food and Drug Administration Agency (FDA) and Occupational Safety and Health Administration (OSHA) towards European laboratories' certification of pharmaceuticals, medical devices and electrical safety standards.³⁶ As a result, 'tensions grew when the USA failed to implement the agreement with respect to three of the sectors which were initially of greatest interest to the EU (electrical safety, medical devices and pharmaceutical good manufacturing practices)'.³⁷

While they can be useful tools of regulatory cooperation, the MRAs adopted in these sectors stated that they are not to be construed as entailing mutual acceptance of standards or the technical regulations of the parties, only the recognition of conformity assessment procedures. The MRAs also contain a provision on the preservation of regulatory autonomy stating that 'nothing [in this Agreement] shall be construed to limit the authority of a Party to determine, through its legislative, regulatory and administrative measures, the level of protection it considers appropriate for the relevant public policy area'. Among the adopted MRAs, one finds safeguard clauses (see Pharmaceutical Good Manufacturing Practices Article 21, 1998 MRA) or Transitional periods (Medical device Art. 5.), during which the parties engage in confidence-building activities for the purpose of obtaining sufficient evidence to make determinations concerning the equivalence of Conformity Assessment Bodies of the other party (joint confidence building programme).

The *MRA for Marine equipment* (adopted in 2004) went further than the 1998 MRA by providing mutual recognition of certificates of conformity for marine

³⁵ R. von Borries, 'Transatlantic regulatory initiatives in Europe', in: G. A. Bermann *et al.* (eds.), *Transatlantic Regulatory Cooperation Legal Problems and Political Prospects* (Oxford: OUP, 2000) pp. 451-465. at p. 460.

³⁶ M. Pollack, *supra* note 29, at p. 909.

³⁷ G. Shaffer: *Managing EU-US Trade Relations through Mutual recognition and safe harbour agreements: 'New' and 'Global' Approaches to Transatlantic Governance?* In E.-U. Petersmann and M.A. Pollack (eds.) *Transatlantic Economic Disputes, The EU, the US and the WTO* (Oxford: OUP, 2003) pp.297-325, at p. 303.

equipment, and at the same time promoting global harmonisation of technical requirements in the framework of international agreements and organisations in which both the EU and the US participated. Under the terms of this MRA, designated products which comply with EU requirements would be accepted for sale in the US without any additional testing or certification and *vice versa*, and the parties' procedures are regarded as 'equivalent' for the purposes of assessment conducted by conformity assessment bodies in either country (Articles 3 and 4), where equivalence rests on the parties' legislation being aligned with certain International Maritime Organisation Conventions.³⁸ In 2011, a US-EU Bilateral Air Safety Agreement on the regulation of civilian aviation safety entered into force, which 'allows for reciprocal acceptance of findings of compliance and approvals issued by each other's relevant authorities'.³⁹ Most recently, in 2012, two mutual recognition agreements were adopted between EU and US regulators with both sides holding high expectations as to their impact in reducing barriers to trade. The *EU and US Organic Trade partnership and equivalence arrangement* established mutual recognition of conformity assessment for organic products, eliminating the need to obtain separate certifications with reference to two standards and thus lowering red tape and related costs.⁴⁰ Through this arrangement, the EU and USA agreed on a mutual recognition of their respective Organic Standards legislation, the EU Regulation 834/2007 and the Organic Foods Production Act. The '*Trusted traders*' MRA authorised economic operators, whose certification will now be recognised by both parties thereby allowing these companies to benefit from faster controls and reduced administration for customs clearance. Under this agreement the EU and the US recognise each other's security-certified operators. Authorised economic operators in the EU will receive benefits when exporting to the US market, and the EU will reciprocate for certified members of the US Customs-Trade Partnership against terrorism (C-TPAT).⁴¹

3.4 Horizontal regulatory initiatives for alignment of regulatory approaches, methods

Another form of cooperation so as to establish regulatory compatibility lies in horizontal, methodological initiatives focusing on the *how* of regulation and seeking convergence between regulatory actions. At the June 2005 EU-US Summit, the United States and European Commission issued the *Roadmap for EU-US Regulatory Cooperation and Transparency* to provide a framework for cooperation on a broad range of important horizontal (and sector-specific)

³⁸ *Ibid.*, at p. 306. (Shaffer notes the pre-existing harmonisation of standards in this sector under the International Maritime Organization, which allowed for mutual recognition of 'equivalence' of each other's standards).

³⁹ S. I. Akhtar and V. C. Jones, *supra* note 14, at p. 7.

⁴⁰ Formal letters creating this partnership were signed on 15 February 2012, available at <<http://www.fas.usda.gov/organictrade/Agreement.pdf>>.

⁴¹ European Commission Press Release, 'Customs: EU and USA agree to recognise each other's "trusted traders"', available at <http://europa.eu/rapid/press-release_IP-12-449_en.htm>.

areas.⁴² Under this ongoing multi-year initiative, US and European authorities aim to build effective mechanisms to promote better quality regulation and minimise unnecessary regulatory divergences so as to facilitate transatlantic trade and investment and increase consumer confidence in the transatlantic market. This Roadmap set a framework for specific regulatory activities in 15 sectors.⁴³ Regulatory cooperation featured as the main objective of transatlantic co-operation in the *Communication on A Stronger EU-US Partnership and a More Open Market for the 21st Century* in 2005, suggesting a reinforced approach to regulatory policy cooperation.⁴⁴ In the same year, the *EU-US Declaration 'Initiative to Enhance Transatlantic Economic Integration and Growth'* promoted regulatory cooperation and standards by identifying cooperation and coordination mechanisms in order to improve regulatory quality and reduce divergences; exchanges of experience and the sharing of knowledge are encouraged through a high-level dialogue in accordance with the roadmap for EU-US regulatory cooperation.⁴⁵ Formal dialogue on horizontal regulatory issues is conducted in the frame of the *High Level Regulatory Cooperation Forum*, set up by the EU-US summit in 2005, bringing together senior officials of both parties from all areas of the government to discuss regulatory policy matters of mutual interest. The Forum is co-chaired by the Director-General of the Directorate General for Enterprise and Industry on the EU side and the Administrator of the Office of Information and Regulatory Affairs in the Office of Management and Budget on the US side. The Forum 'lends senior-level support and visibility to the concrete activities of informal dialogue'⁴⁶ and as a more institutionalised dialogue on good regulatory practices aims to improve the quality of regulation on both sides, through sharing best practices such as risk and impact assessments, and techniques designed to reduce the costs to business and consumers arising from unnecessary differences in regulatory requirements. The *EU-US Regulatory Cooperation Best Cooperative Practices* in 2006 distilled a set of suggested best practices to complement the EU-US

⁴² Office of the US Trade Representative, '2005 Roadmap for EU-U.S. Regulatory Cooperation and Transparency' available at <http://www.ustr.gov/archive/World_Regions/Europe_Middle_East/Europe/US_EU_Regulatory_Cooperation/2005_Roadmap_for_EU-US_Regulatory_Cooperation_Transparency.html>.

⁴³ Pharmaceuticals, automobile safety, ICT standards in regulations, Cosmetics, consumer product safety, unfair commercial practices, nutritional labelling, food safety, marine equipment, eco-design, chemicals, energy efficiency, telecommunications and radio communications equipment, electromagnetic compatibility, medical devices.

⁴⁴ Commission's Communication on 'A Stronger EU-US Partnership and a More Open Market for the 21st Century', available at <http://trade.ec.europa.eu/doclib/docs/2005/may/tradoc_123438.pdf>.

⁴⁵ EU-US Declaration 'Initiative to enhance Transatlantic Economic Integration and Growth', 20 June 2005, available at <<http://www.europarl.europa.eu/document/activities/cont/201004/20100427ATT73625/20100427ATT73625EN.pdf>>.

⁴⁶ A. Meuwese, 'EU-US horizontal regulatory cooperation: Mutual recognition of impact assessment' in D. Vogel and J. Swinnen (eds.), *Transatlantic regulatory cooperation: the shifting roles of the EU, the US and California* (Cheltenham: Edward Elgar Publishing, 2011) pp. 249-264 at p. 256.

Guidelines for Regulatory Cooperation and Transparency as a guide for regulators to use in cooperative approaches or informally.⁴⁷

Morall points out that ‘a review of the regular progress reports on the roadmap sectors [*Roadmap for EU-US Regulatory Cooperation and Transparency*] issued between 2005 and 2008 finds the reports mostly speaking in terms of the “enhanced” dialogue, “expanded” information exchanges and “deepening” collaboration. By 2008, despite monthly meetings held by the Office of the U.S. Trade Representative with the regulatory agencies with roadmap responsibilities, there was little to showcase, except in the financial and securities sectors, and both sides stopped reporting on progress on the roadmaps. Emphasis shifted back again to methodological and horizontal issues such as risk assessment, regulatory impact analysis, voluntary standards, and early warnings of new regulations.’⁴⁸

Another commentator notes that despite the fact that ‘initiatives to removing or reducing transatlantic regulatory barriers to trade since the NTA have made some progress towards reducing regulatory burdens, many U.S. and European companies heavily engaged in the transatlantic marketplace maintain that the results have not been materially significant’.⁴⁹ It is apparent from the infamous disputes before the WTO panels that the most controversial regulatory differences emanate from ‘diverging regulatory philosophies’, different risk-assessment systems, public policy considerations, regulatory approaches and make it difficult or seemingly impossible to establish harmonisation or mutual recognition of standards without complex legislative changes (for example in consumer protection, health and food standards).⁵⁰

The *Common Understanding on Regulatory Principles and Best Practices*,⁵¹ drafted by the High Level Regulatory Cooperation Forum in 2010, reaffirmed the shared joint commitment to regulatory principles of evidence-based policy-making, transparency and openness, analysis of relevant alternatives; monitoring and evaluation of the effectiveness of existing regulatory measures; and use of approaches that minimise burden and aim for simplicity. However, the document indicates that these regulatory principles are not binding on the regulators, and are to be considered only as much as the applicable laws in each jurisdiction allow. Furthermore, for the EU, they serve as ‘an aid to better lawmaking’ and do not bind the EU institutions.

⁴⁷ ‘EU-US Regulatory Cooperation-Best Cooperative Practices’, available at <http://trade.ec.europa.eu/doclib/docs/2006/july/tradoc_129223.pdf>.

⁴⁸ J. Morall III, ‘Determining compatible regulatory regimes between the U.S. and the EU’, US Chamber of Commerce, *Advancing Transatlantic Business*, at p. 39.

⁴⁹ R. J. Ahearn, ‘Transatlantic Regulatory Cooperation: Background and Analysis’ *Congressional Research Service*, RL34717, (August 24, 2009), at p.1.

⁵⁰ S. Mildner and O. Ziegler, ‘A Long and Thorny Road, Regulatory Cooperation under the Framework for Advancing Transatlantic Economic Integration’, *Intereconomics* (2009), pp. 49-58 at p. 49.

⁵¹ US-EU Commission, ‘High-Level Regulatory Cooperation Forum-Common Understanding on Regulatory Principles and Best Practices’, available at <<http://www.whitehouse.gov/sites/default/files/omb/oira/irc/common-understanding-on-regulatory-principles-and-best-practices.pdf>>.

As we have seen, numerous political declarations have called for regulatory convergence and harmonisation, but enacting changes into laws that would encourage the convergence of regulatory approaches have been extremely limited. Stakeholders have criticised such slow progress, and the US Chamber of Commerce raised the idea of a binding Agreement on Regulatory Cooperation that would oblige regulators on both sides to operate under a common set of regulatory principles and assess the cost impact of forthcoming regulations on transatlantic commerce, adopt each other's best practices and utilise similar methodologies to assess the costs and benefits of proposed regulations.⁵²

3.5 Sector specific approaches, initiatives and achievements

While the previously described general methodological cooperative efforts on principles and guidelines (such as transparency, openness, etc.) have a horizontal scope, actual regulatory initiatives in the bilateral regulatory talks have focused on a sectoral, case-by-case approach. As has been noted, quite a few of the initiatives contain suggestions for sector-specific cooperation between regulators. To provide impetus and boost regulatory cooperation, the *Framework for Advancing Transatlantic Economic Integration* agreed between the EU and the US in 2007 was aimed at 'achieving more effective, systematic and transparent regulatory cooperation', and at reinforcing the existing structures of transatlantic dialogue by intensifying sector-by-sector regulatory cooperation in a defined set of areas, as well as 'lighthouse projects', and dialogue on methodological issues.⁵³ The 2007 EU-US Summit launched the *Transatlantic Economic Council (TEC)*⁵⁴ a political body, with the purpose of guiding and stimulating the work on transatlantic economic convergence so as to strengthen EU-US economic integration. It brings together those Members of the European Commission and US Cabinet Members who carry the political responsibility for the policy areas covered by the *Framework for Advancing Transatlantic Economic Integration*. In a government-to-government cooperation, the TEC was expected to have the kind of high-level political support that previous efforts at economic integration may have lacked and which is 'is perceived as necessary to persuade domestic regulators to yield some of their authorities or to better cooperate with their counterparts across the Atlantic in the harmonising regulatory approaches'.⁵⁵ However, both in its efforts to resolve a number of longstanding bilateral trade disputes and prevent new ones, as well as in its efforts to harmonise regulation on a sector-by-sector basis, the TEC's mission proved difficult due to political and bureaucratic resistance on both sides to the revision of existing laws and regulations.⁵⁶

⁵² R.J. Ahearn, *supra* note 12 at p. 12.

⁵³ 'Framework for Advancing Transatlantic Economic Integration between the EU and the US', available at <http://ec.europa.eu/enterprise/policies/international/files/tec_framework_en.pdf>.

⁵⁴ Co-chaired by the White House Deputy National Special Advisor for International Economic Affairs, and European Commissioner for Trade.

⁵⁵ R. J. Ahearn, *supra* note 12 at p.18.

⁵⁶ *Ibid.*, at p. 18.

Critics have pointed to the TEC's 'discussion rather than action' nature,⁵⁷ the modest success of transatlantic initiatives attributed to the absence of economic guidance and lack of clear direction,⁵⁸ the limited agenda, its 'small-scale incrementalism' and the too-low ambition of regulatory cooperation within the TEC and otherwise.⁵⁹ In 2010, a Memorandum of understanding was signed on *E-health and the harmonisation of electronic health records and education programmes for IT and health professionals* in the context of the TEC, however, implementation is slow.⁶⁰ More recently, in April 2011, an agreement laid down a set of fundamental regulatory principles for trade in information and communication technology (ICT) services.⁶¹

3.6 Promoting international standards within transatlantic regulatory cooperation

Initiatives aimed at the application of international standards in the transatlantic context have faced difficulties, since in the US the regulatory agencies are required to use international standards only to the extent prescribed by the TBT Agreement and are not prevented from taking measures they consider necessary to attain a public policy objective (such as the protection of human, animal or plant life, or of the environment) at the level they deem necessary. The 'voluntary', private sector and marketplace-driven character of the US standard system differs from the EU's intensive implementation of international standards in its domestic regulatory practice.⁶² In 2010, leaders at the political level of the TEC and the High Level Regulatory Cooperation Forum encouraged regulatory agencies, services, and standardisation bodies to implement the joint improvements agreed on in a new document *Building Bridges between the EU and U.S. Standards Systems*.⁶³ Based on this agreement, the parties agreed 'to create new mechanisms to promote cooperation, collaboration, and coherence in this area, with a view towards minimising unnecessary regulatory divergences, and better aligning respective regulatory approaches to facilitate transatlantic trade. Elements of such jointly agreed undertaking was, among others, to take into account existing international standards for technical regu-

⁵⁷ F. Erixon and L. Brandt, 'Ideas for New Transatlantic Trade', *Transatlantic Task Force on Trade Working Papers*, at p. 5, available at <http://www.ecipe.org/media/publication_pdfs/ideas-for-new-transatlantic-initiatives-on-trade.pdf>.

⁵⁸ *Ibid.*, at p. 2.

⁵⁹ See F. Erixon and G. Pehnelt, 'A New Trade Agenda for Transatlantic Economic cooperation', 9 *ECIPE WP* 2009, at p. 5, available at <http://www.ecipe.org/media/publication_pdfs/a-new-trade-agenda-for-transatlantic-economic-cooperation.pdf>.

⁶⁰ European Council for Foreign Relations, 'Scorecard 2010/2011', *supra* note 18.

⁶¹ 'European Union-United States Trade Principles for Information and Communication Technology Services', available at <http://trade.ec.europa.eu/doclib/docs/2011/april/tradoc_147780.pdf>.

⁶² Report on the use of voluntary standards in support of regulation in the US October 2009, at p. 11, available at <http://gsi.nist.gov/global/docs/Voluntary_Standards_USRegs.pdf>.

⁶³ Building Bridges Between the U.S. and EU Standards Systems, available at <<http://www.whitehouse.gov/sites/default/files/omb/oira/irc/us-eu-standards-bridges.pdf>>.

lations, laid down by international standard-setting bodies, and developed by the TBT Committee Decision Agreements, and WTO law.

3.7 Most recent focus: upstream regulatory cooperation in emerging technologies

Exploring upstream regulatory cooperation has been an important element in efforts to detect possible trade irritants and non-tariff barriers to trade, and to gauge the possibility of convergence at an early stage, before (diverging) domestic legislation is adopted. Such upstream regulatory cooperation has been prominent in recent years on the agenda of the TEC, once the inherent limitations in the TEC's political clout in the face of existing regulation became apparent. Consequently, the TEC seems to have shifted its focus to the *pre-emption* of future trade irritants and refocused its work toward 'upstream regulatory cooperation' with the 'potential to develop into a genuine strategic instrument focusing on dispute prevention.'⁶⁴ Accordingly, upstream regulatory cooperation has focused on emerging technologies and innovation since the TEC's December 2010 meeting,⁶⁵ serving as platform to facilitate discussions in areas such as electric vehicles, ICT services, e-health, nanotechnology, energy saving products, electric vehicles, cloud computing. The *Transatlantic Innovation Action Partnership* of 2011 coordinates US and EU activities aimed at strengthening innovation ecosystems and promoting the commercialisation of emerging technologies and sectors. The Innovation Action established two new sectoral work streams in priority areas, raw materials and bio-based products, not sufficiently addressed through the then existing co-operation.⁶⁶ The European Council on Foreign Relations in its Scorecard of 2012 notes that 'with the participation of carmakers such as Audi and Ford, some progress was also made on harmonising norms for electric vehicles and for the so-called smart grids designed to distribute electricity more efficiently. The transatlantic partners are hoping to set global standards for tomorrow's industries such as cloud computing and nanotechnologies, and they have joined forces to answer multi-faceted challenges such as antibiotic resistance.'⁶⁷ Early upstream regulatory cooperation carries the potential to prevent and pre-empt regulatory differences ahead of regulatory action, and cooperation in these areas can also pave the way for global regulatory actions and standards.

⁶⁴ Speech by Catherine Ashton EU Trade Commissioner on 'The transatlantic challenge: working together to shape the rules of globalisation', U.S. Chamber of Commerce Washington D.C., 26 October 2009, available at <http://europa.eu/rapid/press-release_SPEECH-09-499_en.htm?locale=fr>.

⁶⁵ U.S.-EU Transatlantic Economic Council, Joint Statement, 17 December 2010, Washington D.C., available at <http://trade.ec.europa.eu/doclib/docs/2010/december/tradoc_147140.final.pdf>.

⁶⁶ 'Transatlantic Innovation Action Partnership Work Plan', available at <http://trade.ec.europa.eu/doclib/docs/2011/january/tradoc_147174.pdf>.

⁶⁷ European Foreign Policy Scorecard 2012, 'Relations with the US on standards and norms', available at <<http://www.ecfr.eu/scorecard/2012/usa/29>>.

4. REGULATORY COOPERATION IN THE TTIP NEGOTIATIONS: OBJECTIVES AND OPTIONS

4.1 Removal of unnecessary regulations and NTBs: a key objective in economic partnership

In November 2011, the EU-US Summit tasked the TEC to establish a High-Level Working Group on Jobs and Growth ('HLWG') to explore, assess and identify options to further enhance EU-US economic relations, and examine negotiations on horizontal and sectoral regulatory issues. The report of the findings, conclusions and recommendations by the HLWG, co-chaired by EU Commissioner for Trade, Karel De Gucht and US Trade Representative Ron Kirk, had been preceded by intense consultation and dialogue with public and private stakeholder groups. The potential options for expanding transatlantic investment and trade presented in an *Interim report* (June 2012) by the HLWG included, amongst others, to seek opportunities for enhancing the compatibility of regulations and standards, and the elimination, reduction, or prevention of unnecessary 'behind the border' non-tariff barriers to trade in all categories. These options, together with other means for expanding market access and strengthening the leadership of the transatlantic partners in setting global rules, were envisaged as building towards a comprehensive trade and investment agreement. The *Interim report* drew up the following suggestions to be included in the negotiations toward such a comprehensive agreement, specifically with respect to regulatory issues and non-tariff barriers:

- 'An ambitious "SPS-plus" chapter, including establishing a bilateral forum for improved dialogue and cooperation on SPS issues.
- An ambitious "TBT-plus" chapter, including establishing a bilateral forum for addressing bilateral trade issues arising from technical regulations, conformity assessment procedures, and standards.
- Horizontal disciplines on regulatory coherence and transparency for goods and services, including early consultations on significant regulations, impact assessment, upstream regulatory cooperation, and good regulatory practices.
- Provisions or annexes containing additional commitments or steps aimed at promoting regulatory compatibility over time in specific, mutually agreed sectors.⁶⁸

Taking these suggestions further, the *Final report* (February 2013) of the HLWG highlighted what the parties saw as the key elements and objectives of regulatory cooperation:

'addressing "behind-the-border" obstacles to trade, including, where possible, through provisions that serve to reduce unnecessary costs and administrative delays stemming from regulation, while achieving the levels of health, safety, and environmental protection that each side deems appropriate, or otherwise meeting legitimate regu-

⁶⁸ Interim Report to Leaders from the Co-Chairs EU-U.S. High Level Working Group on Jobs and Growth 19 June 2012, available at <http://trade.ec.europa.eu/doclib/docs/2012/june/tradoc_149557.pdf>.

latory objectives; identify new ways to prevent non-tariff barriers from limiting the capacity of U.S. and EU firms to innovate and compete in global markets; seek to strengthen upstream cooperation by regulators and increase cooperation on standards-related issues; putting processes and mechanisms in place to reduce costs associated with regulatory differences by promoting greater compatibility, including, where appropriate, harmonization of future regulations, and to resolve concerns and reduce burdens arising from existing regulations through equivalence, mutual recognition, or other agreed means, as appropriate.⁶⁹

The specific recommendations in the final report offer more detail than the interim report concerning the form of cooperation in various areas of trade and regulatory cooperation. With respect to sanitary and phyto-sanitary issues, it calls for SPS measures which are based on international standards and global (WTO) principles, and application following scientific risks assessment, in accordance with proportionality and transparency.⁷⁰ Similarly, TBT issues should be tackled in light of cooperative efforts between regulators, in transparent and coordinated processes, and for enhanced confidence in conformity assessment procedures and standards. As to horizontal regulatory issues, methodological rapprochement is called for by highlighting the importance of early consultations, use of impact assessment, periodic reviews and application of best practices. With respect to specific sectors, the final report calls for a plan of commitments in sector-specific cooperation and the approaches applied to create more convergence. Finally, the HLWG emphasised the need for a (permanent) institutional framework within which future regulatory cooperative steps can be explored and processed.⁷¹

With such detailed and ambitious recommendations in sight, the negotiations of the comprehensive trade agreement were announced⁷² (in no less significant a context than the State of the Union address delivered by President Obama on 12 February 2013),⁷³ and shortly afterwards the European Commission drafted the EU's draft negotiating mandate for the negotiations toward ostensibly the biggest bilateral trade ever negotiated.⁷⁴ Commentaries singled out

⁶⁹ Final report of the High Level Working Group on Growth and Jobs, 11 February 2013, at p.3, available at <http://trade.ec.europa.eu/doclib/docs/2013/february/tradoc_150519.pdf>.

⁷⁰ The HLWG takes note of the (public policy) sensitivity of SPS measures on both sides of the Atlantic and recommends closer cooperation in this area, next to the bilateral negotiations involved in the comprehensive agreement. Accordingly, the report calls on the parties to 'seek to make early and continuing progress on SPS measures affecting bilateral trade, taking into account the priorities of either side, and their respective institutional frameworks'.

⁷¹ Ibid.

⁷² European Commission Press Release, 'European Union and United States to launch negotiations for a Transatlantic Trade and Investment Partnership', (13 February 2013), available at <http://europa.eu/rapid/press-release_MEMO-13-95_en.htm>.

⁷³ 'Obama's 2013 State of the Union Address', available at <<http://www.nytimes.com/2013/02/13/us/politics/obamas-2013-state-of-the-union-address.html?pagewanted=all&r=0>>.

⁷⁴ European Commission Press Release, 'European Commission Fires Starting Gun for EU-US Trade Talks', (12 March 2013), available at <http://europa.eu/rapid/press-release_IP-13-224_en.htm>.

the importance attached to the removal of regulatory barriers to trade;⁷⁵ the focus on aligning rules and technical product standards which form the ‘most important barrier to transatlantic trade’⁷⁶ which were seen as ‘potentially “making or breaking” the agreement’;⁷⁷ the dismantling of unnecessary regulatory barriers, and the inclusion in the agreement of mechanisms (including upstream regulatory cooperation) aiming at preventing future trade barriers.⁷⁸

4.2 The priorities of discussing regulatory cooperation in the negotiations for the TTIP

The launched negotiations and mandate adopted by the Council and bestowed upon the Commission built upon the recommendations of the HLWG, laying down objectives around three main topics: (i) market access; (ii) regulatory issues and non-tariff barriers; (iii) addressing global trade rules. Emphasising the significance attached to the removal of NTBs, the objectives with respect to regulatory compatibility call for mechanisms to achieve regulatory compatibility through harmonisation, mutual recognition and enhanced cooperation between regulators. Accordingly, both sides wish to aim to negotiate an ambitious agreement on sanitary and phyto-sanitary issues as well as technical barriers to trade. In addition, negotiators will work on regulatory compatibility in specific sectors, such as chemical, automotive, ICT, pharmaceutical and other health sectors such as medical appliances. The need for regulatory convergence is not limited to trade in goods, but also extends to services.

Recognising the sensitivity of the negotiating chapter, it has been acknowledged that not all regulatory divergences can be eliminated in a single agreement, and both sides envisage a ‘living agreement’,⁷⁹ with a framework that allows for progressively greater regulatory convergence over time against defined targets and deadlines. This will, it is envisaged, enable not only the elimination of existing barriers, but also the prevention of new ones.⁸⁰ While regulatory compatibility is the ultimate aim in this important chapter within the negotiations, it is also clear that the agreement should not prejudice domestic regulatory autonomy as to the level of health, safety, consumer, labour and environmental protection and cultural diversity.

⁷⁵ ‘A new EU-US Free Trade Agreement will provide an invaluable shot in the arm for exporters and workers’, 15 April 2013, available at <<http://eu2013.ie/news/news-items/20130415-brutonsbopedeu-ustrade/>>.

⁷⁶ ‘Progress made on new EU-US Trade Agreement at the EU Trade Informal’, (18 April 2013), available at <<http://eu2013.ie/news/news-items/20130418post-tradeinformalpr/>>.

⁷⁷ S. I. Akhtar and V. C. Jones, *supra* note 14.

⁷⁸ ‘European Parliament resolution of 23 May 2013 on EU trade and investment negotiations with the United States of America’, INTA/7/12078, available at <<http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2013-227>>.

⁷⁹ European Commission Memo, ‘European Union and United States to launch negotiations for a Transatlantic Trade and Investment Partnership’, available at <http://europa.eu/rapid/press-release_MEMO-13-95_en.htm>.

⁸⁰ European Commission Press Release, ‘Member States endorse EU-US trade and investment negotiations’, (15 June 2013), available at <http://europa.eu/rapid/press-release_MEMO-13-564_en.htm>.

4.3 Suggestions for creating regulatory compatibility

In the varied reactions to the perspective of and the priorities for regulatory cooperation within the TTIP, we find differing assessments of these objectives. In the US, some worry that regulatory harmonisation will remove domestic regulatory autonomy, an aspect of national sovereignty, and will lead to more government regulation dictated by the trade partner, such as the introduction of the precautionary principle for example.⁸¹ On the other hand the Transatlantic Consumer Dialogue, in their letter to the highest political leaders of the parties, expressed fears of lower regulatory standards, and warned against focusing simply on business and economic considerations and interests, to the detriment of public policy concerns such as consumer and environmental standards.⁸² The European Parliament has also voiced concern – repeatedly – in particular with respect to the importance of the precautionary principle, which in its view must be defended in the trade talks.⁸³ As was noted earlier the EU at its highest executive level also commits to safeguarding most sensitive areas of regulation, such as agriculture.⁸⁴

Amongst the specific suggestions directed at the TTIP negotiations, the US Chamber of Commerce called for transparency as a guiding principle, and a horizontal framework within which to ‘empower and encourage regulators to cooperate at an early stage and through the life-cycle of a regulation’.⁸⁵ Such a horizontal framework would require the setting of clear goals, the provision of regulatory tools to achieve such goals, the establishment of an oversight body to monitor and encourage progress, and open access to regulatory agreements in various sectors.⁸⁶ In addition, they call for sector specific mutual agreements and equivalence arrangements, focusing on cosmetics, chemicals, automobiles, medical devices.

The negotiations started in July 2013, and commentaries already at the preliminary stage of talks have indicated that the discussions surrounding regulatory cooperation would reveal different positions. It has been noted that while the EU favours mutual recognition arrangements in a list of priority sectors (including medical devices, chemicals, pharmaceutical and automobiles), the US eye is rather set on horizontal issues (thus the methodological approaches discussed in 3.4), a framework with the aim of tackling future regu-

⁸¹ Fred Smith, ‘Memo to the U.S. and EU: Free trade is decidedly not war’, *Forbes Magazine* (7 September 2013), available at <<http://www.forbes.com/sites/fredsmith/2013/07/09/memo-to-the-u-s-and-eu-free-trade-is-decidedly-not-war/>>.

⁸² Available at <<http://sensiblesafeguards.org/assets/documents/tafta-letter-070813.pdf>>.

⁸³ European Parliament Press Release, ‘EU/US Trade talks: keep Parliament on board, MEPs warn’ (23 May 2013), available at <<http://www.europarl.europa.eu/news/en/news-room/content/20130520IPR08593/html/EUUS-trade-talks-keep-Parliament-on-board-MEPs-warn>>.

⁸⁴ See the comment by Commissioner for Trade, Karel De Gucht *supra* note 22.

⁸⁵ The U.S. Chamber of Commerce, ‘Regulatory cooperation: what coherence can and should TTIP achieve?’, *Bruegel*, available at <http://www.bruegel.org/fileadmin/bruegel_files/Events/Presentations/130718_TTIP/130718_TTIP_Picking.pdf>.

⁸⁶ *Ibid.*

lations.⁸⁷ It appears that existing regulatory differences may be hard to address, but upstream regulatory cooperation in emerging technologies carries more potential for successful cooperation and establishment of convergence, as well as standard setting globally.

5. CONCLUSIONS

In considering what regulatory cooperation has achieved, most observers would agree that new mechanisms for dialogue and information exchange have improved mutual understanding and working relationships among economic regulators in a wide range of sectors, and that the political declarations and soft law instruments have committed (albeit without legally binding effect) the parties to such cooperation time and time again. However, certain sensitive areas such as food safety constitute a 'ground zero in the transatlantic dialogue delivering no result, while consumer protection issues such as product safety, exchange of information on scams and dangerous products for recalls also show slow result'.⁸⁸ Experience has shown that structured dialogue fell short of delivering results in the GMO dispute, despite the fact that biotechnology was exactly one of the areas where structured dialogue among regulators had been initiated with the aim of gradual convergence of regulatory standards and prevention of trade disputes.⁸⁹

While it was established to encourage regulatory harmonisation and to steer and evaluate regulatory cooperation, the TEC seems to have fallen short of expectations. Despite the declarations, ambitious wording of intentions focusing on exchanging views, best practices, shaping common principles and frameworks, the TEC's performance can hardly be viewed as successful in the light of its mission to streamline regulations and eliminate non-tariff barriers to trade and investment. The recent tendency in regulatory cooperation has been to focus on new and relatively unregulated areas, and to align regulations in emerging technologies, such as nanotechnology and electric cars, where both the EU and US are developing regulatory approaches and where dialogue can prevent divergent regulatory action. These are the innovative, new areas in which the transatlantic axis can also feed into global norm-setting.

While regulatory issues feature as an important element in the TTIP negotiations, and creating compatibility, equivalence of regulations and cooperation between regulators are regarded as the cornerstone of the entire negotiation undertaking, already at the early stages different visions are apparent as to the way to achieve these aspirations. The TTIP does however carry the potential to address these issues, and there appears to be political commitment to take this forward. The agreement itself may not be able to address every issue.

⁸⁷ 'EU-US trade talks delve into regulatory maze', *EurActiv*, (25 September 2013), available at <<http://www.euractiv.com/specialreport-eu-us-trade-talks/eu-us-trade-talks-delve-regulato-news-530682>>.

⁸⁸ European Council of Foreign Affairs, European Foreign Policy Scorecard 2010/2011, *supra* note 18.

⁸⁹ See *supra* section 3.2.

However it could, with defined targets and deadlines and with methods tailored to different sectors, lead progressively to further mutual recognition agreements, covering not only testing and certification but also substantive standards. This would boost the confidence of regulators on both sides of the Atlantic, and, if communicated effectively, that of consumers, as well as reducing costs and eliminating trade barriers to transatlantic trade.

COMPETITION, RECIPROCITY AND HARMONISATION: EU-CHINA REGULATORY COOPERATION ON STANDARDS IN THE LIGHT OF THE EU BETTER REGULATION STRATEGY, THE EUROPE 2020 STRATEGY AND EUROPE'S TRADE POLICY

Andrea Wechsler*

1. INTRODUCTION

Standards – and in particular technical standards – are becoming ever more important in modern trade and investment policies and negotiations.¹ While the focus of this paper is on technical standards and, thus, on norms and requirements for technical systems, it should nevertheless be noted that the term 'standard' has a variety of meanings. It covers norms or requirements ranging from norms for governments, norms for economic actors, norms for international *standard-setting organisations* (SSOs) and for international *standard-developing organizations* (SDOs) to technical standards.² Technical standards can be developed privately by, for instance, corporations and industry groups or publicly by institutions such as standards organisations. They can also be the result of mixed public-private standard-setting processes.

The relevance of technical standards is, *inter alia*, reflected in their treatment in international economic law and international trade regulation. On the one hand, the *World Trade Organization* (WTO) recognises the potential danger of technical regulations, product standards, testing and certification procedures becoming technical barriers to trade, i.e., non-tariff barriers to trade. On the other hand, the WTO acknowledges the role of standards in facilitating barrier-free trade through interoperability, compatibility and functionality and in benefiting environmental protection, safety, national security and consumer information.³ In consequence, the *WTO Agreement on Technical Barriers to Trade* (*TBT Agreement*) aims to eliminate unnecessary obstacles to trade by ensuring barrier-free trade and sets out a code of good practice for both governments and non-governmental or industry bodies.⁴

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¹ W. B. Arthur, 'Increasing Returns and the New World of Business', *Harvard Business Review* July – August 1996.

² S. Charnovitz, 'International Standards and the WTO', GWU Law School, 133 *Legal Studies Research* 2005.

³ See WTO, 'Technical Regulations and Standards', available at <http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm4_e.htm#TRS>.

⁴ Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments – Results of the Uruguay Round, 1868 U.N.T.S. 120 (15 April 1994) [hereinafter TBT Agreement], Annex 1, para. 2.

With the tremendous growth in the number of technical regulations and standards, the *TBT Agreement* is considered a crucial international instrument for ensuring global market access. In addition, the *European Union* (EU), countries worldwide and private stakeholders are pushing for further standardisation policies to support the objectives of the economic growth and competitiveness of their home markets and industries. Furthermore, various national, European and international networks have been created by public authorities, industry and other stakeholders with the intention of enhancing cross-border collaboration on standards. Altogether these policy and collaboration efforts can be characterised on a scale ranging from competition to reciprocity to harmonisation.

In designing cross-border collaboration on standards, the EU has placed particular emphasis on promising emerging markets and target markets for exports, such as the People's Republic of China (China). At the same time, however, the Chinese government has been re-directing its economic strategies and trade policies towards making China the leading global innovator in the world – a phenomenon that has been characterised as ‘techno-nationalism’.⁵ Becoming the leading global innovator entails not only emphasis on the development of indigenous innovative activities but also an increased focus on standard-setting policies as a core component of a domestic innovation strategy. In consequence, standardisation has become of paramount importance in China's 12th 5-Year Plan 2011-2015.⁶

In the light of these developments, this paper analyses the question of the direction that EU-China regulatory cooperation on standards has taken, is taking and should take in the light of the *EU Better Regulation Strategy*⁷, the *Europe 2020 Strategy*⁸ and Europe's trade policy. It, thus, focuses on the issue of how larger regulatory strategies and policies are informing and should inform European standardisation policy towards this global player in an ever more techno-nationalistic setting. In essence, the paper argues that international trade policy – including standards policy – should be re-evaluated from ‘low politics’ to ‘high politics’ whilst EU regulatory cooperation should place greater emphasis on raising China's awareness of the danger of controlling standardisation as opposed to facilitating standardisation processes.

The paper, first, outlines the respective policy and regulatory approaches towards standards and standardisation in the EU and China. Second, an analysis of EU-China regulatory cooperation on standards focuses on the history, current state, substance and achievements of EU-China cooperation on standards. Third, a discussion of EU-China regulatory cooperation provides for an evaluation of this cooperation in the light of the *EU Better Regulation Strategy*, the *Europe 2020 Strategy* and Europe's trade policy. This is followed by conclusions and suggestions for new directions in EU-China regulatory cooperation on standards.

⁵ Suttmeier/Yao (2004).

⁶ Available at <http://www.gov.cn/2011lh/content_1825838.htm>.

⁷ See <http://ec.europa.eu/governance/better_regulation/index_en.htm>.

⁸ See <http://ec.europa.eu/europe2020/index_en.htm>.

2. STANDARDISATION POLICY AND REGULATORY APPROACHES IN THE EU AND CHINA

Standardisation processes have moved beyond the realm of purely private initiatives. As standards have become the basis for international competition among countries, the fact of and the need for government involvement and regulation is becoming ever more visible.⁹ Standards are increasingly emerging through a hybrid process of coordinated mechanisms and market mechanisms in which firms and governments collaborate.¹⁰ Some newcomer governments, such as the Chinese and the Korean, have clearly opted for increased strategic involvement in and regulation of their country's standard-setting policies,¹¹ and even European governments and the EU have interceded in standard-setting in a variety of industries, such as the mobile telecom industry. The area of technical standardisation has, thus, become an area of multi-jurisdictional and multi-layered governance in which cross-border regulatory cooperation is becoming ever more important.

2.1 The European regulatory *acquis* on standards

Developments in EU standardisation policy need to be set against the larger background of EU policy-making for European integration and, in particular, neo-functional models of integration.¹² The European Commission stresses the contribution of standardisation to the implementation of internal market legislation and its nature as a tool for the completion of the Single Market.¹³ Standardisation policy is considered to provide for an important contribution to the development of sustainable industrial policy, of innovative markets and of a strong European economy.¹⁴ Standards are further considered to contribute to economic and social development and to environmental protection. The role and relevance of standardisation is further stressed in relation to the fostering

⁹ W. Mattli and T. Büthe, 'Setting International Standards: Technological Rationality or Primacy of Power?', 56/1 *World Politics* October 2003, pp. 1-42; L. Garcia, 'A New Role for Government in Standard-Setting?', 1/2 *Standard View* 1993, pp. 2-10; J. L. Fun and D. T. Methe, 'Market- and committee-based mechanisms in the creation and diffusion of global industry standards: the case of mobile communications', 30 *Research Policy* 2001, pp. 589-610.

¹⁰ H. Lee and S. Oh, 'The political economy of standards setting by newcomers: China's WAPI and South Korea's WIPI', 32 *Telecommunications Policy* 2006, pp. 662-671; J. L. Funk, 'Competition between regional standards and the success and failure of firms in the global mobile communication market', 22 *Telecommunications Policy* 1998, pp. 419-441.

¹¹ N. Kshetri *et al.*, 'Chinese institutions and standardisation: The case of government support to domestic third generation cellular standards', 35 *Telecommunications Policy* 2011, pp. 399-412; N. Brunsson and B. Jacobsson, *A World of Standards* (Oxford: Oxford University Press 2001), p. 12

¹² For the establishment of the neo-functional approach to the EU see Ernst Haas, *The Uniting of Europe: Political, Social and Economic Forces 1950-1970* (1968).

¹³ See <http://ec.europa.eu/enterprise/policies/european-standards/standardisation-policy/policy-activities/index_en.htm>.

¹⁴ Commission of the European Communities, Communication from the Commission to the Council, the European Parliament and the European Economic and Social Council, 'Towards an increased contribution from standardisation to innovation in Europe', COM(2008) 133 final.

of the landscape for the ICT industry as well as for services. In the realm of technical standards, it should also be noted that the Commission launched a fact-finding study in 2008 to analyse the connection between IPRs and standards in promoting innovation.¹⁵

More specifically and in the realm of technical harmonisation, the European Commission – until the 1980s – followed an approach of mutual recognition of national policies.¹⁶ As mutual recognition and negotiations of common regulations proved more and more difficult, the so-called ‘New Approach’ was adopted in a Council Resolution in 1985.¹⁷ The Council Resolution set out a number of key principles for the Communities’ approach to technical harmonization and standards. Most noticeably, it established a clear separation of responsibilities between the European legislator, on the one hand, and European standard bodies (CEN,¹⁸ CENELEC,¹⁹ ETSI²⁰), on the other hand. At the same time, EEC legislative harmonisation was limited to essential prerequisites for the free movement of products throughout the Community. Thus, ample space was left for voluntary standards and standard setting by standardisation bodies. Further rules at the time reflected the spirit of the New Approach: the European Communities intended to promote voluntary, market-led standardisation while fusing the professional authority of non-governmental standardisation bodies with their own regulatory powers.²¹

Taken together, the functional approach to standardisation and the New Approach have translated into the establishment of a general framework for European standardisation policy. In the late 1990s, Directive 98/34/EC laid down a procedure for the provision of information in the field of technical standards and regulations.²² In 2003, General guidelines were published for cooperation between CEN, CENELEC and ETSI and the European Commission and the European Free Trade Association.²³ In 2006, Decision No. 1673/2006/EC of the European Parliament and of the Council of 24 October 2006 created a legal basis for the financial support of the European Commission for the

¹⁵ Fraunhofer FOKUS/dialogic, Study on the Interplay between Standards and Intellectual Property Rights (IPRs), Final Report, April 2011, available at <http://ec.europa.eu/enterprise/policies/european-standards/files/standards_policy/ipr-workshop/ipr_study_final_report_en.pdf>.

¹⁶ ‘Governance and Regulatory Structures’, in A. J. Hoffmann and M. J. Ventresca (eds), *Organizations, Policy and Natural Environment* (Stanford University Press 2002), p. 412.

¹⁷ Council Resolution of 7 May 1985 on a new approach to technical harmonization and standards, *OJ C* 136, 4.6.1985, pp. 1-9.

¹⁸ European Committee for Standardisation, available at <<https://www.cen.eu/cen/pages/default.aspx>>.

¹⁹ European Committee for Electrotechnical Standardisation, available at <<http://www.cenelec.eu/>>.

²⁰ European Telecommunications Standards Institute, available at <<http://www.etsi.org/WebSite/homepage.aspx>> .

²¹ Governance and Regulatory Structures, see *supra* note 16.

²² Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations, *OJ L* 204, 21.7.1998.

²³ General Guidelines for the co-operation between CEN, CENELEC and ETSI and the European Commission and the European Free Trade Association were adopted and signed on 28 March 2003, 2003/C 91/04, *OJ L* 91, 16.4.2003.

European standardisation system.²⁴ Furthermore, since 1998, about 20 new legislative acts in which standards play a decisive role, relating to ICT, the environment and consumer protection, have been adopted and implemented by the EU.²⁵ In the early 2000s, the European standards bodies CEN, CENEL-EC and ETSI well established their position amongst national and international SSOs and implemented their tasks of providing for voluntary processes for the development of technical specifications based on consensus among all interested parties.

However, recent years have seen an ever more active approach of the Commission towards standardisation, which goes far beyond the New Approach. In 2006, the *Competitiveness Council* identified the need to enhance the European standard-setting system²⁶ as did the European Parliament in its resolution on innovation strategy in 2007.²⁷ In 2008, the Commission issued a Communication to the Council, the European Parliament and the European Economic and Social Committee setting out the political objectives and challenges of leveraging standardisation for innovation in Europe. In 2011, a Commission Communication suggested a strategic vision for European standards.²⁸ Furthermore, the *Europe 2020 Strategy for Smart, Sustainable and Inclusive Growth*²⁹ envisages a bigger role for European standardisation in European competitiveness, consumer protection and environmental matters.

In response to these strategic declarations, the Commission adopted concrete annual work programmes and action plans, such as the *2010-2013 Action Plan for European Standardisation*,³⁰ which provides not only information about recently issued mandates (standardisation requests) but also sets out future standardisation initiatives. However, the increased focus of the EU on standardisation has not only translated into policies, action plans and recommendations. It has further culminated in the adoption of the 2012 *Regulation on*

²⁴ Decision No 1673/2006/EC.

²⁵ Communication from the Commission to the European Parliament and the Council on *the Role of European standardisation in the framework of European policies and legislation*, COM(2004) 674 final, 18.10.2004, available at <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2004:0674:FIN:EN:PDF>>.

²⁶ Council Conclusions on a Broad-Based Innovation Strategy: Strategic Priorities for Innovation Action at EU Level, 4 December 2006, available at <http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/intm/91989.pdf>.

²⁷ European Parliament Resolution of 24 May 2007 on putting knowledge into practice: a broad-based innovation strategy for Europe, cf. European Commission, Communication COM(2006) 502 final, 'Putting knowledge into practice: A broad-based innovation strategy for the EU'.

²⁸ European Commission, Communication 'A strategic vision for European standards: Moving forward to enhance and accelerate the sustainable growth of the European economy by 2020', COM(2011) 311 final, available at <http://ec.europa.eu/enterprise/policies/european-standards/standardisation-policy/index_en.htm>.

²⁹ European Commission, Communication, 'Europe 2020, A Strategy for Smart, Sustainable and Inclusive Growth', COM(2010) 2020 final, available at <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:2020:FIN:EN:PDF>>.

³⁰ European Commission, '2010-2013 Action Plan for European Standardisation', available at <http://ec.europa.eu/enterprise/policies/european-standards/files/standards_policy/action_plan/doc/standardisation_action_plan_en.pdf>.

European Standardisation,³¹ which establishes rules governing cooperation between European standardisation organisations, NSBs, Member States and the Commission, as well as for the establishment of European standards and European standardisation deliverables, for the identification of ICT technical specifications, for stakeholder participation and for financing of European standardisation (Article 1).

What is most remarkable in the context of this renewed focus on standardisation is that – in its 2008 Communication – the Commission envisaged not only a stronger role for standardisation in support of innovation and complementing market-based competition but voiced, for the first time, concerns about ‘growing international competition in standard-setting from emerging powers’.³² Responding to these concerns, emphasis has been placed on the active role of the EU in facilitating European contributions to international standardisation work. The Commission has repeatedly expressed its intention of strengthening its efforts ‘through multilateral agreements and through bilateral trade and regulatory dialogues to promote regulatory models based on the reliance on voluntary standards, and to enhance the commitment of our trade partners to the development and use of international standards.’³³ The 2012 *Regulation on European Standardisation*³⁴ further reinforces this intention by stressing in its recitals the promotion of multilateral and bilateral regulatory cooperations and by requiring objectives for an international dimension of European standardisation in the annual Union work programme (Article 8).

In summary, past and current standardisation policies in the EU demonstrate an instrumental understanding of standardisation as a tool for market-led regulation in furtherance of European integration. At the same time, however, recent years have witnessed an ever more pro-active policy approach by the Commission towards standardisation. It has not only recognised the insufficient involvement of European actors in international standard setting but has also redefined its own role as facilitator for standardisation within and beyond the European market. The Commission has, thus, moved from a policy coordination model in standardisation policy towards the EU regulatory model.³⁵ To sum up,

³¹ Regulation (EU) No. 1025/2012 of the European Parliament and of the Council of 25 October 2012 on European standardisation, amending Council Directives 89/686/EEC and 93/15/EEC and Directives 94/9/EC, 94/25/EC, 95/16/EC, 97/23/EC, 98/34/EC, 2004/22/EC, 2007/23/EC, 2009/23/EC and 2009/105/EC of the European Parliament and of the Council and repealing Council Decision 87/95/EEC and Decision No 1673/2006/EC of the European Parliament and of the Council.

³² Commission of the European Communities, Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee, ‘Towards an Increased Contribution from Standardisation to Innovation in Europe’, COM(2008) 133 final, p. 2.

³³ Ibid.

³⁴ Regulation (EU) No. 1025/2012 of the European Parliament and of the Council of 25 October 2012 on European standardisation, amending Council Directives 89/686/EEC and 93/15/EEC and Directives 94/9/EC, 94/25/EC, 95/16/EC, 97/23/EC, 98/34/EC, 2004/22/EC, 2007/23/EC, 2009/23/EC and 2009/105/EC of the European Parliament and of the Council and repealing Council Decision 87/95/EEC and Decision No 1673/2006/EC of the European Parliament and of the Council.

³⁵ G. Majone, *Regulating Europe* (Routledge 1996), Chapter 1.

the EU has adapted both its regulatory model and the substance of its standards policies so as to reinforce its role as facilitator for standardisation in a fast changing global landscape with an ever stronger proliferation of standardisation organisations and public and private actors.³⁶

2.2 Standardisation policy in the P.R. China

Developments in Chinese standardisation policy need to be set against the background of the rise of China's economic power and its underlying reform and opening policies in the last 30 years. Beginning with the Chinese path to socialism with Chinese characteristics in 1978, the Chinese economy has become the second largest economy in the world. Annual economic growth rates have been at an average high of 9,5%.³⁷ In 2001, China joined the WTO in 2001, marking yet another milestone in Chinese economic and legal development.³⁸ From 2005 to 2012 in line with aspirations towards a *Harmonious Society* the administration reform policies were reshaped so as to promote the rise of large national champions coupled with egalitarian and populist industrial policies.

Recent years have seen a fervent drive towards indigenous innovation and corresponding industrial policies. Both President Hu Jintao and Premier Wen Jiabao pushed plans – most noticeably the *2006 Medium- to Long-Term Strategic Plan for the Development of Science and Technology*³⁹ – to turn China into a science and technology (S&T) powerhouse by 2020 and into the global innovation leader by 2050. Particular emphasis has thereby been placed on the fostering of indigenous and home-grown innovations as well as on turning Chinese society into an innovation-oriented society by the year 2020. This fostering is to be attained through a variety of legal and policy instruments ranging from educational initiatives, to financing innovation, increased inter-firm competition, improvements in corporate governance and public procurement to advances in intellectual property (IP) protection.⁴⁰ Moreover, technical standards are considered a key instrument for promoting technological development in China.

In the years leading up to its WTO accession, China regarded standards as an essential part of industrial development strategies and, thus, gradually embedded standards policies into its larger industrial policies. A sound legal and institutional framework came to complement these policy efforts. In 1988, the *Standardisation Law of the P.R. China* was adopted with the objective of 'de-

³⁶ R. Werle, 'Institutional Aspects of Standardisation: Jurisdictional Conflicts and the Choice of Standardisation Organizations', 00/ 1 *MPIfG Discussion Paper* May 2000.

³⁷ Cf. The Worldbank, Data, available at <<http://data.worldbank.org/country/china>>.

³⁸ A. Chen, China One Year After Its WTO Entry, in S. Bao *et al.*, (eds.), *The Chinese Economy After WTO Accession* (Aldershot, England: Burlington, VT: Ashgate 2006), p. 17

³⁹ OECD, OECD Reviews of Innovation Policy, China, Synthesis Report (2007), p. 17, available at <<http://www.oecd.org/science/innovationinsciencetechnologyandindustry/39177453.pdf>>.

⁴⁰ A. Wechsler, 'Intellectual Property Law in the P.R. China: A Powerful Economic Tool for Innovation and Development', 1 *China-EU Law Journal (CESL)* 2011, pp. 3-54.

veloping the socialist commodity economy, promoting technical progress, improving product quality, increasing social and economic benefits, safeguarding the interests of the state and the people and adapting standardisation to the needs of socialist modernization and the development of economic relations with foreign countries'.⁴¹ In 1990, the *National Programs for Science and Technology Developments* were adopted. And in 1995, the *China National Institute of Standardisation* (CNIS) was founded.⁴²

Subsequent to its WTO accession, China has given increased policy priority to indigenous innovation and, thus, also to the idea of using technical standards to enhance China's innovation capabilities.⁴³ First of all, in 2001, the *TBT Agreement* entered into force. In the same year the *Administration for Quality Supervision Inspection & Quarantine* (AQSIQ),⁴⁴ *Standardisation Administration of the P.R. China* (SAC)⁴⁵ and the *Certification and Accreditation Administration of the People's Republic of China* (CNCA)⁴⁶ were established. In 2008, China became a Permanent Member of the *International Organization for Standardisation* (ISO). In 2011, it applied to become a Group A Member in the *International Electrotechnical Commission* (IEC). These institutional achievements have translated into an ever greater number of Chinese national standards – both *de facto* and *de jure*.

Even though Chinese standardisation policies are considered to have already borne fruit, it is difficult to assess the extent to which such standards are the fruit of national S&T achievements as opposed to the mere adoption of international standards. It is suggested that China has an estimated 10,000 active standards that are built upon standards issued by the international standardisation bodies ISO, IEC and the *International Telecommunication Union* (ITU).⁴⁷ Furthermore, it is estimated that thousands of Chinese standards are based on European standards. At the same time, however, there are now more than 27,000 national standards in force in China.⁴⁸ In response to this rise in national standards, complaints have been raised about China not meeting its obligations under the *TBT Agreement* and, thus, about lack of conformity of Chinese national standards with their international counterparts.⁴⁹ Moreover, China is known for having developed its own standards, such as in the case of the standard for DVDs, known as EVD, to avoid royalty payments to patent-

⁴¹ Article 1 of the Standardisation Law, adopted at the Fifth Meeting of the Standing Committee of the Seventh National People's Congress on December 29, 1988 and promulgated by Order No.11 of the President of the People's Republic of China on December 29, 1988.

⁴² Available at <<http://www.cnis.gov.cn/>>.

⁴³ See *supra* note 39.

⁴⁴ Available at <<http://english.aqsiq.gov.cn/>>.

⁴⁵ Available at <<http://www.sac.gov.cn/>>.

⁴⁶ Available at <<http://www.cnca.gov.cn/cnca/>>.

⁴⁷ J. R. Glover, 'China's Trade & Standards Policy Review' 2006, p.7, available at <<http://www.strategicstandards.com/files/ChinaTrade.pdf>>.

⁴⁸ Global Times, 'China Increases Use of International Standards', 16 November 2011, available at <<http://www.globaltimes.cn/NEWS/tabid/99/ID/684319/China-increases-use-of-intl-standards.aspx>>.

⁴⁹ Statistics available at <<http://www.stats.gov.cn/english/statisticalstandards/index.htm>>.

holding corporations worldwide.⁵⁰ These developments testify to the Chinese realization that standards lead markets.

It is therefore not surprising that Chinese efforts in the realm of standardisation policies have been even further enhanced in the most recent years. In 2006, the SAC formulated the Outline of the *11th 5-Year-Plan on the Development of Standardisation* which aims at an adoption rate of international standards of 80% by 2010, the adoption of 6.000 standards annually, and the reduction of standard adoption time from 4,7 years to two years.⁵¹ Another essential pillar of Chinese standardisation policy constituted then the focus on key industrial areas for standardisation. Furthermore, the *12th 5-Year-Plan* aims to eliminate obsolete technologies from Chinese industry while supporting it in integrating state-of-the-art, environmental considerations and a favourable environment for the services industry through accelerated reforms.⁵² The *Plan* refers to a number of additional objectives to be achieved with the support of standardisation for other specific industrial sectors of strategic importance.⁵³ On a larger policy level, the *Plan* constitutes not only a clear declaration of intent to strengthen China's standardisation policy but also a declaration of intent to reinforce China's global presence through standardisation policies. This declaration is motivated by estimated annual losses of 36 billion USD to Chinese companies as a result of technical barriers to trade.⁵⁴

The Plan is complemented by sector-specific and local standardisation strategies. Not only does the overall standardisation strategy put emphasis on sector-specific standard development and setting, various governments departments have adopted standardisation strategies for different industries. In 2005, for instance, the *National Standardisation Plan 2005-2010 for the Logistics Industry* was issued jointly by SAC, NDRC, three Ministries, the AQSIQ, the National Bureau of Statistics, and the Civil Aviation Administration of China.⁵⁵ In 2006, a comparable scheme was issued in the form of the *Standardisation Development Plan for Seawater Utilization*. And in 2007, MOFCOM issued both the *11th Five-Year Standardisation Development Plan for Commodity Circulation* and the *Outline of Innovation and Development Plan 2006-2007 for Traditional Chinese Medicine*. Further plans in the area of conservation and utilization of resources and the services industry were issued in 2008 and 2009. In addition to sector-specific innovation, particular emphasis was placed local standardisation in support of urban-rural construction and local industrial development. The rationale behind such strategies as the *2007 Programs for*

⁵⁰ S. Lohr, 'Fast Gaining in Technology, China Poses Trade Worries', *The New York Times*, 13 January 2004, available at <<http://www.nytimes.com/2004/01/13/business/fast-gaining-in-technology-china-poses-trade-worries.html>>.

⁵¹ P. Wang, 'A Brief History of Standards and Standardisation Processes: A Chinese Perspective', 117 *East-West Center Working Papers* 2011, p.7.

⁵² See <http://english.gov.cn/special/115y_index.htm>.

⁵³ SESEC-2 Seventh Quarterly Report, 31 May 2011, available at <<http://www.eustandards.cn/files/2011/06/SESEC-2-Report-Q7-May-2011.pdf>> .

⁵⁴ V. Aggarwal, 'One Size Fits All? Competing by Setting Technical Standards', 30 August 2008, available at <<http://www.frost.com/sublib/display-market-insight-top.do?id=142387128>>.

⁵⁵ See P. Wang, *supra* note 51, p. 7.

Implementing Shenzhen Municipal Standardisation Strategy was to push the issue of standardisation to the lowest level of economic development. In thus issuing sector-specific and rural development plans, the government intends to foster and promote industrial development in selected fields and regions through the mobilization of a maximum of governmental and social resources.

In consequence, one of the primary objectives of the Chinese government for the upcoming years is a substantial contribution to international standards and, thus, the objective of globalizing Chinese standards. The Chapter on 'Active Participation in Global Economic Governance and Regional Cooperation' of the *Plan* states that China will 'actively take part in the drafting and amending of international regulations and standards to increase its influence in international economic and financial organizations'.⁵⁶ Particular emphasis will be placed on pushing international standards based on Chinese standards in areas of priority, such as agriculture, emerging industries of strategic importance, services, safety and security and on strengthened management of standardisation.⁵⁷

These emphases clearly reflect the Chinese perception of standards as being key global strategic elements in fostering emerging domestic industries.

In line with China's intention of making a substantial contribution to international standards, the country has expressed its interest in better positioning itself strategically. Thus, China aimed at and succeeded in obtaining the status of a permanent member within the IEC so that it can have greater influence on formulating its rules and policies.⁵⁸ Moreover, the country aims to attain more chairmanships and responsibilities in secretariats of international standardisation organisations. Furthermore, it aims to deepen international exchange and cooperation in standardisation with leading global players, such as the EU, the United States (U.S.), Northeast Asia and ASEAN. Such cooperation should lead to increased participation in national mirror committees as well as to active participation in all international standardisation work affecting Chinese industry. It will further be supported by translation and publication of English versions of Chinese national standards as well as the provision of a pool of specialized Chinese standardisation experts.⁵⁹

Whilst efforts are now being focused on the international market, issues in the home market remain. Such issues are primarily grounded in the Chinese top-down approach to standards. This top-down approach is, for instance, reflected in the promotion of standards for existing technologies rather than for future innovations. There is widespread criticism that the Chinese government-centred standardisation strategy cannot adequately deal with the rising complexity in technology, business organisation and markets. It has, thus, been

⁵⁶ See *supra* note 52 for more information.

⁵⁷ SESEC-2 Seventh Quarterly Report, 31 May 2011, available at <<http://www.eustandards.cn/files/2011/06/SESEC-2-Report-Q7-May-2011.pdf>> .

⁵⁸ On 28 October 2011, the resolution of making China the permanent member of IEC was officially passed at the 75th General Meeting of IEC held in Melbourne, Australia. Currently, the permanent members of IEC are China, France, Germany, Japan, UK and USA.

⁵⁹ SESEC-2 Seventh Quarterly Report, 31 May 2011, available at <<http://www.eustandards.cn/files/2011/06/SESEC-2-Report-Q7-May-2011.pdf>> .

argued that China's drive towards becoming a co-shaper of international standards is considerably inhibited by its continued tight control of standardisation processes.

In summary, China has made remarkable developments in the field of standardisation both in black-letter law and practice. Recent years have seen it move from being a fast-follower of standards, towards being a controller of standards with the aspiration of becoming a co-shaper of international standards. At the same time, however, the government has retained its role as controller of standardisation processes and has, thus, failed to become a facilitator of standards in China. To sum up, China is well on its way towards becoming an active player in international competition in standard setting, towards exporting Chinese standardisation deliverables and towards successfully placing Chinese technology on the global stage.

3 EU-CHINA REGULATORY COOPERATION ON STANDARDS

EU-China regulatory cooperation on standards has developed dramatically in recent years. In particular, at the collective level of relations between China and the collective organisations of the EU substantial progress has been made towards a diverse and pragmatic form of cooperation.

3.1 History and current state of EU-China cooperation on standards

EU-China regulatory cooperation on standards is embedded in a long history of trade relations between China and Europe reaching well back into the Middle Ages.⁶⁰ However, in the light of today's trade volumes one should remember the fact that there was almost no trade whatsoever between China and the EU only 30 years ago.⁶¹ Today, China is the second largest economy and the biggest exporter in the world. It is also the fastest growing market for European exports with EU-China trade in goods having reached about 430 billion Euros and trade in services having reached about 20 billion Euros annually.⁶² While trade volumes are consistently increasing, so it seems are a number of trade barriers in China. Amongst them are an ever growing number of country-specific standards that are considered hard for foreign competitors to comply with.⁶³ Other difficulties are, *inter alia*, reports in the realm of IP violations⁶⁴ as well as in the area of public procurement. Complaints by foreign stakeholders have, in particular, been voiced in circumstances in which the Chinese government pursues its indigenous innovation strategies through instruments, such as, procurement, standardisation and IP protection.

⁶⁰ See P. Wang, *supra* note 51.

⁶¹ European Commission, 'Facts and Figures on EU-China Trade', September 2012.

⁶² *Ibid.*

⁶³ *Ibid.*

⁶⁴ See A. Wechsler, *supra* note 40, pp. 3-54.

Responding to such complaints, the EU has not only relied on remedies in the context of multilateral fora, such as complaints at the WTO,⁶⁵ it has also engaged in a bilateral dialogue and cooperation with China. One of the most striking examples of such bilateral cooperation efforts has been the *EU-China IPR2 Project* from 2007 to 2011.⁶⁶ The project was designed as a partnership project between the EU and China with the objective of promoting a sustainable environment for effective IPR protection and enforcement in China. Even though the project has been considered a 'milestone' for EU-China cooperation in IP matters, critical voices have noted the limits of this form of cooperation in the light of Chinese domestic IP and innovation strategies and the natural limitations of any European impact on Chinese political, administrative and judicial processes. Nevertheless, the project seems to serve almost as a blueprint for European cooperation efforts in the realm of standardisation.

While on the one hand such blueprints for cooperation have certainly inspired EU-China regulatory cooperation on standards, on the other hand, there were also sheer necessities for cooperation in an environment of proliferation of specifications and exploding numbers of private SSOs and alliances.⁶⁷ It has been shown that recent years have seen an explosion in the numbers and varieties of private SSOs, in particular, in the field of ICT, and also a proliferation of – often competing – technical specifications. It has, thus, been argued that the private sector 'has largely failed in managing the public good that is standardisation'⁶⁸ to the detriment of the general public and consumers. Government intervention has subsequently been encouraged, such as with suggestions for the participation of public representatives in standard-developing or -setting processes. Whilst the value of managerial freedom and private cooperation is well recognized, suggestions for stronger regulatory intervention for better coordination have increased in recent years. It follows that increased regulatory cooperation between the EU and China comes at a time in which ever more concrete suggestions for public policy intervention in standardisation and standards battles are being made.⁶⁹

This comes also at a time in which the European Commission has come to realize that its traditional foreign and trade policies towards China had become outdated. Commentators are going as far as claiming that 'Europe's approach to China is stuck in the past'.⁷⁰ Nevertheless, EU-China relations have become an important point on the Commission's international affairs agenda as well as on its industrial policy agenda. In 2001, the EU General Affairs Council approved

⁶⁵ See complaints WT/DS431/1, WT/DS432/1, WT/DS433/1 of 13 March 2012.

⁶⁶ See <<http://www.ipr2.org/>>.

⁶⁷ C. Cargill and Sh. Bolin, 'Standardisation: A Failing Paradigm', in S. Greenstein and V. Stango (eds.), *Standards and Public Policy* (Cambridge University Press 2007), pp. 296-328, p.308.

⁶⁸ *Ibid.*, p. 312.

⁶⁹ Luis M.B. Cabral and T. Kretschmer, 'Standard Battles and Public Policy', in S. Greenstein and V. Stango, *supra* note 67, pp. 329-344.

⁷⁰ J. Fox and F. Godement, 'Policy Report, A Power Audit of EU-China Relations', *European Council on Foreign Relations* (2009), available at <http://ecfr.3cdn.net/532cd91d0b5c9699ad_ozm6b9bz4.pdf>.

the *proposed EU-China Industrial Policy and Regulatory Cooperation Dialogues*.⁷¹ The institutional basis for this dialogue was to become the *EU-China Joint Committee*, whilst the legal basis was the *Agreement on Trade and Economic Cooperation between the European Economic Community and the People's Republic of China* of 1985.⁷² In 2006, the Commission issued a Communication that set out how it envisaged the way forward in dealing with the new economic powerhouse in the global economy.⁷³ While acknowledging China as one of the EU's most important partners, particular emphasis was placed on building an ever closer, stronger and strategic partnership through bilateral cooperation. An important pillar within this regulatory dialogue ever since has been the EU-China regulatory cooperation on standards.

In 2001, at the early beginnings of EU-China cooperation on standards, a regulatory dialogue between the European Commission and the AQSIQ began. In essence, the dialogue was called 'the Consultation Mechanism on Industrial Products and WTO/TBT' and aimed at regulatory convergence for the promotion of free trade in goods.⁷⁴ Presently, the dialogue comprises 12 working groups, including one on Standardisation and Conformity Assessment. In 2006, the work within the *Seconded European Standardisation Expert for China* (SESEC) began with the support of CEN, CENELEC, ETSI and the European Commission's *Directorate General (DG) for Enterprise and Industry* and the *European Free Trade Association* (EFTA). It has ever since aimed at raising awareness of the European Standardisation System in China.⁷⁵ In 2008, the *EU-China Medical Devices Expert Roundtable* (MDER) was set up between the *State Food and Drug Administration* (SFDA)⁷⁶ and *DG Enterprise & Industry*. In the same year, a Working Group for Standardisation and Conformity Assessment was founded in the *EU Chamber of Commerce in China*.⁷⁷ In 2009, a Memorandum of Understanding was signed between SAC and CEN, CENELEC and ETSI. Likewise, in 2009, a dialogue was started on construction and energy-saving standards between the European Commission and the *Ministry of Housing and Urban-Rural Development* (MoHURD).⁷⁸ In the same year, the Europe-China Standardisation Information Platform (CESIP) was launched as a practical information tool.⁷⁹

In summary, EU-China regulatory cooperation in standardisation has intensified considerably in recent years. It is well complemented by EU Member State initiatives as well as private and global initiatives to reduce technical barriers to trade. It is also well embedded in the general European policy ap-

⁷¹ 2362nd Council Meeting, General Affairs, Luxembourg (2001).

⁷² Available at <http://ec.europa.eu/enterprise/policies/international/files/f1748_en.pdf>.

⁷³ European Commission, Communication from the Commission to the Council and the European Parliament, 'EU-China: Closer partners, growing responsibilities', COM(2006) 631 final.

⁷⁴ See information from the European Commission, available at <http://ec.europa.eu/enterprise/policies/international/cooperating-governments/china/index_en.htm>.

⁷⁵ See <<http://www.eustandards.cn/>>.

⁷⁶ Available at <<http://www.sda.gov.cn/>>.

⁷⁷ See <<http://www.eurochamber.com.cn/en/home>>.

⁷⁸ Available at <<http://www.mohurd.gov.cn/>>.

⁷⁹ See <<http://eu-china-standards.eu/>>.

proach in terms of foreign affairs and industrial policy towards China. At the same time, both Chinese and European industries have come to realise the extent to which their businesses are dependent on successful collaboration in the field of standard setting so that their participation has also been intense and fruitful in the context of EU-China regulatory cooperation. Nevertheless, it is striking that most of the information and collaboration initiatives were initiated by the European Commission or European entities rather than by their Chinese counterparts. Whilst Chinese representatives and officials are highly motivated to participate in the respective dialogues once they have been approached by EU representatives, the communication and activity patterns nevertheless demonstrate the extent to which the EU aims at securing European industry stakes in global commerce and, in particular, in trade with one of its largest trading partners.

3.2 The substance of EU-China cooperation on standards

Investigating the substance of EU-China cooperation on standards in more detail allows for an understanding of the nature and depth of EU-China regulatory cooperation. In doing so, it is suggested that EU-China regulatory cooperation can be clustered into four categories: first, network building; second, information exchange; third, consulting; and fourth, capacity building.

First, most of these activities would qualify both under the category of network building and selected other categories. The motivating factor for fostering network building is the improvement of transparency and mutual involvement in standardisation work, and thus, ultimately the removal of technical barriers to trade.⁸⁰ To achieve transparency and mutual involvement, the European Commission together with the *European Standards Organisation* (ESO) and EFTA encourage cooperation between private industry associations involved in standardisations both in China and the EU. Following the Commission's encouragement, the SESEC project is certainly the most visible outcome in the area of network building since 2006. SESEC aims to 'enhance the visibility of European standardisation activities, increase the cooperation between Chinese and European standardisation bodies and support European companies facing standardisation-related issues hampering market access to China'.⁸¹ One of the most successful measures taken to achieve these aims has been the deployment of European standards attachés in China. Another big achievement of SESEC was the signing of a *Memorandum of Understanding*⁸² (MoU) between ESO and SAC in 2009 which aims, *inter alia*, to promote mutual understanding of the development of standards in Europe and China (Article 1). In order to achieve the objectives set out in Article 1, the MoU envisages expert workshops and seminars, practical training, the exchange of specialists, the establishment of working groups and information exchange (Article 2).

⁸⁰ EU-China Cooperation, available at <<http://www.eustandards.cn/european-standardization/eu-china-cooperation/>>, (last access 19 June 2012).

⁸¹ Cf. <<http://www.eustandards.cn/sesec/>>.

⁸² Available at <eustandards.myeggplant.com/files/2010/10/ESOs-SAC-MoU-EN.pdf>.

Second, information exchange is one of the core pillars of EU-China regulatory cooperation. The most important action taken in this regard was the establishment of the *China-EU Standards Information Platform* (CESIP) in 2009.⁸³ The platform fosters the accessibility of standards and related technical regulation to all interested stakeholders by providing information about the relevant applicable and upcoming standards – both voluntary and mandatory – in China and Europe. The web site also offers sector-specific information in four pilot sectors: electrical equipment, medical devices, machinery and environmental protection. The website is bilingual, free of charge and allows for a variety of search functions. Another important information exchange between public authorities is the Regulatory Dialogue between the European Commission and AQSIQ, with 12 working groups that aim to foster reciprocity in standardisation cooperation.⁸⁴ Yet another regulatory dialogue was started in 2009 in the area of construction and energy-saving standards. Based on a MoU, the DG Enterprise and Industry, the DG Energy and Transport and the MoHURD host a *Cooperation Framework on Energy Performance and Quality in the Construction Sector*. A great variety of activities are envisaged to enhance information exchange in this field.

Third, consulting activities work in various directions. On the one hand, the *EU SME Centre* in Beijing advises European Small and Medium Enterprises (SMEs) on establishing commercial activities in China.⁸⁵ Advice on technical standards and regulation is provided by experts on conformity assessment, technical regulation and standardisation. On the other hand, however, there are also activities that aim at the development of recommendations for public authorities. Thus, in 2001, an EU-China High Level Forum on Medical Devices Standardisation took place with the participation of CENELEC, the *Beijing Institute of Medical Devices Testing*,⁸⁶ the *European Coordination Committee of the Imaging, Electromedical and Healthcare IT Industry* and the *China Centre for Pharmaceutical International Exchange*.⁸⁷ One of the outcomes of the 2001 Forum was a recommendation for the adoption of the third edition of the IEC 60601-1 Standard. Moreover, in 2008, an *EU-China Medical Devices Expert Roundtable* (MDER) was set up between the SFDA and *DG Enterprise and Industry*. In 2008, six working groups provided an extensive report on the differences between the European and Chinese medical device regulatory framework. The report contained extensive recommendations for the future development of industry standards and regulations as well as of the interaction between SSOs and Chinese and European authorities.⁸⁸ Furthermore, out of the *European Chamber of Commerce in China* (EUCCC) came a *Working*

⁸³ See <<http://eu-china-standards.eu/>>.

⁸⁴ See <http://ec.europa.eu/enterprise/policies/international/cooperating-governments/china/index_en.htm>.

⁸⁵ See <<http://www.eusmecentre.org.cn/>>.

⁸⁶ Available at <<http://en.bimt.org.cn/>>.

⁸⁷ Available at <<http://www.ccpie.org/en/index.asp>>.

⁸⁸ Joint Working Group Report, EU-China Medical Device Expert Roundtable (MDER), Joint Working Group Report, January-December 2008, available at <http://www.cocir.org/uploads/documents/34-759-mder_20report_en_final_209_20march_202009%5B1%5D.pdf>.

Group for Standardisation and Conformity Assessment, which lobbies for constructive recommendations to remedy standardisation deficiencies in China.⁸⁹

Fourth, yet another pillar of EU-China regulatory cooperation is capacity building and collaborative training activities. Most notably, the *EU-China Standardisation Collaborative Training Program in Support for ISO Twinning Scheme* was established to support capacity building in the field of international standardisation for technical personnel. The project is not only provided for unilaterally by the European Commission, but enjoys the support of the SAC while being implemented by the *Chinese National Institute for Standardisation (CNIS)*⁹⁰ and a number of other European NSBs. It aims to train 100 International Chinese Standardisation experts, 20 trainers and 200 supporting experts in China. This particular training initiative is embedded in a web of further activities arising out of the other forms of regulatory cooperation.

In summary, extensive activities have been undertaken in the framework of EU-China regulatory exchange in the realm of network building, information exchange, consulting and capacity building. Such activities have taken place with the participation of a variety of public and private actors and have been funded primarily by European funds with the aim of supporting the building of a solid knowledge base in China and Europe. Going beyond focusing on harmonization of standards, these activities have focused on the promotion of soft regulation on a voluntary basis, on the support of authorities and regulators in relation to technical requirements and on knowledge-sharing for optimal technical solutions. Rather than focusing on governmental dialogues only, the European Commission has encouraged and enabled a variety of actors in standardisation to move towards closer cooperation. In sum, the substance of EU-China cooperation aims at amicable cooperation through a variety of mechanisms at a variety of levels while paying tribute to the rising role of China as a major global player in standardisation.

3.3 Achievements and challenges of EU-China cooperation on standards

Measuring the achievements of EU-China cooperation on standards is a difficult undertaking due to the lack of hard facts and data. It can certainly be taken as a positive sign that the first phase of SESEC activities from 2006 to 2009 was extended from 2009 to 2012.⁹¹ And it is likewise positive that the suggested deployment of European standards attachés in China has been well accepted both by European industry and Chinese stakeholders. Undoubtedly, EU-China regulatory cooperation has contributed to fruitful reciprocity in a fiercely competitive environment. At the same time, however, it should be noted that this regulatory cooperation constitutes merely one of many collaborative efforts worldwide which promote international standardisation. Mention should

⁸⁹ See <<http://www.eurochamber.com.cn/en/working-groups-forums-desks/1/51>>.

⁹⁰ See <<http://www.cnis.gov.cn/>>.

⁹¹ See <<http://www.eustandards.cn/sesec/>>.

be made of the *Global Standards Collaboration (GSC)*⁹² and cooperation between the *Standards Institute (ANSI)* and the *National Institute of Standards and Technology (NIST)*.⁹³

Another key issue to consider when assessing the achievements of EU-China regulatory cooperation on standards is the competition of interests meeting in the respective alliances. The dedication of China to closing its gaps with international standardisation and to complying with WTO commitments for the benefit of its domestic economy has been the strongest driver for Chinese regulatory initiatives. This dedication – supported and fuelled by economic evidence⁹⁴ – has not only translated into over 300 million Renminbi (36 million Euros) being spent on standardisation between 2006 and 2008 alone, but it has also translated into ever more and ever stronger Chinese standards.⁹⁵ By the end of 2008, there were 22,931 local standards in China, of which 3,111 were compulsory.⁹⁶ Moreover, some 39,686 sector standards and 14,142 local standards had been registered by 2008. 444 national standardisation technical committees (TCs) had been founded by 2008 with 586 sub-committees (SC). 184 national standards that had resulted from independently-developed domestic technologies by 2007 testify to the success of the Chinese indigenous innovation strategy.⁹⁷ At the same time, the internationalization of Chinese standards has made considerable progress so that China has not only become a permanent member of the ISO and the IEC but has also thereby managed to improve its standing in international standardisation. Now, several Chinese nationals hold key posts in relevant international standardisation organisations. China is consistently increasing the numbers of its submissions of international standards proposals and is increasingly successful in getting them adopted.⁹⁸ As a result, the ISO hails selected Chinese standardisation examples as best practice for the benefit of standards, such as in the shipping and the iron and steel industries.⁹⁹

Despite the difficulties in attributing these successes to EU-China regulatory cooperation, a long line of achievements should nevertheless be recognised. The greatest relevance of EU-China regulatory cooperation to be considered is the enhancement of understanding between European and Chi-

⁹² <<http://www.etsi.org/WebSite/AboutETSI/GlobalRole/GSC.aspx>>.

⁹³ SAC Signs Agreement of Cooperation With ANSI and NIST, 9 March 2011, available at <<http://www.cspress.cn/News/15993.jhtml?origin=1>>.

⁹⁴ Z. Deng and Y. Liu, 'Technological Standard and Industrial International Competition – Evidence from Information Industry in China', 4 *Shanghai Journal of Economics* 2010, pp.1-12.

⁹⁵ P. Wang *et al.*, 'Standardisation Strategy of China – Achievements and Challenges', 107 *East-West Center Working Papers* 2010, p. 11.

⁹⁶ See P. Wang, *supra* note 51, p. 10.

⁹⁷ *Ibid.*, p. 12.

⁹⁸ SAC, Key Data for Standardisation, available at <http://www.sac.gov.cn/sac_en/AffairsOpening/StatisticalData/201011/t20101123_4265.htm>.

⁹⁹ See, ISO, Repository of Studies on Benefits of Standards, Dalian Shipbuilding Industry Co. Ltd. China, available at <<http://www.iso.org/iso/home/standards/benefits/standards/benefits-detail.htm?emid=25>>.

nese standardisation experts.¹⁰⁰ Economic evidence has shown that professional backgrounds can have a tremendous impact on the reliability and substance of standard setting.¹⁰¹ By fostering interpersonal dialogues and training as well as through capacity building, EU-China regulatory cooperation has greatly contributed to mutual understanding and respect of the respective standardisation approaches.

Nevertheless, issues with the Chinese standard-setting regime have remained and it has consistently been criticized by stakeholders. First, the lack of transparency in the standard-development process has been noted to inhibit full access to the market.¹⁰² Closely related is, second, the direct involvement of the Chinese government in standard setting processes. One of the most well-known examples of public control of standard setting was the development of the WAPI (wireless LAN authentication and privacy infrastructure) standard in China in 2003.¹⁰³ While using a security hole in the then established international WiFi standard as justification, the Chinese government wanted to set up its own standard which was to be incompatible with the international WiFi standard. Details of the encryption algorithm were only given to 24 Chinese companies with the result that foreign competitors had to pay royalty fees for the Chinese markets. In consequence, foreign companies objected and asked their governments to intervene on the grounds of a violation of the *TBT Agreement*.¹⁰⁴ Eventually and upon intervention by the US government, the Chinese government conceded to postpone the implementation of the WAPI standard. After two years of negotiations and a subsequent ballot, the WiFi standard won over the WAPI standard and the latter has never really been commercialised.¹⁰⁵ This WAPI incident demonstrated yet another, third, reason for criticism of the Chinese standardisation system. It is argued that the role of private actors and multinational companies (MNCs) is as yet insufficiently being taken into account.¹⁰⁶ In an attempt to protect and foster domestic innovation and domestic companies, the voice of MNC's has substantially been neglected by the Chinese government. The dialogue fostered by the European Commission aims at remedying the situation while a further enabling of communication and collaboration between MNCs and Chinese stakeholders would be of great benefit to the Chinese standard-setting process.

¹⁰⁰ K. Ziegler, 'The European Standardisation System – Prospects for EU-China Cooperation, China-EU IT Standards Research Partnership', *Beijing Policy Workshop*, Friendship Hotel, 8 December 2009, p. 4.

¹⁰¹ A. Allen and R. Karthik, 'Towards an Understanding of the Role of Standard Setters in Standard Setting', *Journal of Accounting and Economics* June 2012.

¹⁰² T. Tsao, *A Study on Developing the ICT Technical Standards in Mainland China* 2010, available at <<http://ethesys.lib.mcu.edu.tw/ETD-db/ETD-search/viewetd?URN=etd-0726110-214822>>.

¹⁰³ See H. Lee and S. Oh, *supra* note 10.

¹⁰⁴ Z. K. Cromer, 'China's WAPI policy: Security measure or trade protectionism', 18/15 *Duke Law and Technology Review* 2005.

¹⁰⁵ S. Kennedy, 'The Political Economy of Standards Coalitions: Explaining China's Involvement in High-Tech Standard Wars', 2 *Asia Policy* July 2006, pp. 41-62.

¹⁰⁶ J. Hou, 'The Role of MNCs in China's Standardisation', 114 *East-West Center Working Paper* 2011.

In summary, EU-China regulatory cooperation has clearly translated into a variety of achievements in international standardisation. At the same time, however, issues remain with Chinese standardisation that are primarily grounded in the fact that the Chinese government exerts stronger control over standardisation processes and allows for less MNC involvement than its Western counterparts have ever done. Furthermore, the Chinese government's increased emphasis on actively exporting Chinese standards has become ever more visible. Thereby, new challenges are being posed to foreign governments and stakeholders in facing Chinese standards competition. In sum, EU-China regulatory initiatives to cooperate in national and international standard-development and standard setting are contributing substantially towards reciprocity and mutual understanding in an era in which standards wars are being increasingly transferred to the government level.

4 EVALUATION OF EU-CHINA REGULATORY COOPERATION ON STANDARDS

The evaluation of EU-China regulatory cooperation on standards in this section will be made not only with reference to the range from competition to reciprocity to harmonization but also with reference to the *EU Better Regulation Strategy*, the *Europe 2020 Strategy* and Europe's trade policy towards China.

4.1 Regulatory cooperation in the light of the EU Better Regulation Strategy

Aligning EU-China regulatory cooperation with the *EU Better Regulation Strategy* requires an evaluation of the extent to which bilateral regulatory strategies contribute to 'achieving growth and jobs, while continuing to take into account the social and environmental objectives and the benefits for citizens and national administrations'.¹⁰⁷ An important element of the *Strategy* is the right choice of regulatory instruments. This entails a judgment as to the type of legislative action that best fits each particular objective and as to whether regulatory action should best be taken in terms of setting standards, levying taxes, financing actions, providing information or offering advice. In a Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions,¹⁰⁸ the European Commission has identified a number of key messages relating to sound regulation in the whole policy cycle, to the shared responsibility of the European institutions and Member States, and to reinforcing a constructive dialogue between stakeholders and all regulators at the EU and national levels.

¹⁰⁷ See introduction by the European Commission available at <http://ec.europa.eu/governance/better_regulation/index_en.htm>.

¹⁰⁸ See the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'Smart Regulation in the European Union', COM(2010) 543 final, 8 October 2010.

First, measuring EU-China regulatory cooperation in terms of the quality of regulation throughout the policy cycle requires an assessment of the success of the design, implementation, enforcement, evaluation and revision of this regulatory cooperation in achieving regulatory objectives. While drawing increasingly upon a pool of Commission experts and adopting an ever more proactive regulatory approach to standardisation, the EU still relies extensively on the autonomy of industry and self-regulation by stakeholders.¹⁰⁹ Corresponding to the bottom-up structure of the European innovation system, EU regulatory approaches have relied primarily on joint initiatives by a variety of actors, thus refraining from overregulation. At the same time, European regulatory approaches to China are well embedded in the WTO legal framework in general, and the *TBT Agreement* in particular, thereby avoiding duplication of policy initiatives.¹¹⁰ The quality of European regulatory approaches is further enhanced by the Commission's drive towards efficiency and accountability both for European and for international standard-setting procedures.¹¹¹ Constant policy reviews and, in particular, the *Expert Panel for the Review of the European Standardisation System (EXPRESS)*¹¹² allow for strategic recommendations on how to further improve the quality of standards regulation in the EU and in EU-China regulatory cooperation.

Second, measuring EU-China regulatory cooperation in terms of the division of responsibilities between European institutions and Member States requires an assessment of collective efforts in the realm of international standardisation. While the European Commission has taken the lead in EU-China regulatory cooperation and the SESEC project as such, it has not pre-empted Member States and their institutions from enhancing mutual cooperation. Thus, the *German Institute for Standardisation*¹¹³ began its own cooperation with the SAC in China in 1979 and reinforced it in 2006.¹¹⁴ Furthermore, the participation of Member States in European standardisation processes is guaranteed through direct membership in CEN and CENELEC, whilst participation is in any case open in ETSI. However, at the same time, the European Commission has been ever more visibly drawing the regulation of standardisation to the central policy level. Thus, the Commission clearly emphasises in recital 6 of the 2012 *Regulation on European Standardisation* that it is the role of the Union to promote

¹⁰⁹ Q. Van Voorst tot Voorst *et al.*, 'Standardisation Processes in China and the European Union Explained by Regional Innovation Systems', 08/05 *Innovation Studies Utrecht* 2005, p. 25

¹¹⁰ Commission of the European Communities, *European Policy Principles on International Standardisation*, SEC(2001) 1296, p. 3.

¹¹¹ Commission of the European Communities, *European Policy Principles on International Standardisation*, SEC(2001) 1296, p. 9.

¹¹² See 'The Expert Panel for the Review of the European Standardisation System (EXPRESS)', available at <http://ec.europa.eu/enterprise/policies/european-standards/standardisation-policy/policy-review/express/index_en.htm>.

¹¹³ Deutsches Institut für Normierung (DIN), available at <<http://www.din.de>>.

¹¹⁴ DIN, *Strategische Partnerschaft mit China*, 4 November 2006, available at <<http://www.din.de/cmd?level=tpl-artikel&cmstextid=62280&languageid=de>>.

'bilateral approaches with third countries to coordinate standardisation efforts and to promote European standards'.¹¹⁵

Third, measuring EU-China regulatory cooperation in terms of a constructive dialogue between citizens and stakeholders requires an evaluation of the possibilities for feedback from and participation by citizens and stakeholders. The European Commission welcomes citizen and stakeholder participation both at the policy level and at the implementation level. This approach is also implemented in the framework of SESEC, where CEN, CENELEC, ETSI, the CEN-CENELEC Management Centre (CCMC), and EFTA are, *inter alia*, recognised as core stakeholders in international standardisation.¹¹⁶ CEN, CENELEC and ETSI – in turn – are extensively based on stakeholder participation either directly or through National Mirror Committees, and European Standards Organisations are based on openness, transparency and impartiality.¹¹⁷ Even more specifically, the activities run under the umbrella of SENEC take place with the extensive participation of industry leaders and innovators.¹¹⁸

In summary, it follows that exhaustive efforts have been made by the European Commission to align its EU-China regulatory policy with the *EU Better Regulation Strategy* in terms of quality of regulation. It follows further that the need for a division of responsibilities between European institutions and Member States is reflected in EU-China regulatory cooperation, while tendencies to centralise such efforts at the initiative of the European Commission are becoming ever stronger. And finally, EU-China regulatory cooperation has well implemented the European aspiration of providing for a constructive dialogue between stakeholders and citizens. It follows that EU-China regulatory cooperation hovers in between fostering competition and promoting reciprocity. Nevertheless, responding to Chinese techno-nationalism requires at least some degree of assertiveness and centralization on the part of the Commission. Further simplification and efficiency could be achieved by transferring regulatory efforts from bilateral relations to the construction of more viable multilateral governance structures.

4.2 Regulatory cooperation in the light of the Europe 2020 Strategy

Evaluating EU-China regulatory cooperation with regard to the *Europe 2020 Strategy* demands an evaluation of whether and to what extent EU-China regulatory cooperation contributes to the EU's growth strategy for the coming

¹¹⁵ Regulation (EU) No. 1025/2012 of the European Parliament and of the Council of 25 October 2012 on European standardisation, amending Council Directives 89/686/EEC and 93/15/EEC and Directives 94/9/EC, 94/25/EC, 95/16/EC, 97/23/EC, 98/34/EC, 2004/22/EC, 2007/23/EC, 2009/23/EC and 2009/105/EC of the European Parliament and of the Council and repealing Council Decision 87/95/EEC and Decision No 1673/2006/EC of the European Parliament and of the Council.

¹¹⁶ Cf. SESEC, Stakeholders, available at <<http://www.eustandards.cn/sesec/stakeholders/>>.

¹¹⁷ Ibid.

¹¹⁸ See, for instance, the Second China Smart Grids International Conference, 2 November 2012, available at <<http://www.eustandards.cn/2010/11/02/%EF%83%BCsesec-in-the-second-china-smart-grids-international-conference>>.

decade. First of all, the *Strategy* claims as its priority to deliver smart sustainable and inclusive growth by 2020. Secondly, the *Strategy* sets out five key targets for the EU to achieve by 2020. These targets relate to employment coverage, R&D investment, climate change and energy, education, and poverty and social exclusion.¹¹⁹ Thirdly, the *Strategy* includes seven so-called flagship initiatives through which the 2020 targets should be achieved.¹²⁰ These initiatives are known as: the digital agenda for Europe, an *Innovation Union*, Youth on the Move, a resource efficient Europe, an industrial policy for the globalisation era, an agenda for new skills and jobs, and a European platform against poverty. Lastly, the EU aims to use the full range of EU policies and instruments to effectively achieve the *Europe 2020* goals.

First, in terms of the five key targets it should be noted that none of the indicators for these five key targets sets any specific target for standardisation.¹²¹ It follows that standardisation targets and EU-China regulatory cooperation must be seen as indirectly fostering the targets.

Second, and in terms of the flagship initiatives in the realm of smart growth, it is particularly the digital agenda for Europe and the *Innovation Union* that require smart standardisation policies for success. The creation of a single market based on interoperable Internet facilities and applications requires intelligent standardisation policies. More relevant, however, in the context of EU-China regulatory cooperation is the establishment of an *Innovation Union*. Establishing an *Innovation Union* requires refocusing R&D and innovation policies towards addressing novel social challenges as well as strengthening every link in the innovation chain.¹²² The respective Communication by the Commission states explicitly that interoperable standards are required to improve the framework conditions for businesses to innovate.¹²³ Likewise, in the realm of sustainable growth the Communication states that common standards are of outstanding relevance for building a resource-efficient Europe through modernising and decarbonising the transport sector.¹²⁴ In addition, the Commission aims at a new industrial policy for the globalisation era that maintains and supports a strong, diversified and competitive industrial base for Europe.¹²⁵ Therein, standard-setting is regarded as an essential instrument for a successful horizontal approach to industrial policy. And even more importantly in the context of EU-China regulatory cooperation, leveraging European and international standards for the long-term competitiveness of European industry is

¹¹⁹ European Commission, *supra* note 29.

¹²⁰ See <http://ec.europa.eu/europe2020/europe-2020-in-a-nutshell/flagship-initiatives/index_en.htm>.

¹²¹ See headline indicators at <http://epp.eurostat.ec.europa.eu/cache/Euro_2020/E2020_EN_banner.html>.

¹²² See <http://ec.europa.eu/europe2020/europe-2020-in-a-nutshell/priorities/smart-growth/index_en.htm>.

¹²³ European Commission, *supra* note 29, p.12.

¹²⁴ *Ibid.*, p.15.

¹²⁵ See <http://ec.europa.eu/enterprise/policies/industrial-competitiveness/industrial-policy/index_en.htm>.

regarded as a key to promoting the transition of service and manufacturing sectors to greater resource efficiency.¹²⁶

In summary, it follows that the *Europe 2020 Strategy* does not explicitly provide any standardisation targets for EU-China regulatory cooperation to meet. However, it sets out a comprehensive set of key targets and flagship initiatives in which standardisation policy and standards cooperation play a decisive role. Whilst it is as yet too early to measure the contribution of EU-China regulatory cooperation to the achievement of those targets, it can certainly be claimed that the current design of EU-China regulatory cooperation contributes to the achievement of the *Europe 2020 Strategy* in the area of the digital agenda for Europe, the *Innovation Union*, and the industrial policy for globalization. At the same time, its design aims to strike a balance between encouraging reciprocity, on the one hand, and harmonising international standards, on the other hand.

4.3 Regulatory Cooperation in the Light of Europe's Trade Policy towards China

An assessment of EU-China regulatory cooperation in the light of Europe's trade policy towards China requires, first of all, an assessment of how it fits generally into EU trade policy. Quite distinct from the *EU Better Regulation Strategy* and the *Europe 2020 Strategy*, this assessment requires a perspective on the public policy that governs trade between the EU and other countries. In accordance with Article 207 of the *Treaty on the Functioning of the European Union* (TFEU),¹²⁷ the main objectives of EU trade policy are the lowering of barriers to EU exports and investments on the one hand, and on the other the improvement of conditions for importers from third countries, with the former being of paramount importance in the realm of international standardisation policies.

Thus, in terms of access strategies, it should be noted that China is the second largest EU export destination after the US. And it should further be noted that China leads the list of importers into the EU.¹²⁸ It follows that EU-China regulatory cooperation on standards is of paramount importance in facilitating trade between the two trading blocks. This fits well in an era of economic regionalism and bilateralism.¹²⁹ At the same time, however, and in terms of instruments, EU-China regulatory cooperation is only one of the many pillars of EU trade policy, which also covers multilateral trade agreements, bilateral trade agreements and the deepening of relationships with other strategic partners.¹³⁰ In fact, increased emphasis on bilateral relations can even

¹²⁶ European Commission, *supra* note 29, p.17.

¹²⁷ OJ C 115, 9.5.2008, p. 1.

¹²⁸ European Commission, 'The European Union Trade Policy' (2011).

¹²⁹ J. Pelkmans and R. Beuter, 'The Transformation of EU Trade Policy', *EIPASCOPE*, 25th Anniversary Special Issues.

¹³⁰ EU Trade Policy Study Group, 'A Modern Trade Policy for the European Union', A Report to the New European Commission and Parliament from the EU Trade Policy Study Group (2010), p. 4.

be considered a symptom of the failure of multipolar trade policies.¹³¹ Yet again, in terms of the substance of trade policy, the EU has consistently stressed that the emphasis of trade policy is moving away from tariffs towards other relevant areas such as standards. It follows that EU-China regulatory cooperation corresponds well with this shift in policy emphasis beyond tariff policies and fits well with a trade policy that aims to secure market access for European exporters.

Turning more specifically to an assessment of EU-China regulatory cooperation in the light of Europe's trade policy towards China, a starting point should be the recognition that recent years have seen the rising importance of close China-EU cooperation in S&T.¹³² This is, in particular, due to the fact that China-EU commercial relations are more technology-intensive than other bilateral relationships. China's government is well aware of the EU being the largest source for China's imported technology. In fact, China very deliberately supports the transfer of European technology to China. This finding is supported by a statement by Deng Xiaoping that demonstrates the extent to which China aims to absorb European technologies: 'Now, that the West European countries are beset with economic difficulties, we should lose no time in seeking their cooperation, so as to speed up our technological transformation'.¹³³ This statement should not be the only reason for worries on the part of the European Commission. In fact, complaints on the part of European enterprises are wide-ranging and they are particularly strong in the realm of standardisation. Ever since 1995 these complaints have invariably been addressed by changing policy on the part of the European Commission, with the regulatory dialogue on standard setting being one of the cornerstones of EU-China trade policy in the 21st century.¹³⁴

One important point to note in the context of EU-China trade policy, however, is the nature of such policies. Ever since 2006, the EU has placed particular emphasis on the amicable resolution of trade problems through dialogue rather than a more confrontational approach.¹³⁵ The reason for this policy approach lies in its recognition of China as a partner and a new trading power rather than an opponent.¹³⁶ Retaliatory measures are reserved as a last resort for conflict resolution. This also applies to the use of WTO channels of dispute resolution, which are reserved for ultimate stalemates. In consequence, the nature of EU-China regulatory cooperation in the area of standardisation cor-

¹³¹ S. Woolcock, *European Economic Diplomacy: The Role of the EU In External Economic Relations* (Ashgate Publishing Limited 2012), p. 10.

¹³² Z. Zuqian, 'China's Commercial Relations with Europe', in D. Shambaugh *et al.* (eds.), *China-Europe relations perceptions, policies and prospects* (London, New York: Routledge 2007), p. 235.

¹³³ W. Jiabao, 'Vigorously Promoting Comprehensive Strategic Partnership Between China and the European Union', Speech, by the Chinese Prime Minister at the China-EU Investment and Trade Forum, Brussels, 6 May 2004.

¹³⁴ R. Ash, 'Europe's Commercial Relations with China', in D. Shambaugh *et al.* (eds.), *supra* note 132, p. 231.

¹³⁵ *Ibid.*

¹³⁶ Commission Working Paper Document, 'Competition and Partnership', COM(2006) 632 final.

responds well to this amicable policy approach. Rather than relying on hard laws and final dispute resolution mechanisms, EU-China regulatory cooperation on standards relies on soft laws, collaborative designs and amicable dispute resolution. Nevertheless, the EU has consistently stressed that – despite an amicable approach – it will strongly fight for openness in European trade with China for the benefit of European businesses.¹³⁷

In summary, until the 1990s EU trade policy could well be characterised as technocratic and rather opaque. However, from the mid-1990s there has been a consolidation of decision-making processes and a growth in *de facto* competence for trade in the Commission due to treaty changes. These changes have also left their imprint on EU-China regulatory cooperation on standards, an area in which the EU has demonstrated increasing activity. Moreover, EU-China regulatory cooperation has come to correspond to a growing trend towards economic regionalism, beyond-tariff foreign policy, and to increasing perceptions of China as a new and important trading partner. This perception has also translated into an approach that could be characterized as one based on the realization of ever novel competition. Realizing the growing competition from China, the EU has devoted its foreign trade policies towards assisting European enterprises in China, towards overseeing the establishment of new commercial resources in China and towards supporting European enterprises in international standards wars.

5. CONCLUSIONS AND SUGGESTIONS FOR NEW DIRECTIONS IN EU-CHINA REGULATORY COOPERATION ON STANDARDS

This paper's discussion of regulatory approaches towards standards in the EU and China, its analysis of EU-China regulatory cooperation on standards and its evaluation thereof have shown that the global landscape of standardisation is shaped by political, professional and citizen interests. With the increasing proliferation of standardisation and the ever growing role of standards in global commerce, political initiatives that intervene in formerly mostly private standard-setting processes have dramatically increased. One of these political initiatives has been EU-China regulatory cooperation aiming to soften the standards competition between the two trading blocks. The ever growing interest of the EU to engage in a constructive dialogue with China reflects not only its interest in harmonious trade relationships but also its fears about a rising technological power and fierce competitor.¹³⁸ This cooperation can even be characterized as one of the initiatives to curb Chinese techno-nationalism through ever stronger bilateralism. It is grounded in the fact that the Chinese standardisation system has matured considerably over the last decade, with the number of Chinese standards now exceeding the number of European standards. And it has received further impetus from China's dedication to closing the gaps to

¹³⁷ Ibid.

¹³⁸ Cf. R. Peerenboom, *China Modernizes: Threat to the West or Model for the Rest?* (Oxford: OUP 2008).

international standardisation. At the same time, however, there remains a lack of understanding between European and Chinese standardisation cultures, as well as deficiencies in the adoption of coherent sets of standards in China and on a global level.

Turning, then, to suggestions on how to address these deficiencies in EU-China regulatory cooperation on standards, the following recommendations are made:

First of all, standards policy should, together with trade policy, be re-evaluated as 'high politics', as opposed to remaining classified as 'low politics'. The reason for this recommendation is the rising determination of global players, such as China, to make trade policy an important instrument of its international affairs policy. Standard wars are just one – albeit an important – symptom of this development, while such wars are increasingly being fought by public authorities as opposed to private entities. It follows further from this shift from private to public that European innovation, S&T, trade and international affairs policies should be adapted and integrated to better account for the flexibility and progress of technological development. Moreover, constant re-evaluation should be undertaken as to whether a particular standard-setting problem is best dealt with by compulsive laws and regulations or voluntary standards.

A second recommendation relates to this final point of distinction between regulation and standards. Its aim is to encourage the European Commission to refocus attention on raising China's awareness of the danger of controlling standardisation as opposed to facilitating standardisation processes. Past initiatives have not only shown China's serious commitment to technological innovation and standard setting but also its potential to distort processes of standards development and setting through government intervention. As the international standards landscape is becoming ever more controversial and contested, initiatives are required that curb economic nationalism while promoting openness and transparency in international standard setting. EU-China regulatory cooperation could be an important milestone in reshaping the role of government involvement in the promotion of technological development. More specifically, EU-China regulatory cooperation should – in its current cooperative spirit – refocus its aim on promoting enabling roles, as opposed to controlling roles, of governments in standard-setting.

To sum up, China-EU regulatory cooperation has become an important bilateral collaborative effort in the realm of international standardisation that not only has the potential to determine the trajectory of the global standards regime. Rather, it has the responsibility to promote an open, efficient, coherent and competitive global standards regime that strikes an appropriate balance between guaranteeing market access, benefiting consumers and allowing for the achievement of public policy objectives.

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EUROPEAN UNION POLICY ON FOREIGN INVESTMENT: A MISSED OPPORTUNITY?

Stephen Woolcock

1. INTRODUCTION

This article seeks to contribute to the broader topic of the EU's role in shaping international regulatory norms or standards. The EU could be said to possess normative power when the following conditions are satisfied: (a) there is an enduring consensus on the overall aims and shape of the EU *acquis*; (b) there is *de jure* competence under the treaties; and (c) there is also an acceptance of *de facto* EU competence by the Member States. *De facto* competence exists when there is an agreed, well established regime for decision-making and negotiation with respect to international economic negotiations. Normative power is however unlikely to be sufficient as a means of shaping the positions of other parties (states) in international negotiations. This is clearly illustrated in the EU's attempts to provide leadership of the multilateral trade negotiations for the decade stretching from the mid-1990s until the Global Europe strategy of 2006, when the EU switched (back) to a multi-level approach to trade negotiations. Market power is also required in trade and investment negotiations, and the EU's relative market power has been in decline for some time due to: (a) the rise of the emerging countries with their market potential and relatively closed markets; (b) the openness of the EU market following the *de facto* unilateral opening of the 1980s, especially in investment; and (c) the limited scope for the EU to use 'negative' threats of closure to enhance its market power (due to *de facto* consensus based or even QMV decision-making).

The EU was largely unsuccessful in shaping the multilateral agenda in the World Trade Organization (WTO). Because the comprehensive agenda favoured by the EU was opposed by developing and emerging market members of the WTO and gained little support from the United States. Rather than negotiate investment in the WTO as favoured by the EU, the US pressed for plurilateral negotiations in the OECD. The idea of making progress in the OECD and then widening participation to a genuinely multilateral agreement proved to be a false hope and the negotiations on the Multilateral Agreement on Investment (MAI) collapsed in 1998.¹ The EU preference was to include investment as one of the Singapore issues in the multilateral Doha Development Agenda (DDA).² Although added to the WTO work programme agenda in Singapore in 1996

¹ Again in 2011/12 the United States was pressing for a plurilateral approach to trade and investment in the wake of the deadlock in negotiations in the WTO. This time the US has included services in its plurilateral agenda and is seeking to persuade the EU to follow suit.

² A. R. Young and J. Peterson, 'The EU and the new trade politics', 13:6 *Journal of European Public Policy* 2006, pp. 795-814.

the issue was never really discussed in the WTO. The other so-called Singapore issues (public procurement, competition and trade facilitation) did not fair much better and all but the last were dropped from the DDA in 2003.

The failure of the EU to shape norms and standards in FDI is therefore part of a broader picture that raises questions about the utility of normative power unless backed or at least accompanied by market power. The EU made little headway in persuading others to follow its lead in other policy areas, such as competition and public procurement, where the EU possessed a strong *acquis* as well as *de jure* and *de facto* EU competence, so areas in which one would expect the EU to have possessed normative power. The switch in EU policy in the mid-2000s towards the more active use of preferential trade negotiations could therefore be seen as recognition of the limits of normative power. Where the EU possesses normative power this can be brought to bear at either the preferential or multilateral levels of negotiation, but relative market power is greater at the preferential (in effect bilateral level).

2. INTERNATIONAL INVESTMENT AGREEMENTS (IIA)

This section summarises the main elements in any IIA so that an assessment can be made of the impact of the EU on the evolution of international norms and standards. Figure 1 provides an overview, but requires some elaboration.

The *definition of investment* in any agreement can be important, some agreements define investment as covering only FDI (a concept that is itself imprecise but generally means control by the foreign legal entity) others have a broader definition and can, for example, include all assets including intellectual property. The existing European Bilateral Investment Treaties (BITs) concluded by the EU Member States, do not generally provide a detailed definition of investment.

An important distinction between IIAs in the past has been between those that provide for *liberalisation* (i.e., pre-establishment national treatment, or bans on performance requirements imposed by governments on investors, such as local value-addition) and investment *protection*. Pre-establishment national treatment means in effect access for FDI and this is granted by listing sectors covered in schedules using either positive listing (of sectors covered) or negative listing (of sectors excluded). Negative listing is generally considered to be more liberal because new activities are covered unless specifically listed and thus excluded. As figure 1 illustrates the US approach is to use negative listing, the EU in negotiations such as those on the General Agreement on Trade in Services (GATS) which includes establishment (liberalisation of FDI) in mode 3, generally uses positive listing (or a hybrid system of positive and negative listing). Performance requirements can take a number of forms and generally speaking the North American IIAs include more prohibitions than those agreed in the Trade Related Investment Measures (TRIMs) Agreement in the Uruguay Round that banned six.

In terms of investment protection IIAs have since the last century always included provisions requiring compensation and fair and equitable treatment

in cases of *de jure* expropriation (i.e., nationalisation). Many agreements, including about half the European BITs, also cover *de facto* expropriation (sometimes called regulatory taking). In such cases IIAs provide for compensation when host state regulatory policies negatively affect the value of assets (e.g., through environmental regulations that raise the costs for investors). The more 'developed' IIAs such as those based on the US or Canadian model agreements provide definitions of what can constitute *de facto* expropriation. For example, they specify that non-discriminatory regulation pursuing legitimate social or environmental objectives cannot be defined as *de facto* expropriation. The European BITs leave the determination of what is *de facto* expropriation to arbitral panels and do not seek to define the scope for 'the right to regulate'. Although it is argued that arbitration by complying with international legal practice does in effect follow similar norms, this remains an area of controversy. There is also a distinction between the North American approach and that of the European (Member State) BITs in that the former provide comparators for the general principles of national treatment, fair and equitable treatment and most favoured nation (MFN) status. In other words these principles should apply in like circumstances or in line with international legal standards. The European BITs simply specify the principles and again leave these to be applied on a case by case basis in the case of disputes by an arbitral panel.³

All IIAs generally provide for the protection of *capital transfers*, in other words repatriation of profits or dividends. These are sometimes more specific and include exemptions in cases of balance-of-payments crisis or other exceptional economic difficulties, as in the case of agreements signed by the US and the free trade agreements concluded by the EU. EU Member State BITs tend to include simple clauses on freedom of capital movement. As a result some have been inconsistent with EU legislation.⁴

Some IIAs include requirements on investors to satisfy certain requirements, such as to comply with environmental or labour standards. In current EU terminology these are called *sustainable development* provisions. Both the US and Canadian IIAs include such social provisions, although they are linked to economic outcomes. In other words under NAFTA host states must not disregard environmental standards in order to gain a competitive commercial advantage. The 'classic' European BITs do not include provisions on sustainable development and only one (concluded by Belgium-Luxembourg) includes such a provision.

With regard to *dispute settlement* the international norm is now clearly one of investor-state dispute settlement with recourse to arbitration (such as ICSID, the International Centre on the Settlement of Investment Disputes). In the past European BITs did not include investor-state dispute settlement, but Member States have followed the trend towards investor-state provisions set by the US and the more recent agreements include it. Such dispute settlement dates at

³ European Parliament, Directorate General for External Policies 'The EU Approach to International Investment Policy After the Lisbon Treaty', 2010, PE 433.854-855-856.

⁴ *Ibid.*, see also OECD (2005) 'Novel Features in OECD Countries' Recent Investment Agreements: An Overview' (Paris 2005).

least from the Canada US FTA of 1988 and NAFTA, which established this as the norm. Again the North American based IIAs provide for much greater detail on how disputes and arbitration should work. Experience with disputes has led the US and Canada to include, for example, provision for bi-national reviews of arbitration decisions, transparency (to include more stakeholders) and provisions to prevent dual claims and forum shopping (i.e., choosing the IIA that offers the best chances of winning a claim for damages) by investors. The Member State BITs leave the arbitral process entirely to the existing (private) arbitration systems without any scope for consideration of public policy. This was done in the belief that scope for public policy in the past meant only scope for host states to frustrate claims by European investors. Retaining the Member States' norms in this and other aspects of investment policy is conservative and may not reflect the future in which the EU will become relatively more important as a host state itself.

One final important distinguishing feature of IIAs is whether they are comprehensive, meaning whether they cover both liberalisation and protection. From the 1980s and certainly since NAFTA, the US has negotiated comprehensive agreements covering liberalisation and investment protection and usually as part of a bilateral preferential trade and investment agreement. The EU did not negotiate comprehensive agreements because there has been no EU competence for investment. The EU has included some aspects of liberalisation in its trade agreements, such as establishment in services, by virtue of the *de facto* competence of the EU in this field. EU FTAs also included provisions on capital flows, because these came under EU competence under Article 63 and 64 TFEU (previously 57 TEC) but not investment protection which continued to be covered by the some 1200 Member State BITs. The issues for the EU are therefore whether it can successfully negotiate comprehensive provisions on investment as part of on-going PTA negotiations (with Canada, Singapore or India) or as BITs outside of a free trade agreement (such as with China) and what these comprehensive investment provisions should look like.

3. THE CURRENT INTERNATIONAL CLIMATE FOR IIAS

Despite various efforts in the past to negotiate one, there is no common international investment agreement. But there is arguably an emerging set of norms in the field of international investment based on a patchwork of bilateral, regional, plurilateral and multilateral agreements.

Historically there have been various efforts to establish international (multilateral) standards for investment. These took the form of the debate in the League of Nations in the 1920s and 30s, which introduced general norms such as fair and equitable treatment that are still used today and the International Trade Organization (ITO). When the ITO failed due to differences between creditor states (essentially the USA) and host states (Latin America), efforts shifted to the OEEC/OECD during the 1950s. Again differences between creditor and host states prevented agreement, but the draft produced at the time, the so-called Abs-Shawcroft draft provided the basis for European (BITs) the

	EU Member State BITs	North American model	The emerging norm In IIA
definition	FDI	FDI portfolio & other assets	Broad definition of investment
coverage	all investment	negative listing	Hybrid or negative listing of sector coverage
Liberalisation Pre establishment national treatment	none	ambitious but sensitive sectors excluded; ban on many performance requirements	increasing broad based on schedules performance requirements as in the TRIMs agreement
protection post est. NT	classic expropriation; some BITs with de facto but not defined unconditional free capital movement MFN national and fair and equitable treatment (no comparator)	classic and defined de facto expropriation free capital movement MFN national and fair and equitable treatment with comparator	classic and de facto expropriation, but with defined limits to de facto expropriation free capital movements subject to safeguards in times of crisis MFN, subject to scope for deeper commitments as part of regional integration national and fair and equitable treatment based on international legal norms
Sustainable development	only in one BIT (Belgo-Lux)	provisions on investor compliance with environment and labour standards	no clear international norm
Dispute settlement	investor-state arbitration tribunals with extensive discretion to interpret standards	investor-state detailed rules limiting scope for interpretation of rules in arbitration bilateral review	investor-state no clear norm yet but most new comprehensive trade and investment agreements seek to define the scope for arbitral interpretation

Figure 1. Comparison of the European model BIT with that of North America
Source: author

first of which was the German-Pakistani BIT in 1959. After further US-led efforts during the 1970s to create a GATT for investment failed, a plurilateral approach to liberalisation prevailed within the OECD together with a partial multilateral approach in the General Agreement on Trade in Services (GATS) and Trade Related Investment Measures (TRIMs) agreements in the Uruguay Round.⁵ Investment protection was provided by BITs with the European (Member States) setting the pace until the 1980s when the US developed a model BIT in 1982, which became the model for comprehensive rules on investment in the North American Free Trade Agreement (NAFTA).

The 1990s saw a surge in BITs and general liberalisation of investment. After the end of the Uruguay Round the consensus among developed economies was that investment remained the next key topic for international negotiations, but views still differed on how to proceed. The US favoured a return to the OECD to negotiate a plurilateral 'Multilateral Investment Agreement' (MAI) that would then attract other signatories and thus become a high standard international investment agreement. The EU favoured inclusion of investment as one of the Singapore issues in the Doha Development Agenda (DDA), but opposition from developing countries and lack of support from the USA, meant that there were no serious negotiations within the WTO. While negotiations in the OECD were taking place EU member states continued to conclude BITs and the US pressed ahead with its NAFTA model.

When the MAI negotiations collapsed in 1998, for a range of reasons, it was seen as confirmation of the view that if progress was to be made it would have to come in the form of bilateral agreements. The US pressed ahead with its 'competitive liberalisation strategy' once the Bush Administration obtained Trade Negotiation Authority from Congress in 2001.⁶ There was diffusion of the NAFTA model (see table 1) via countries such as Mexico, Chile and Singapore, which signed NAFTA type Preferential Trade Agreements (PTAs) with the US that included comprehensive investment provisions and then used similar rules in PTAs with third countries.⁷

More and more developing countries switched from infant industry-protection-based development strategies and, encouraged by UNCTAD and other bodies, signed up to BITs in the belief that these would result in increased inward investment.

In Europe the response was fragmented. Member States continued to conclude BITs based more or less on the classic European model established in

⁵ The so called Mode 3 of GATS covers establishment for service providers, which is equivalent to access or liberalisation for foreign service providers subject to a hybrid (mixed positive and negative listing of covered sectors). The TRIMs prohibits six performance requirements, such as local content used in the production resulting from FDI.

⁶ 'Competitive liberalisation' meant using any level or forum for negotiation (multilateral, plurilateral or bilateral) in pursuit of US aims and represented a departure from US support from multilateralism see C. F. Bergsten, 'Competitive Liberalization and Global Free Trade: a vision for the early 21st Century', *Working Paper No 96-15* (Washington: Institute for International Economics 1996).

⁷ J. Reiter, 'Investment' in S. Woolcock (ed.), *Trade and Investment Rulemaking: the role of regional and bilateral agreements* (Tokyo: UN University Press 2006).

the 1960s and covering investment protection but not liberalisation.⁸ In the early 2000s the EU negotiated a number of bilateral PTAs that included investment provisions, such as EU – Chile, but coverage of investment in these was limited to liberalisation of capital flows. There was no coverage of investment protection. There was *de facto* EU competence for services investment in the Uruguay Round so the EU negotiated investment in services in the form of establishment under Mode 3.

In other words a patchwork of investment rules was developing in place of a comprehensive international regime. In this the NAFTA model was more comprehensive and developed than the European BITs. During the 1990s there was a surge in the number of IIAs resulting in more than 3000 BITs and numerous PTAs with comprehensive investment provisions.

But during the 2000s the picture began to change somewhat. While the central role of investment came to be recognised by all countries, experience with IIAs led to a shift in opinion on their merits. In North America a spate of claims for *de facto* expropriation by US companies against Canada led to a revision of the general wording on *de facto* expropriation that aimed to define its scope more tightly. Experience with arbitration also led to some concern expressed that important public policy issues were being decided by arbitral panels that were not always transparent and were not subject to any review. A number of claims against new EU member states, such as the Czech Republic and Poland, raised awareness that even EU member states could be subject to claims under investment protection provisions.

As outward FDI from the emerging markets began to grow there has been a growing awareness that the balance of interest between the creditor nations (hitherto the OECD countries) and the hosts for inward FDI (previously the developing economies) is changing. Chinese and Indian acquisitions of telecommunications and steel companies in the USA and EU respectively pointed to a trend towards at least a partial reversal of FDI flows. Some interests within the EU began to raise the question of whether IIAs would restrict the EU's right to regulate, because EU level regulation could be seen as *de facto* expropriation. The prospects of (state-owned) Chinese companies acquiring 'strategically' important companies in the EU also raised the question of what sort of exceptions there should be to liberalisation under IIAs to defend the EU's 'commercially strategic' interests and who would decide on these, the Member State government(s) concerned or the EU. Defence of commercially 'strategic' firms in the EU would amount to a *de facto* industrial policy, on which there has never been a consensus in the EU. For emerging markets the benefits of IIAs are also now seen in terms of protecting their investment in the developed country markets as much as attracting inward FDI.

Among developing countries (DCs) there has also been a reassessment of the value of IIAs. Many smaller developing countries signed BITs in the belief that they would result in increased inward FDI. But empirical studies have produced ambiguous results on the impact of BITs on FDI flows. Only in the

⁸ This model is essentially that described in figure 1, although Member State BITs have evolved slightly since the 1960s.

case of comprehensive investment rules as part of a wider free trade agreement does there appear to be much clear evidence of increased inward FDI. South Africa announced a shift in policy that amounted to a desire to renegotiate the BITs it had concluded in the late 1990s and early 2000s and other developing countries have adopted a far more cautious approach.

This reassessment of IIAs has introduced an element of flexibility in a debate that was previously shaped by a clear creditor-host state/North-South divide and could present an opportunity to revive efforts to negotiate a genuine multilateral regime for investment. At the very least the former entrenched positions of creditor and host states have been eased. This comes at a time when the EU through the TFEU has acquired exclusive competence for foreign direct investment. Thus international trends in investment policy and the expansion of competence within the EU provide an opportunity for the EU (as opposed to the Member States) to more effectively shape the policy debate on international investment rules. Whether it can do so depends on how the EU responds, which will in turn be determined by how competence is defined in practice and whether the EU can define a coherent comprehensive policy on international investment.

4. EU COMPETENCE FOR FDI

Articles 206 and 207 TFEU bring 'foreign direct investment' under exclusive EU competence as part of the Common Commercial Policy (CCP), but does not define FDI leaving somewhat open the actual scope of the new EU competence.

Whilst there is no single definition of FDI there is a broad agreement that FDI must involve a long-lasting interest of an investor in the enterprise abroad (which does not often apply to portfolio investment) and provide the investor with a certain degree of managerial control. The figure of 10% of the affiliated company's shares is often used as a measure of control.⁹ Within the EU there has been an acceptance of this distinction between FDI and portfolio investment, such as in its position papers regarding negotiations on investment in the Doha Round of the WTO and indeed in the Commission's Communication on investment.¹⁰ The ECJ has also defined FDI along similar lines¹¹ according to which FDI should be considered as a long-lasting investment, representing at least 10% of the affiliated company's equity capital/shares and providing the investor with 'managerial control' over the affiliated company's operations. If an investor holds less than 10% of shares of an affiliated company, it can still qualify as FDI provided the investor has 'managerial control' over the affiliated

⁹ C. Hermann, 'Die Zukunft der mitgliedstaatlichen Investitionspolitik nach dem Vertrag von Lissabon' in 21/6 *Europäische Zeitschrift fuer Wirtschaftsrecht*, pp.207-211.

¹⁰ European Commission, Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions 'Towards a comprehensive European foreign investment policy', COM(2010) 343.

¹¹ C-446/04 in which the ECJ draws on the definition of direct investment in Directive 88/361/EEC.

company.¹² As comprehensive investment agreements and standard BITs normally not only cover FDI, but also portfolio investment, payments and legal titles (e.g., intellectual property rights), the ECJ's definition sets limits on the new EU competence. The EU's definition corresponds with those used by the IMF and the OECD, but there is still some scope for differences over competence given the growth of global supply chains.¹³

The lack of EU competence for investment was an anomaly given the increasingly close links between trade and investment. In successive intergovernmental conferences the Commission had pressed for exclusive competence to be extended, but Member States resisted. The exact details of how FDI came to be accepted as exclusive competence remain to be researched. In the discussions on the Constitutional Treaty inclusion of investment was opposed by Germany, France, Britain, Spain and The Netherlands (the main users of bilateral Member State BITs). But investment was included in the draft constitutional treaty and carried over into the Treaty on the Functioning of the European Union (TFEU). The factors behind this change were probably the growing acceptance that having EU exclusive competence for trade but not investment was indeed an anomaly given the ever greater importance of investment in EU external economic relations. There was also pressure from the Commission, European Parliament and integrationist Member States in favour of a more active and coherent external policy for the EU. Another factor may however have been that the key negotiators of the TFEU in the Member States coming from foreign ministries were focused on their role in the new External Action Service of the EU that was to be created and that they were willing to make concessions on FDI, a policy area shaped by a small group of the specialist investment lawyers.

However it came about the extension of competence provides an opportunity for the EU to play a greater role in international investment policy. The EU will have more leverage in bilateral negotiations than individual Member States and the ability to negotiate comprehensive trade and investment agreements will also enhance EU leverage. Before the EU can make use of this opportunity it has to overcome a number of challenges including: (i) how to manage the transition from Member State to EU investment agreements; (ii) what common policy should the EU adopt and (iii) where should *de facto* competence for EU investment policy lie, in the negotiation and application of EU IIAs.¹⁴

¹² European Parliament, *supra* note 3.

¹³ C. Tietje, 'Europa spring ein' *Frankfurter Allgemeine Zeitung*, 19 January 2009, p. 8.

¹⁴ There are number of other more specific challenges, such as who should assume responsibility for investment disputes, see European Commission Proposal for a Regulation of the European Parliament and the Council establishing a framework for managing financial responsibility linked to investor-state dispute settlement tribunals established by international agreements to which the European Union is party COM (2012) 335 final 2012/0163 (COD). There is also the question of who would decide on the use of any 'security' exception to EU liberal investment policy.

5. THE CHALLENGES

The EU faces a number of interrelated challenges if it is to promote coherent EU standards or norms in international investment. In the short to medium term it must manage the transition from some 1200 Member State BITs to a common EU regime. In the longer term it must find a consensus on a common EU policy on investment. But at the same time it is working on these 'domestic' issues, it must negotiate trade and investment agreements with third countries as part of the on-going EU strategy for securing EU engagement in growth markets.¹⁵

5.1 Managing the transition from Member State to EU investment agreements

Managing the transition is important because a degree of legal uncertainty has been introduced with the TFEU. If the EU is now competent for FDI what is the status of the existing Member State BITs? Under international law the existing BITs will continue to provide protection for investors even after they are terminated. So even if all Member State BITs were terminated overnight, there would still be a risk of a potential clash between EU and Member State investment agreements. Third countries could for example, challenge claims made by EU investors under Member State BITs on the grounds that these have been superseded by EU competence. Even before the adoption of the TFEU some Member State BITs were found to be in conflict with EU law.¹⁶ In this instance the Member State BITs provided unqualified protection for capital flows, whereas the EU treaties provide for capital controls when necessary to deal with acute difficulties in the functioning of Economic and Monetary Union or for trade sanctions (Arts 64(2), 66 and 75 TFEU). There is also an apparent conflict between the investment provisions in certain EU bilateral agreements, such as EU Chile from 2000, which provides for capital controls in cases of serious balance of payments problems. This is again at odds with Member State BITs that provide unqualified rights to free flow of capital, and the Member States concerned have had to rectify their existing BITs.

The Commission's approach to dealing with the transition issue was set out in the proposed Regulation on transitional arrangements for Member State BITs with third countries of July 2010.¹⁷ After nearly two years of discussions with differences emerging between some Member States and the Commission as well as the European Parliament agreement was finally reached in the form of

¹⁵ This has been set out in the Global Europe paper of 2006 and the Trade Growth and World Affairs statement of 2010 and includes for example seeking to negotiate FTAs with the major emerging markets.

¹⁶ See the cases against Sweden, Finland and Austria C-206/2006, 269/2006 and C-118/2007 European Court of Justice.

¹⁷ European Commission, Proposal for a regulation of the European Parliament and the Council for the introduction of a transitional regulation for bilateral investment treaties between Member States and third countries, COM(2010) 344, 7 July 2010.

Regulation 1219/2012.¹⁸ This provides for authorisation of existing Member States by the Commission on notification by the Member States (Article 2 of the proposed Regulation). The Commission assesses each BIT to ensure that it does not contain provisions that were in conflict with EU law, did overlap with EU BITs and (most controversially) does not constitute an obstacle to the development and implementation of the Union's policies relating to investment. For example, Member States with existing BITs with China might prefer to keep these rather than engage in a long drawn out EU – China negotiation, especially when the content is uncertain due to pressure from interests such as those in the European Parliament wanting to add sustainable development conditions. The regulation envisages authorisation for Member States to negotiate amendments to existing or new BITs, for example with small developing countries Member States argued against the Commission having power to authorise Member State BITs on the grounds that this would create legal uncertainty. Issues of competence and control also resulted in a drawn out negotiation. Decisions on the sensitive issue of authorisation of Member State BITs will be taken by the advisory procedure in accordance with the new comitology rules set out in Regulation 182/2011 and a Committee for Investment Agreements is established 'to assist' the Commission in its decisions.¹⁹

5.2 Defining a common EU policy on investment

The more challenging but medium to long term challenge is to reach a consensus on a common EU policy on investment. For some years the Commission and Member States have been working on a 'common investment platform', but the TFEU adds the need to reach agreement with the European Parliament, which has complicated and arguably politicised the debate.

Broadly speaking it is in the interest of investors (i.e., EU companies or legal persons) in third countries, to maximise access for FDI and the post establishment protection for their invested assets. Investors generally seek unqualified protection for their investment, in other words national treatment, fair and equitable treatment and freedom to repatriate earnings and capital. Business interests tend to stress the need for legal certainty and are concerned that a long drawn out debate within the EU on what EU investment policy should be would result in competitive disadvantages for EU business as the EU's main competitors press ahead with comprehensive investment agreements. The policy community that has worked on investment agreements over the years has been fairly small and made up of specialist investment lawyers. This policy community tends to favour conserving the existing, classic Member State

¹⁸ Regulation (EU) 1219/2012 of the European Parliament and the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries *OJ* [2012] L 351/40, 20.12.2012.

¹⁹ Under the advisory procedure the Commission is not bound by the Committee's decision but must take 'utmost account' of them. This approach was facilitated by the inclusion of criteria for the authorisation decisions that, together with the comitology process, have the effect of limiting Commission discretion.

model BIT and resists what is called 'NAFTA contamination' or following the evolution of IIAs that include new, more extensive wording that seeks to define rights and obligations more exactly.

On the other hand, not all interest groups in the EU favour extensive liberalisation of investment or at least support certain sectoral exceptions from liberalisation. Although the 1980s saw the general shift towards liberalisation of investment in the EU which has arguably weakened the EU's market power, some sensitive sectors remain such as health, education and audio-visual. Some development NGOs oppose extensive liberalisation on the grounds that it undermines the ability of developing countries to develop their own industries or works against sustainable development. There is also the question of whether EU level investment agreements will undermine the EU's ability to regulate in the field of the environment or social policies. This 'right to regulate' is important for environmental interests in the EU, whether in the shape of NGOs, in some Commission services or the European Parliament. There is also pressure to include sustainable development clauses in EU trade and investment agreements. With the European Parliament having the power of consent covering any trade or investment agreements, this provides the Green parties and the Socialists and Democratic group with leverage in pushing for sustainable development clauses.

In between these two broad ends of the spectrum there is a case for using the opportunity offered by the extension of EU competence to modernise Europe's existing investment agreements to ensure that they will remain viable in an international economy in which the balance of FDI flows seems certain to change with an increase in FDI flowing into the EU from emerging markets. There is also a case for addressing the risks inherent in a system of dispute settlement that relies on private arbitration without any public review of arbitral decisions.

To these interests one must add those of the various EU institutions. As noted above the European Parliament is determined to ensure that it has an effective say in such a new area of EU competence. The Council and within it a number of Member State governments such as Germany, The Netherlands and Britain are equally determined to limit the role of the European Parliament for fear that it will lead to an excessive politicisation of EU investment policy. Some Member States have a strong interest in the status quo, because with established networks of high standard BITs (i.e., those offering unqualified protection for investors) they can offer benefits for their own investors and attract investors from other Member States seeking to benefit from the investment protection offered by such BITs. The interest of the Commission is in implementing the treaty, but also ensuring that the EU negotiates comprehensive trade and investments agreements as this would confirm EU *de facto* competence in the field of investment.

This then brings us to the third challenge facing the EU, namely to negotiate such comprehensive trade and investment agreements at a time when there is no explicit consensus on EU investment policy. Following the Global Europe strategy of 2006, as confirmed by the policy on Trade, Growth and World Af-

fairs, of October 2010, the EU is currently negotiating preferential agreements with Canada, Singapore and India that include investment.²⁰ Canada has an interest in comprehensive investment provisions in the Comprehensive Economic and Trade Agreement (CETA) it is negotiating, because it has important investment interests in some of the new member states in particular. Canada's experience with NAFTA has meant that it is seeking wording in the agreement with the EU that includes clearer definitions of standards and rights, obligations as well as rules on transparency and review for arbitral procedures. In other words it is seeking NAFTA type wording. India is interested in an EU investment agreement to replace the network of Member State BITs, but opposes sustainable development clauses as does Singapore which is keen to include investment in the PTA it is negotiating with the EU. The EU is also preparing to negotiate with China, in order to match the IIAs concluded by EU competitors and has included investment in its negotiating mandate for the Transatlantic Trade and Investment Partnership (TTIP) with the United States. In a negotiation with China can the EU place the clear commercial interest in FDI in China above the sustainable development clause the European Parliament will surely seek but which China will surely reject? More tricky still is however, the issue of a 'security exemption' in other words the ability to control inward FDI on the grounds of 'national' security. This might be seen as analogous to the CIFIUS (Committee on International Foreign Investment in the United States). The EU has long argued against any broad interpretation of 'national security' that would enable commercial investments to be blocked. But with the expected increase in outward FDI from China what should the EU policy be and who (EU, Commission or Member States) should decide what is in the 'national' (or EU) interest? In the case of the TTIP the US has stated it wants the highest standards possible in order to set the bar for IIAs in general, but how far will the EU go in pressing the US to open up sub-central level investment and in how far should the EU converge towards the US/NAFTA model?

6. THE EU AND INTERNATIONAL INVESTMENT STANDARDS

The EU approach to IIAs has differed from the other dominant models such as that of NAFTA. With regards to the definition of investment, EU policy will cover FDI only and not portfolio investment, but beyond that it seems likely that the EU will avoid detailed definitions of investment in any agreement. This is the approach used by the Member States in their BITs and it is likely to be supported by the Commission if only because it leaves scope for the evolution of EU level policy. Less explicit definitions provide scope for increases in *de facto* competence and flexibility, which is in line with the EU's past approach on trade in general.²¹

²⁰ S. Evenett, "Global Europe" An initial assessment of the European Commission's New Trade Policy', available at <<http://www.evenett.com/articles.htm>>.

²¹ S. Woolcock, *European Union Economic Diplomacy: the role of the EU in external economic policy* (Ashgate 2012), especially chapter 3.

On liberalisation the expectation must be that the EU will continue to adopt a relatively flexible approach to coverage based on a hybrid listing approach for liberalisation. This is the approach the EU has used for establishment in its services negotiations and one it has used in recent PTAs that have covered both trade and investment, such as the EU Colombia-Peru FTA and EU Central America Trade Agreement. This compares with the negative list approach of the US/NAFTA model. Both of course provide scope to exclude sensitive sectors, but most developing countries favour hybrid approaches. On performance requirements the EU has established a practice of included a more limited number of bans than in the case of the US/NAFTA model, so one can expect this distinction to continue. On capital flows the EU policy, also established in various FTAs, is to include scope for capital controls in cases of balance of payments or currency crises. This may be at odds with other approaches to IIAs, as it has been with the BITs of some Member States.

On investment protection it remains unclear whether the EU will opt for the Member State BIT model of simply requiring national and fair and equitable treatment without any comparator. As figure 2 shows practice across the Member States varies. The largest users of BITs (Germany, the UK and The Netherlands) tend not to include reference to any comparator (whether this is the prevailing international standard or national treatment in 'like circumstances'). Smaller Member States and the new Member States that have been on the receiving end of claims, tend to favour the use of a reference to international law. See figure 2. The exclusion of any specific reference to comparators leaves more scope for arbitral tribunals to determine what is fair and equitable treatment.

Any EU IIA would have to include provisions on classic expropriation (i.e., to ensure fair and prompt compensation). On this point as well as on investor-state dispute settlement there can be no EU level agreement that offers worse protection than the existing Member State BITs, as this would surely mean a

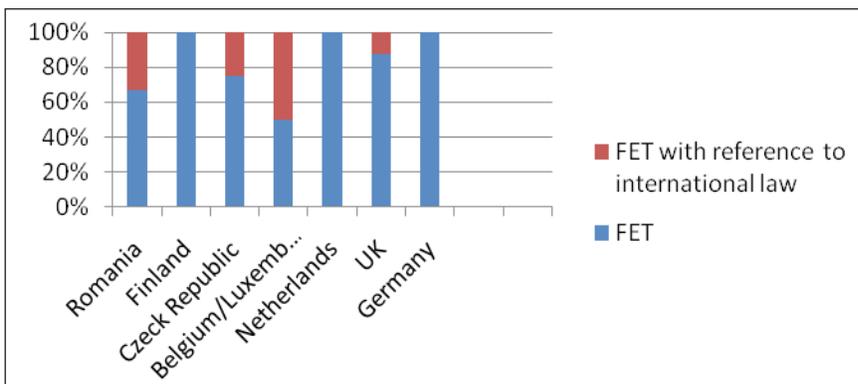


Figure 2. EU Member State BIT Fair and Equitable Treatment (FET) provisions and customary international law

Source: European Parliament (2010)

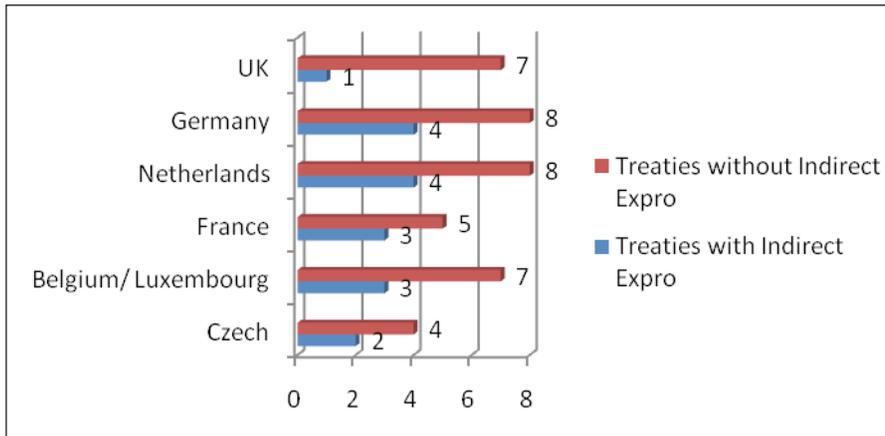


Figure 3. EU countries’ inclusion of indirect expropriation provisions in recent BITs
 Source: European Parliament (2010), based on a study of 51 recent EU Member State BITs

continued use of Member State BITs and an inability on the part of the Commission to make the case for progressively replacing these with EU wide agreements. On *de facto* expropriation the picture is less clear cut, see figure 3. As study of 50 recent Member State BITs shows that indirect expropriation has not been firmly established as the norm. But offering no provisions on *de facto* expropriation in EU level agreements would put EU investors (and inward investors into the EU) on a worse footing than for example US investors, or for that matter Chinese investors.²² The expectation must therefore be that the EU IIAs will include provisions on *de facto* expropriation.

Probably more uncertain still is what sort of limits or qualifications the EU will include on rights in cases of *de facto* expropriation or, to put it another way, what provisions will it want to include on the ‘right to regulate’. The main advocates of the status quo will wish to avoid any qualification of investor rights, with the arguments that this would be used against EU investors overseas and that the EU’s respect for the rule of law means it is very unlikely to lose any claims. On the other hand, it is unclear that an EU comprehensive trade and investment agreement or EU BIT will gain consent from the European Parliament without some provision on the right to regulate. Here some ‘NAFTA contamination’ seems likely, for example, a provision to the effect that non-discriminatory regulations aimed at genuine social or environmental objectives would not be considered to be *de facto* expropriation.

On the social issue or the inclusion of human rights clauses and sustainable development provisions in agreements the model that is emerging in the EU is for the inclusion of both in any comprehensive trade and investment agreement. The Commission and supporters of these provisions argue that the TFEU

²² China appears to wish to see indirect expropriation in its comprehensive trade and investment agreements, such as that negotiated recently with Peru.

requires this in the sense that trade and investment policy (as well as other elements of external relations) must be consistent with the EU's general normative position as expressed in Article 21, Chapter 1 Title V of the Treaty on European Union, which can be interpreted as requiring the promotion of sustainable development. The EU now insists on the inclusion of the human rights clause in all FTAs, even in the case of the negotiations with Canada. The test case will of course be an EU – China agreement. The EU has also sought provisions requiring compliance with a number of the main multilateral environment agreements (MEAs) and the core ILO (International Labour Organization) labour standards. But the issue is how effectively these would be monitored and what sort of sanctions would be taken in cases of questionable compliance. Recent preferential agreements (EU Colombia is a case in point) do not provide a specific monitoring and enforcement mechanism for human rights, but do for sustainable development (although the latter can to some degree be used to monitor the former). General sanctions exist if a party does not comply with the provisions of the agreement, but the question is whether the EU would use these.

Then there is the issue of a 'security' exemption in IIAs and if so should this enable foreign acquisitions of commercially sensitive companies to be blocked, and by whom. The EU and US recently agreed to guidelines on investment policy that call for a narrow definition of security in such cases.²³ Indeed, the EU has in the past opposed the use of security exceptions by the US to limit investment. But with the growth of acquisitions by state-owned Chinese companies there will be calls for an ability to block such acquisitions as long as China effectively controls EU investments. But the positions of Member States differ; some (such as Britain) are less concerned about reciprocity than attracting inward FDI, while others (such as France) insist upon it. Devolving powers to Member States to decide on such cases would undermine any common EU policy, but decisions to block acquisitions or FDI on anything but narrowly defined (i.e., defence equipment) security grounds would be equivalent to an EU level industrial strategy, on which there is unlikely to be agreement.

The method of dispute settlement in IIAs is of equal important to the standards, if only because under the current system of arbitration, the interpretation of the scope of any investment agreement lies largely in the hands of the private arbitrators. As noted above any EU IIA would have to include investor-state dispute settlement. The opposition of civil society NGOs is unlikely to have much effect here. The issue is more how much discretion should be left in the hands of the arbitrators and how much the state (i.e., the EU) should set the parameters for arbitration. Member States that have faced claims for damages will tend to favour limiting discretion. As figure 4 shows these are mostly the new Member States. Member States such as Germany or Britain that have had cases brought against them under investment agreements (but not lost) cases

²³ See Statement of the European Union and the United States on Shared Principles for International Investment, available at <http://trade.ec.europa.eu/doclib/docs/2012/april/tradoc_149331.pdf>.

Czech Republic	16	France	1
Poland	10	Portugal	1
Romania	7	Bulgaria	1
Hungary	6	Spain	1
Slovakia	5	United Kingdom	1
Estonia	3	Total	60
Germany	2	COMPARISON:	
Latvia	2	United States	14
Lithuania	2	Canada	14
Slovenia	2		

Figure 4. Known International Arbitration Cases Against EU Member States (There are cases that go to arbitration but are not made public).

Source: UNCTAD / European Parliament (2010)

	Participation of non-disputing parties	Transparency	Open hearings	Amicus Curiae submissions	Consolidation of claims
German Model					
French Model					
Belgium/ Luxembourg Model					
Canadian Model	+	+	+	+	+
US Model	+	+	+	+	+

Figure 5. Detail on EU and North American model agreements' provisions on investor-state dispute settlement and arbitration

Source: European Parliament (2010), based on 2005 OECD Report entitled 'Novel Features in OECD Countries' Recent Investment Agreements: An Overview

do not recognise the problem of arbitral discretion, nor does The Netherlands, which does not appear to have faced any cases.

Figure 5 shows how the Member States BITs compare to the North American model on dispute settlement. The Member State BITs include no provision on any of the issues discussed above that could open-up the arbitral processes to closer public scrutiny. The Member State models in this area appear to be

at odds with the emerging international consensus that favours greater transparency. Again it seems unlikely that the European Parliament will give its consent to any agreement that does not require transparency in some form. So the expectation must be that the EU will have to include these in any agreement it negotiates.

7. CONCLUSIONS

This article has argued that for the EU to have normative power in shaping international standards in investment policy it needs: (a) consensus on the core aims of EU policy or an *acquis*; (b) *de facto* as well as *de jure* competence, by which it is meant that there is agreement among the EU institutions on how decisions in the field of foreign investment are taken; (c) market power and (d) arguably a distinctive set of EU norms. The conditions (a) to (c) should need no further elaboration. The need for distinctive norms is debatable since, by virtue of the scale of EU FDI, the EU would have influence even if it were to emulate standards shaped elsewhere. If normative power is however defined as influencing others to change their policies to adopt EU norms then distinctive norms would seem to be a precondition.

Until the adoption of the TFEU the EU had full *de jure* competence only for capital flows (under Article 57 TEC) and *de facto* competence only with regard to the negotiations on investment in services under mode 3 of the GATS. This meant the EU was not recognised as the sole actor in investment negotiations. The Member States shaped investment policy on liberalisation through their role in OECD level negotiations and investment protection through their BITs.²⁴ There was no distinctive EU policy. When the US moved to liberalise investment policy in the late 1970s, the response came from individual Member States rather than from the EC/EU. Britain moved early to liberalise investment and was followed by the other Member States at varying speeds and with varying conviction. While Europe as a whole had considerable potential market power this was never exercised collectively so that policy on investment tended to be shaped by US initiatives.

How do things stand with the adoption of the TFEU? There is now exclusive EU competence for FDI. Subject to issues of definition of FDI this should facilitate a greater role for the EU in shaping international investment standards. But the EU is still some way from establishing *de facto* competence in the shape of a consensus among the EU institutions and key interests on how decisions in international investment policy should be taken. This lack of consensus was shown in the long debates concerning the arrangements for transition from Member State BITs to EU level BITs, who should assume responsibility in investment dispute settlement cases and what 'security' exception there should be to the EU's liberal policy on investment.

²⁴ The Commission participated in OECD negotiations, such as on the Multilateral Investment Agreement negotiations in the 1990s, and sought to coordinate Member State positions in the talks. But Member States retained a determining influence in the OECD.

Nor is there a firm *acquis* on EU international investment policy that encompasses at least the major institutional actors of the Commission, Council, European Parliament and the Member State governments. The domestic *acquis* is one of liberal investment, but there are still issues to be decided on what investment protection standards should be included in EU investment agreements. There is a question concerning what standards the EU will seek on sustainable development as well as what safeguards the EU should incorporate on dispute settlement in the form of reviews or transparency provisions. So it cannot be said that the EU has an *acquis* on IIAs.

On market power little has changed in the recent past. The EU is the source and destination of more than half of world FDI. As such it continues to possess considerable market power, even with the burgeoning growth of the emerging powers and the negative economic consequences of the financial crisis. But this market power has to date not been harnessed to EU policies. With the TFEU Member States are no longer free to negotiate bilateral investment agreements, so EU market power should be enhanced, especially now that the EU can negotiate comprehensive trade and investment agreements covering all key issues.

The lack of an *acquis* means however, that the default mandate in bilateral FTA negotiations has been to follow the established Member State model for investment protection. In terms of coverage of liberalisation commitments there is a broad consensus on a limited number of key exclusions, such as air transport, audio visual etc. This default mandate is strongly influenced by the conservative forces in the investment policy community of the Member States with most existing BITs. It may well be enough to satisfy the Commission's desire to ensure that bilateral FTA negotiations are comprehensive and include trade and investment. This will firmly establish the EU as competent for investment as well as trade. It will also enable the Commission/EU to make use of its collective market power. But it is not clear that this default mandate constitutes a distinctive EU norm or set of standards on international investment policy in the coming years that would provide the EU with significant normative power. Nor is it clear that there is consensus on how the EU should use its enhanced market power that would constitute clear *de facto* EU competence for investment equivalent to what it has in trade policy. Agreement on these questions would be needed if the EU is to make the most of the opportunity offered by the current juncture in international policy, the pattern of FDI flows and the addition of extension of exclusive competence to include FDI with the Treaty of Lisbon.

EUROPEAN INVESTMENT TREATY-MAKING: STATUS QUO AND THE WAY FORWARD (A SUSTAINABLE DEVELOPMENT PERSPECTIVE)

Sergey Ripinsky and Diana Rosert*

INTRODUCTION

The 2009 European Union's (EU) Lisbon Treaty¹ took the competence over foreign direct investment (FDI) away from Member States and placed it under the umbrella of the EU's Common Commercial Policy. Even before this competence shift, the EU had been signing treaties that could be categorised as international investment agreements (IIAs) since they included certain substantive provisions on investment. In parallel, individual EU member states have been concluding their own bilateral investment treaties (BITs) with third countries. The Lisbon Treaty's wholesale transfer of FDI competence means that the European Commission will become the sole negotiator of EU's investment agreements.² It is expected, that the latter will gradually replace Member States' existing BITs and lead to major changes to the global IIA landscape.

These developments have taken place against the background of increased attention to, and criticism of certain aspects of IIAs, triggered primarily by the numerous arbitration cases initiated by foreign investors against host governments around the globe. Some of these investor-state arbitrations have been particularly controversial due to their salient public policy dimension, and have given rise to questions about the overall design of IIAs and their compatibility with sustainable development values and principles. The reorientation of IIAs away from the interest of investor protection as the sole treaty objective has become the subject of a growing discourse.

The aim of this paper is twofold. First, it compares the existing EU IIAs with member states' (MS) BITs (at the time of writing, 27 Member States) in order to present a clear picture of investment treaty-making practices in the EU to date. In particular, we look at treaty numbers and the number of country rela-

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¹ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, *OJ C* 306.

² In areas of the EU's exclusive competence, to which the Common Commercial Policy belongs, the European Commission develops the policy direction and represents the EU in negotiations with third countries, while the EU Council, consisting of heads of state and governments, authorizes the Commission's proposals and recommendations, and the European Parliament has an oversight role and ratifies agreements with third countries.

tionships that they create, examine typical treaty content and review dispute settlement activity under both types of agreements.

Secondly, the paper looks at the possible directions of future EU investment policies. The European Union, a bloc of countries with a long-standing commitment to human rights, environmental protection and sustainable development, is well equipped to become a global leader in guaranteeing a harmonious relationship between the goals of investment protection and sustainable development. The FDI competence shift offers an opportunity to take a fresh look at the design and features of the EU's future IIAs. To suggest the way forward in more practical terms, we formulate a list of desirable IIA features and compare it against the record of existing EU IIAs and MS BITs. We then review current discussions within the EU about the content of its future investment treaties, putting them into the broader context of the bloc's external relations, and conclude with some final observations.

1. EU'S AND MEMBER STATES' INVESTMENT TREATY-MAKING PRACTICE TO DATE

This section compares the EU agreements that have provisions on foreign investment with bilateral investment treaties concluded in the past 50-plus years by individual EU member states.³ Before proceeding to a statistical and substantive comparison of these agreements, in order to provide some economic background, we briefly summarise the position of the EU as investment actor *vis-à-vis* developing countries.

EU member states together account for a quarter of global GDP and are an important source of FDI. EU's accumulated FDI stocks in developing countries approach 40% of its overall FDI stocks, and yearly FDI flows to developing countries are around 50% of its overall FDI outflows (see figure 1). The share of developing countries' FDI stocks in the EU is not nearly as significant (17%) but the share of investment flowing into the EU from developing countries has been increasing in the past few years and reached 44% in 2010 (share of developing countries in the overall EU inward FDI flows, see figure 2).

1.1 EU IIAs and MS BITs: treaty numbers and country coverage

To date, the EU and its member states have followed a two-track approach to investment treaty making with third countries: (1) as a collective entity, the EU has been concluding trade and investment agreements; and (2) member states, individually, have been concluding BITs with third countries.⁴

³ The data in this section is provided as of 1 July 2012 (EU IIAs statistics), 1 May 2012 (MS BIT statistics) and 1 January 2012 (dispute settlement statistics).

⁴ There is also a third, multilateral track where both the EU and member states become parties to certain multilateral agreements with provisions on investment (e.g., the Energy Charter Treaty or the WTO Agreement on Trade-Related Investment Measures). These agreements are not considered in this paper.

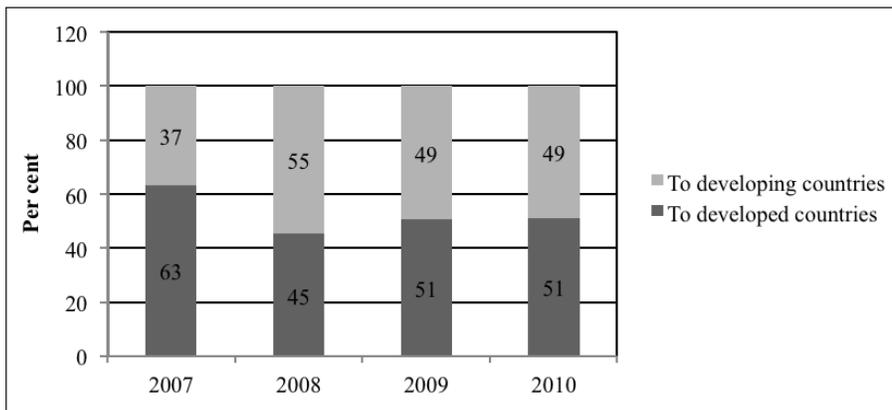


Figure 1. EU outward FDI flows (destination), 2007-2010
Source: UNCTAD estimates.

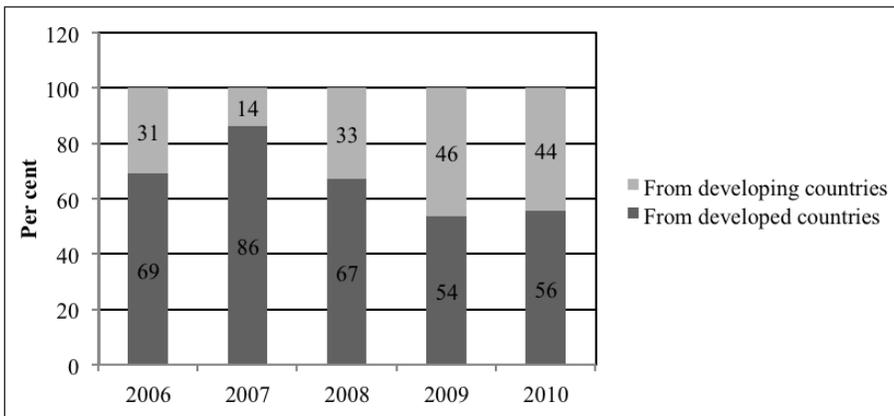


Figure 2. EU inward FDI flows (origin), 2006-2010
Source: UNCTAD estimates.

Even before the entry into force of the Lisbon Treaty, the EU was concluding treaties that qualify as ‘IIAs’. These are usually multi-component treaties, traditionally focussing on trade in goods and services, of which investment was one among other aspects. These agreements bear a variety of names, such as free trade agreements, economic partnership agreements, partnership and cooperation agreements, stability and association agreements and others.⁵

⁵ E.g., the Partnership and Cooperation Agreement between the European Communities and Their Member States and Ukraine (1994), the Agreement Establishing an Association between the European Community and the Republic of Chile (2002), the Economic Partnership Agreement between the CARIFORUM States and the European Community (2008).

They were negotiated by the Commission, and also signed by member states (so-called 'mixed' agreements) as the treaties covered some subject matters that belonged to the shared competence of the EU and member states.

Over time, the EU has concluded around 60 multi-component treaties with non-EU countries (see annex 1). Not all of these agreements are on an equal footing in terms of their investment provisions. In fact, around half of them are 'framework' agreements that contain clauses related to investment (e.g., on investment promotion), but do not have any legally binding obligations in that respect. The other half (31 agreements, to be precise) does include substantive investment provisions. However, even agreements of the latter type do not include most of the provisions that are common to member states' BITs (see section 1.3 below).

As regards country coverage, these 31 substantive treaties create EU relationships with 139 non-EU countries. This is due to the fact that some of the EU agreements are with groups of countries, e.g., the agreements with CARIFORUM (15) or the Central American region (6). The EU-ACP (Cotonou) Agreement is the one with the greatest number of signatories covering 78 non-EU countries of the African, the Caribbean and the Pacific Group of States (ACP). As shown further below, the multi-party participation produces a great effect on the number of country relationships created and the volume of FDI covered.

On a parallel track, individual member states have been signing BITs with third countries that deal with investment only (i.e., not with trade or other matters), even though their provisions on investment differ from those found in EU IIAs (see section 1.3 below). Germany signed the first ever BIT in 1959 and is still a leader among the EU countries by the number of BITs concluded (see table 1), accounting for 123 of the overall 1,318 extra-EU BITs.⁶ Some member states, however, have signed few or no BITs (see table 2).

In practice, member states' uneven BIT activity translates into differing levels of legal protection that EU investors from different member states enjoy abroad. German and Dutch investors, for instance, enjoy BIT treatment in 123 and 87 non-EU countries respectively. Investors from Malta and Estonia have similar protection in 12 and 10 countries respectively, while investors from Ireland do not benefit from BIT coverage in any country. Moreover, provisions in MS BITs, although similar, are not the same, which adds to the distortions and results in different rights even between those investors covered by BITs. The transfer of FDI competence from member states to the EU level should gradually eliminate this legal inequality, since the EU's future comprehensive IIAs will provide all EU investors abroad with the same protections in partner countries.⁷

⁶ To access country lists of BITs and specific BIT texts, see the 'IIA Databases' available at <<http://www.unctad.org/ia>>.

⁷ Aside from extra-EU BITs, there exist 177 intra-EU BITs. These are typically agreements concluded by 'old' member states with 'new' ones prior to their accession but which remained in force after the accession. They create the second type of discrimination between EU investors – this time not abroad but at home. For example, German investors in the Czech Republic (and Czech investors in Germany) benefit from BIT protections including access to international arbitral fora for resolution of disputes because there is a BIT between the two countries, while

Table 1. Top five EU member states by number of BITs concluded

	Extra-EU BITs	Intra-EU BITs	Total BITs
Germany	123	13	136
United Kingdom	93	11	104
France	90	11	101
Netherlands	87	11	98
Belgium and Luxembourg	81	12	93

Source: Based on UNCTAD data (as of 1 May 2012)

Table 2. Bottom five EU member states by number of BITs concluded

	Extra-EU BITs	Intra-EU BITs	Total BITs
Slovenia	19	19	38
Cyprus	18	9	27
Estonia	12	15	27
Malta	10	12	22
Ireland	0	0	0

Source: Based on UNCTAD data (as of 1 May 2012)

The stark difference in territorial reach between EU IIAs and MS BITs becomes apparent if one compares the **number of country relationships** they each create. Despite the much lower number of EU IIAs as compared to MS BITs – 31 versus 1,318 – the EU agreements far outplay MS BITs in terms of the number of country relationships created (see figure 3).

As mentioned above, the EU's 31 existing treaties with substantive investment provisions reach 139 non-EU countries. Given that from the EU side, 27 member states participate in each treaty, these 31 agreements cover 3,753 bilateral relationships (27 x 139). In other words, the 31 EU agreements are statistically equivalent to 3,753 bilateral treaties. These 31 agreements create two and a half times more country relationships than all existing MS BITs taken

French investors in Greece (and Greek ones in France) do not have similar rights as there is no BIT in place. The existing 177 intra-EU treaties cover approximately half of country relationships within the EU, while the other half is not covered, and this clearly distorts the level-playing field on the European market. The fate of intra-EU BITs is currently being debated within the EU; the Commission is of the view that '*intra-EU BITs are not compatible with the EU single market*'. See European Commission, 'Bilateral Investment Treaties between EU Member States (intra-EU BITs)', available at <http://ec.europa.eu/internal_market/capital/analysis/monitoring_activities_and_analysis_en.htm>. For the academic discussion of this issue, see M. Potesta, 'Bilateral Investment Treaties and the European Union: Recent Developments in Arbitration and Before the ECJ', 8 *The Law and Practice of International Courts and Tribunals* 2009, pp. 225–245; T. Eilmansberger, 'Bilateral Investment Treaties and EU Law', 46 *Common Market Law Review* 2009, pp. 398 *et seq.*

together. The case for collective EU negotiations is obvious not only because this eliminates differences in treatment of investors from different countries but also because of the lower transaction costs of treaty making, not to mention the EU's greater negotiating power as compared to individual member states.

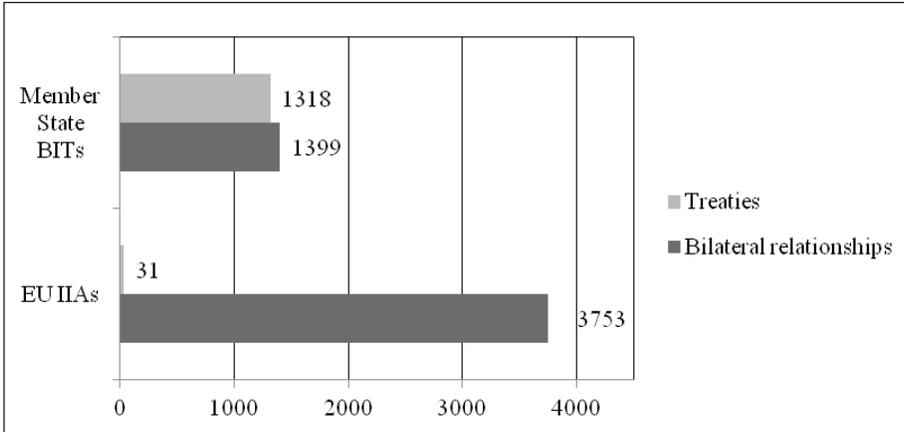


Figure 3. Country relationships created by MS BITs and EU IIAs⁸
 Source: Based on own data and UNCTAD data (as of 1 May 2012 for MS BITs and 1 July 2012 for EU IIAs)

A review of the treaty partners reveals that both EU IIAs and MS BITs are oriented towards developing countries. Rarely have the EU or its member states negotiated IIAs with other developed countries. Only some Eastern European transition economies, prior to joining the EU in 2004 and 2007, had concluded BITs with countries like Australia, Canada, Norway, Switzerland or the United States. In the EU's case, its agreement with the European Free Trade Association (EFTA) (includes Iceland, Norway, Liechtenstein, Switzerland) is an exception.⁹

Given that all major developed countries have adopted an open-door foreign investment policy complemented by a relatively strong record of good governance, institutions and judiciary, there appears to be less of a need for additional protection by means of international investment agreements. However, the example of Chapter 11 of the North American Free Trade Agreement (NAFTA) between Canada, Mexico and the United States shows that investors from developed countries will readily take advantage of international arbitration

⁸ One BIT governs one country relationship (e.g., France-Nigeria or Spain-Argentina). The only exception are BITs concluded by the Belgium-Luxembourg Economic Union, where one BIT covers two country relationships (e.g., the BIT between the Belgium-Luxembourg Economic Union and Tajikistan applies to Belgium-Tajikistan and Luxembourg-Tajikistan relationships). In total, 1,318 extra-EU MS BITs cover 1,399 country relationships.

⁹ This trend may be changing, with the free trade agreement between the EU and Canada currently under negotiation, and the EU-US Transatlantic Trade and Investment Partnership planned. Both agreements will most likely contain an investment chapter.

mechanisms against their developed hosts too, if such mechanisms are available.¹⁰

1.2 EU IIAs and MS BITs: treaty content

In terms of their content, existing substantive EU investment treaties cover somewhat different ground to MS BITs (see annex 2). EU IIAs are limited to providing for national treatment (NT) and most-favoured-nation treatment (MFN) with respect to the establishment and operations of investments and also contain provisions regarding free capital movements and employment of key personnel. In most treaties, the NT and MFN provisions extend to both services and non-service sectors (on the basis of a positive or negative list of industries). Within committed sectors, each contracting party can inscribe limitations and reservations in a schedule.

The EU-CARIFORUM Economic Partnership Agreement (2008) may serve as an example. Its chapter on 'Investment, Trade in Services and E-Commerce' contains the following main obligations:

Article 67

Market access

1. With respect to market access through commercial presence, the EC Party and the Signatory CARIFORUM States shall accord to commercial presences and investors of the other Party a treatment no less favourable than that provided for in the specific commitments contained in Annex IV [Annex IV contains a positive list of committed industries, including limitations and reservations in these industries].
[...]

Article 68

National treatment

1. In the sectors where market access commitments are inscribed in Annex IV and subject to any conditions and qualifications set out therein, with respect to all measures affecting commercial presence, the EC Party and the Signatory CARIFORUM States shall grant to commercial presences and investors of the other Party treatment no less favourable than that they accord to their own like commercial presences and investors.
[...]

Article 70

Most-favoured-nation treatment

1. With respect to any measures affecting commercial presence covered by this Chapter:
(a) the EC Party shall accord to commercial presences and investors of the Signatory CARIFORUM States a treatment no less favourable than the most favourable treatment applicable to like commercial presences and investors of any third coun-

¹⁰ Out of the total of 47 known NAFTA investment disputes, 13 claims have been brought by US investors against Canada and 17 cases have been initiated by Canadian investors against the United States. See U.S. Department of State, NAFTA Investor-State Arbitrations, available at <<http://www.state.gov/s/l/c3740.htm>>.

try with whom it concludes an economic integration agreement after the signature of this Agreement;

(b) the Signatory CARIFORUM States shall accord to the commercial presences and investors of the EC Party a treatment no less favourable than the most favourable treatment applicable to like commercial presences and investors of any major trading economy with whom they conclude an economic integration agreement after the signature of this Agreement.

[...]

Commercial presence, a key term in these provisions, is defined as the ‘*constitution, acquisition or maintenance of a juridical person*’ and ‘*the creation or maintenance of a branch or representative office [...] for the purpose of performing an economic activity*’ (Article 65(a)). The words ‘*constitution*’, ‘*acquisition*’ and ‘*creation*’ point to establishment of investments, i.e. market access. However, an additional reference to ‘*maintenance*’ of a juridical person, branch or representative office suggests that the treaty goes beyond the pre-establishment phase. The term ‘*maintenance*’ can be read in different ways, and it is not yet clear how far-reaching it is – for example, whether it relates only to organisational issues or also covers substantive business activities of the entity concerned.¹¹ In many other EU IIAs, the NT/MFN provisions apply, in addition to ‘*establishment*’ of subsidiaries and branches, to their ‘*operation*’, the latter term being defined as ‘*pursuit of economic activities*’,¹² which clearly points to the post-establishment phase. More detailed information on the EU IIAs’ content is provided in Annex 2.

Neither the EU-CARIFORUM treaty, nor other EU IIAs, provide for additional standards of treatment commonly found in MS BITs. The latter typically also include absolute standards of protection such as fair and equitable treatment of investors and their investments, full protection and security, prohibition of arbitrary and discriminatory measures, guarantees in case of expropriation and provision for compensation of losses incurred during armed conflict or civil strife. However, MS BITs are of the ‘post-establishment’ type, i.e., all these protections, including NT and MFN, become operational only after an investment is established in the host state.

Thus, the two types of agreements – EU IIAs and MS BITs – are to a large extent complementary: EU IIAs open up opportunities for market access (pre-establishment) while MS BITs protect investments from the moment of their establishment onwards (post-establishment).

Another important distinction is the scope of the investment provisions. EU IIAs typically only concern investments in the form of subsidiaries and branches (more recent agreements use the term ‘*commercial presence*’, which also

¹¹ Some fully-fledged IIAs contain a much broader list of post-establishment investment activities to which the NT or MFN obligation apply, in which ‘*maintenance*’ is only one aspect, for instance ‘*management, conduct, operation, maintenance, use, enjoyment and sale or other disposition of investments*’. See for example, Brunei-Japan Free Trade Agreement (2009), Art. 56(1) (definition of ‘investment activities’).

¹² See, e.g., the EC-Georgia Partnership and Cooperation Agreement (1996), Arts. 23, 25.

implies, most commonly, holding equity capital in legal entities).¹³ EU agreements therefore do not cover portfolio investments. By contrast, the definition of 'investment' in MS BITs is much broader and covers an open-ended list of assets such as movable and immovable property, shareholdings (including portfolio investments), any loans and bonds, claims to money or performance under contracts and intellectual property rights.¹⁴

Provisions of EU IIAs and MS BITs are further discussed in section 2.3 from the sustainable-development angle.

1.3 EU IIAs and MS BITs: dispute settlement

The mechanism of enforcement is key in any treaty. EU IIAs and MS BITs take a radically different approach to this issue. EU IIAs provide for political settlement of any disputes through consultations or negotiations between the state parties (often through the inter-state council created by the treaty), or in some more recent treaties (e.g., with Mexico, Chile, Republic of Korea or CARIFORUM) for state-state arbitration. EU IIAs do not mention possible remedies, but presumably a dispute would involve a request to the state party which allegedly is breaching treaty provisions to withdraw or modify the measure that violates the treaty (similar to WTO dispute settlement). To the authors' knowledge, so far there have been no reported arbitration cases related to investment provisions under these treaties.

By contrast, the great majority of MS BITs provide for direct investor-state dispute settlement (ISDS). An aggrieved investor can initiate arbitration proceedings against the host state, claiming that the state has breached a BIT obligation or obligations, and request financial compensation for the losses suffered as a result of the breach. From the individual investor's perspective, BITs provide a more immediate way to enforce treaty provisions when compared to the political settlement or state-state arbitration of EU IIAs where individual companies or industries have to convince their home governments to prosecute host countries' treaty violations.

European investors have been using the ISDS system actively. Out of the 451 publicly known arbitration cases filed around the world by the end of 2011, 219 (or 48%) were initiated by EU investors.¹⁵ Out of these 219 known cases,

¹³ A '*subsidiary*' of a company is defined as a company which is '*effectively controlled*' by the first company. The EU-CARIFORUM EPA specifies that only capital participation which entails '*lasting economic links*' is recognised as '*commercial presence*'. The treaty clarifies that certain long-term loans are also included (Art. 65(a)).

¹⁴ On definitions of the terms 'investment' and 'investor' in BITs, see UNCTAD, *Scope and Definition: A Sequel* (United Nations: New York and Geneva 2011), available at <http://unctad.org/en/Docs/diaeia20102_en.pdf>.

¹⁵ Where the claimant is a company (not an individual), it should be borne in mind that the ultimate investor/beneficiary might be from a non-EU country, even though the company is established in one of the EU member states.

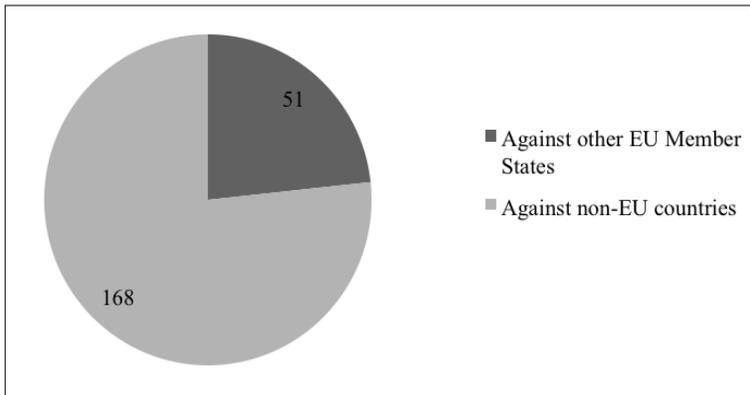


Figure 4. Known ISDS cases filed by EU investors

Source: Based on UNCTAD data (as of 1 January 2012)

168 cases were brought against developing countries,¹⁶ and 51 cases were launched by EU investors against other EU member states (figure 4).¹⁷

Non-EU investors have been significantly less active in suing the EU member states – only 21 such claims are known (4% of the total of 451 cases).¹⁸ EU member states have been more frequently sued by investors from other EU members (51 cases); many of such claims have been based on intra-EU BITs.

In sum, dispute settlement is much more common under BITs compared to EU IIAs. This must be largely the result of the BITs' direct investor-state arbitration system that is better suited to investors' needs than the state-state mechanism enshrined in EU IIAs. Furthermore, MS BITs contain more obligations that can be used to support a claim (the obligation to treat investors fairly and equitably is probably the most important among these). Finally, the EU IIAs' primary focus on pre-establishment means that even if such obligations are breached, the losses to investors can be only of the 'foregone business opportunities' type, and do not involve the destruction or impairment of an established investment, which is a usual grievance in ISDS proceedings under BITs.

Statistics show that currently, EU investors' BIT claims against developing countries by far outnumber claims in the opposite direction. The main reasons for this appear to be better governance practices in Europe and relatively low FDI stocks held in the EU by developing-country investors. However, this trend may be expected to change, at least to a degree, with the continuous growth of developing countries' share in FDI flows to the EU. The significant number of intra-EU BIT claims and the NAFTA experience both suggest that business

¹⁶ Countries most frequently sued by EU investors by means of ISDS are Argentina (30 cases), Venezuela (12), Russia (9), India (7), Ukraine (7), Albania (4), Georgia (4) and Kazakhstan (3).

¹⁷ The most popular respondents in these cases have been the Czech Republic (13 cases), Poland (9), Hungary (6), Slovakia (6) and Romania (5).

¹⁸ 5 such cases have been initiated against Poland, 4 against the Czech Republic, 3 against Romania and 3 against Slovakia.

environments in developed countries generally, and EU member states in particular, are not flawless and that their governments are not immune to investor claims.

2. THE WAY FORWARD: EUROPEAN INVESTMENT AGREEMENTS AND SUSTAINABLE DEVELOPMENT

This part looks into the possible future directions of the European investment treaty making. Section 2.1 briefly discusses what the FDI competence shift entails in practice and suggests that the current juncture presents a propitious moment for a reassessment of how EU investment treaties should look. Section 2.2 deals with the emergence of sustainable development as the overarching guiding principle for investment treaties and explains what this means for their design and content. Section 2.3 assesses the EU's and member states' record in terms of compatibility of their treaties with sustainable development objectives. Finally, section 2.4 briefly reviews the current discussion and developments within the EU with respect to future IIAs.

2.1 Imminent changes in European investment policy-making

Post-Lisbon Treaty statements from the European Commission indicate that the EU will start introducing BIT-like provisions in its future agreements with third countries, thus combining the earlier investment liberalisation approach with investment protection.¹⁹ These provisions can be included in the broad trade and cooperation pacts (presumably, *inter alia*, by amending existing treaties) or stand-alone investment agreements (e.g., with China).²⁰

In September 2011, the EU Council issued the first three mandates to the EU Commission to conduct negotiations on investment in FTAs with Canada, India and Singapore.²¹ The leaked negotiating directives suggest that the Council foresees the inclusion of those BIT elements previously absent in EU IIAs such as the fair and equitable treatment, expropriation and investor-State dispute settlement and aims for the '*highest possible level of legal protection and certainty for European investors in Canada/India/Singapore*'.²² The Council also instructs the Commission to include portfolio investment and intellectual property rights in the definition of covered investment. In December 2011, the EU Council adopted negotiating directives for deep and comprehensive free trade areas, including provisions on investment, with Egypt, Jordan, Morocco

¹⁹ See European Commission, *Towards a comprehensive European international investment policy*, COM(2010) 343, 7 July 2010.

²⁰ *Ibid.*, p. 7.

²¹ EU Council, official press release of the 3109th Council meeting, 13587/11, 12 September 2011, p. 13, available at <http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/EN/genaff/124579.pdf>.

²² 'EU negotiating mandates on investment (EU-Canada/India/Singapore FTAs)', 15 September 2011, available at <<http://www.bilaterals.org/spip.php?article20272>>.

and Tunisia.²³ Finally, in February 2012, the EU and China discussed the possibility of an EU-China investment agreement and agreed '*to work towards the start of the negotiations as soon as possible*'.²⁴ In May 2013, the negotiating directives for the EU-China investment agreement were submitted by the Commission to the Council.²⁵

In the long-term, the EU's comprehensive investment treaty making will entail systemic changes to the international investment regime. The implementation of the EU's new exclusive competence over FDI impairs the ability of member states to continue concluding BITs. New EU-wide investment treaties are expected to gradually replace existing BITs between the EU's future treaty partners and individual EU member states.²⁶ For instance, once concluded, the EU-India FTA may be expected to replace 21 BITs previously signed with India by individual EU members. Given that existing MS BITs (1,318 extra-EU and 177 intra-EU BITs) account for more than half of the world's BITs, the changes will indeed be dramatic, even if gradual. By reducing the overall number of treaties and creating more uniform rules, the EU's new agreements should lead to a considerable consolidation and harmonisation of the international investment regime.²⁷

Investment treaty making under the umbrella of the EU may be expected to be based on a broader spectrum of opinions, take into account various political interests and involve greater democratic scrutiny. This is due to the co-decision

²³ European Commission, 'EU agrees to start trade negotiations with Egypt, Jordan, Morocco and Tunisia', Press Release, IP/11/1545, 14 December 2011, available at <<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/1545&format=HTML&aged=0&language=EN&guiLanguage=en>>.

²⁴ Joint Press Communiqué of the 14th EU-China Summit, MEMO 12/103, 14 February 2012, para. 11, available at <<http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/12/103>>.

²⁵ European Commission, 'Commission proposes to open negotiations for an investment agreement with China', Press Release, 23 May 2013, available at <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=900>>.

²⁶ See European Commission, Proposal for a Regulation of the European Parliament and the Council establishing transitional arrangements for bilateral investment agreements between Member States and third countries, COM(2010) 344, 7 July 2010. See also Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries, OJ L 351/40.

²⁷ It must be noted that some EU member states have continued concluding BITs with third countries after the entry into force of the Lisbon Treaty (1 December 2009). 45 such agreements were signed, including ten in 2011. The Czech Republic has signed the highest number of agreements (10), followed by Romania (5) and Portugal (4). The most frequent treaty partner for post-Lisbon BITs has been India (4 treaties), which is surprising given that the EU is negotiating an FTA with India that will have an investment chapter. According to the recently adopted EU Regulation 1219/2012, member states retain the right to enter into negotiations for the conclusion of new BITs or amendments to their existing BITs subject to receiving the Commission's authorisation. The latter should be granted if the proposed talks and, thereafter, the negotiated text of the treaty satisfy the conditions set out in Article 9 of the Regulation, including consistency with EU law, principles and objectives of the EU external action and the Union's investment policy. See Articles 7-11 of the *Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries*, Official Journal of the European Union L 351/40.

powers of the European Parliament in the Common Commercial Policy, a new feature introduced by the Lisbon Treaty and described as an '*important step forward in combating the democratic deficit in trade policy-making*'.²⁸ The Parliament's strengthened role will naturally lead to deliberations between its different political groups and, assuming that a great part of such deliberations will be public, this will contribute to a more transparent and democratic process.

In sum, the shift of the FDI competence and the resultant institutional changes create an opportunity for EU bodies and stakeholders to review and analyse existing treaty practices and take them forward. From our perspective, such reassessment should start from the fundamentals and take into account the dynamic experiences of the past 15 years. The next section shows how the concept of sustainable development can help to identify positive avenues for change.

2.2 International investment agreements and sustainable development

The rationale underlying the rapid proliferation of BITs over the past 20-30 years has been two-sided: capital-exporting countries have sought to protect their investments abroad, while capital-importing countries have sought to use IIAs as a means to attract FDI. The investment-attraction line of thinking was based on a simple syllogism: '(1) Investments are good for economic development; (2) IIAs attract investment by giving guarantees of protection; and therefore, (3) IIAs are good for economic development'.

The reality has turned out to be more complex. First, increasing doubt has been cast on the premise that IIAs help to attract FDI. Econometric studies have not found a clear statistical link between the conclusion of IIAs and growth in FDI flows.²⁹ A meta-analysis by UNCTAD has suggested that IIAs can be one among several factors with a positive influence on FDI, although by no means a crucial one.³⁰

Second, and more importantly, there has been increased recognition of the fact that investment is not the only ingredient in the development process, and that investment protection serves a good cause so long as it does not interfere with, or trump other development values such as environmental welfare or public health. Increasing FDI inflows is not an ultimate goal but the means to economic growth and job creation, which must go hand in hand with improved

²⁸ R. Leal-Arcas, 'The European Union's Trade and Investment Policy after the Treaty of Lisbon', 11/4 *The Journal of World Investment & Trade*, pp. 463-514 (p. 476). See also M. Bungenberg, 'Going Global? The EU Common Commercial Policy After Lisbon', in C. Herrman and J. Terhechte (eds.), *European Yearbook of International Economic Law 2010* (Springer: Berlin and Heidelberg 2010), pp. 123-151 (pp. 129-130).

²⁹ UNCTAD, *The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries*, UNCTAD Series on International Investment Policies for Development (United Nations: New York and Geneva 2009), pp. xiii, 33-50, 55.

³⁰ *Ibid.*, pp. xii, 14-26, 54-56 and 109-112. It was also noted that treaties which provide for both free trade and investment protection provisions tend to have more pronounced FDI-attraction effects (*Ibid.*, pp. xii, 64-106 and 110-111).

standards of living, maintenance of labour and human rights standards and preservation of the environment. When seeking to boost development, it may be a fallacy to strive for economic growth at all costs. IIAs and increased investment must co-exist harmoniously with public policies and especially those ensuring the sustainability of economic development. IIAs should find a proper balance between interests of private investors and important public interests.

An additional point is that the division between capital exporters and importers is becoming blurred as more and more countries import and export capital at the same time. This also changes the dynamics of investment treaty negotiations and eventually impacts treaty content. More countries, both developing and developed, now must satisfy opposing interests by looking at the relevant issues from both perspectives, capital-exporting and -importing. Canada and the United States are good examples in this respect. After reviewing their model BITs in light of their experience as respondents in NAFTA arbitrations, both countries came up with significantly modified treaty models that seek to balance offensive and defensive interests.³¹

IIAs have demonstrated ample potential to expose countries to international legal proceedings, which come with significant monetary and reputational costs. To date, a total of 89 countries have appeared as respondents in known investment treaty proceedings, often prolonged and expensive. No doubt, many investors' claims are aimed at remedying abusive or arbitrary state conduct, fighting corrupt practices and cronyism. However, there have also been a considerable number of investor claims challenging government policies adopted in the public interest but which had a negative effect on investors. Such cases have concerned, for example, environmental regulations,³² public health and safety issues,³³ sovereign debt restructuring,³⁴ 'affirmative action'

³¹ See Canada's Model Foreign Investment Protection Agreement (2004) available at <<http://italaw.com/documents/Canadian2004-FIPA-model-en.pdf>> and the United States' Model Bilateral Investment Treaty (2004; the most recent version is from 2012) available at <<http://www.state.gov/documents/organization/188371.pdf>>.

³² *Methanex Corp. v. United States*, UNCITRAL, Final Award of 3 August 2005 (Methanex, a Canadian methanol producer, initiated arbitrations against the United States' ban of MTBE gasoline additives); *Chemtura v. Canada*, UNCITRAL, Award of 2 August 2010 (Chemtura, a US agricultural chemicals manufacturer, challenged a pesticide regulation by a Canadian agency); *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Awards of 13 November 2000, 21 October 2002 and 30 December 2002 (SD Myers, a United States hazardous waste management company, submitted a claim against Canada's export ban on PCB, a toxic chemical); *Vattenfall AB and others v. Federal Republic of Germany*, ICSID Case No. ARB/09/6 (Vattenfall, a Swedish energy company, filed a complaint against restrictions on the use of river water and delays in the issuance of related permits imposed by a German local authority on a coal-fired power plant under construction near a river).

³³ *FTR Holding S.A. (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/, and *Philip Morris v. Australia*, UNCITRAL (Philip Morris, a tobacco giant, started arbitrations against Uruguay and Australia, challenging the countries' toughened regulations on tobacco packaging and labeling); *Vattenfall AB and others v. Federal Republic of Germany*, ICSID Case No. ARB/12/12 (Vattenfall challenged Germany's decision to shut down the oldest nuclear power plants and to phase out nuclear energy production).

³⁴ *Abaclat et al., v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility of 4 August 2011 (A mass claim, brought by Italian bondholders, challenges the

policies aimed at improving the status of previously disadvantaged groups,³⁵ and others.³⁶ In light of these developments, some countries have reviewed their model BITs and started to renegotiate their treaties introducing necessary safeguards,³⁷ other countries have even terminated some BITs.³⁸ Still others have withdrawn from the ICSID Convention.³⁹

Cases like the ones mentioned above demonstrate that traditional BITs, by focusing solely on investment protection, have neglected other important societal values, thus opening the way for frivolous claims and one-sided interpretations. The logic followed by some arbitrators is well-illustrated by the following statement: '*The BIT is a treaty for the promotion and reciprocal protection of investments. [...] It is legitimate to resolve uncertainties in its interpretation so as to favour the protection of covered investments.*'⁴⁰ Thus, orthodox BITs can be read as intentionally leaving out sustainable-development considerations as irrelevant in the investment protection context. While not all arbitrators have followed this line of thinking, the wide scope for interpretation creates unpredictability and cultivates subjective judgement. When rules are vague, the true power is in the hands of the interpreter.

In the past few years, the relationship between IIAs and sustainable development has received a good deal of attention from policy-makers, academics,

conditions of the sovereign debt restructuring after Argentina's default on its public debt in the early 2000s).

³⁵ *Piero Foresti, Laura De Carli and others v. Republic of South Africa*, ICSID Case No. ARB (AF)/07/1, Award of 4 August 2010 (Foresti and others, a group of European investors, challenged a new regulation of mineral rights enacted by the South African government in the context of black economic empowerment legislation).

³⁶ On investor-state dispute cases related to environmental and social issues, see M. E. Footer, 'Bits and Pieces: Social and Environmental Protection in the Regulation of Foreign Investment', 18/1 *Michigan State Journal of International Law* 2009, pp. 28-58. For a comprehensive analysis of human rights issues in international investment law, see P.-M. Dupuy, F. Francioni, and E.-U. Petersmann (eds.), *Human Rights in International Investment Law and Arbitration* (Oxford University Press: Oxford 2010).

³⁷ See UNCTAD, *World Investment Report 2010: Investing in a low-carbon economy* (United Nations: New York and Geneva 2010), pp. 85-88.

³⁸ The most recent example is South Africa's termination of its BIT with Belgium and Luxembourg. According to South Africa's Trade and Industry Minister Rob Davies, the Cabinet intends to terminate other BITs as they come up for renewal, and possibly renegotiate them on the basis of South Africa's new model BIT that is yet to be developed (see <<http://www.dti.gov.za/editspeeches.jsp?id=2506>>). In 2009, South Africa started a review of its BITs, stating that the first post-apartheid government entered into 'agreements that were heavily stacked in favour of investors without the necessary safeguards to preserve flexibility in a number of critical policy areas' (see Government Position Paper, *Bilateral Investment Treaty Policy Framework Review*, p. 5, available at <<http://www.info.gov.za/view/DownloadFileAction?id=103768>>). Earlier instances of treaty terminations include Ecuador's termination of nine BITs, Venezuela's termination of its BIT with the Netherlands and Bolivia's termination of its BIT with the United States.

³⁹ The International Centre for Settlement of Investment Disputes, ICSID, which was established by the Convention, is the most frequently used venue for IIA arbitrations. In the last few years, three states denounced their membership: Bolivia in 2007, Ecuador in 2009 and Venezuela in 2012. For a discussion of the related legal issues, see UNCTAD, *Denunciation of the ICSID Convention and BITs: Impact on Investor-State Claims*, IIA Issues Note, No. 2, 2010, available at <http://unctad.org/en/Docs/webdiaeia20106_en.pdf>.

⁴⁰ *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision on Jurisdiction of 29 January 2004, para. 116.

international organisations and other stakeholders.⁴¹ We will highlight a few examples. In 2004 both Canada and the United States issued their updated model BITs, which, among other things, clarified concepts of fair and equitable treatment and indirect expropriation to allow for non-discriminatory public-interest policies, included general exceptions from investor protections (Canada only), added new language on environmental protection and labour rights, a mechanism for expeditious discharge of frivolous claims (US only) and incorporated some other innovative features. In 2005, the International Institute for Sustainable Development issued its *Model International Agreement on Investment for Sustainable Development* which goes even further in this rebalancing effort and includes, for example, a right of states to bring counterclaims against investors who have breached the provisions of the treaty or its domestic law.⁴² The Southern African Development Community (SADC) has been working on a model BIT template for its member states. The current draft includes provisions on environmental and social impact assessments, measures against corruption, minimum standards for human rights, environment and labour, corporate governance, and the right of states to regulate and pursue their development goals.⁴³

The Secretariat of the Commonwealth, an association of 54 countries from different regions (including Africa, Asia, the Americas, the Caribbean, Europe and the South Pacific), in collaboration with the University of Ottawa, have put together a handbook entitled *Integrating Sustainable Development into International Investment Agreements*.⁴⁴ Among other things, it suggests IIA provisions to strengthen investment promotion, provide more flexibility for host countries to pursue legitimate public policies, oblige investors to adhere to minimum standards respecting the environment, human and labour rights and require environmental, social and human rights impact assessments. The Guide also recommends options to reduce the costs of the ISDS mechanism, to require exhaustion of local remedies allowing counterclaims against investors which violate domestic or international law.

In July 2012, drawing on many years of experience in research and technical assistance, UNCTAD launched its own *Investment Policy Framework for*

⁴¹ For academic sources, see, for example, M-C. Cordonier Segger, M. Gehring, and A. Newcombe (eds.), *Sustainable Development in World Investment Law* (Kluwer Law International: Alphen aan den Rijn 2011); A. van Aaken and T.A. Lehmann, 'International Investment Law and Sustainable Development: Developing a New Conceptual Framework', University of St. Gallen Law School, Working Paper No. 2011-10, July 2011.

⁴² H. Mann, K. von Moltke, L. E. Peterson, A. Cosbey, *IISD Model International Agreement on Investment for Sustainable Development: A Negotiator's Handbook*, 2005, available at <<http://www.iisd.org/publications/pub.aspx?pno=686>>.

⁴³ SADC Model Bilateral Investment Treaty Template with Commentary, July 2012, available at <<http://www.iisd.org/itn/wp-content/uploads/2012/10/SADC-Model-BIT-Template-Final.pdf>>.

⁴⁴ J. Van Duzer, P. Simons and G. Mayeda, *Integrating Sustainable Development into International Investment Agreements: A Guide for Developing Country Negotiators* (The Commonwealth, forthcoming), available for purchase at <<https://publications.thecommonwealth.org/integrating-sustainable-development-into-international-investment-agreements-955-p.aspx>> (pre-publication version on file with the authors).

Sustainable Development (IPFSD).⁴⁵ In its international section, the IPFSD compiles policy options available to IIA negotiators and includes both mainstream treaty approaches and less common language used by some countries along with UNCTAD's own suggestions to foster sustainable development. Each section is accompanied by a brief commentary on the various drafting possibilities which highlights – where appropriate – the implications for sustainable development.

Based on the IPFSD, we suggest that a sustainable development-friendly IIA should give expression to the following main elements:

- (i) offering protection solely to those investments that contribute to the host country's sustainable development such as greenfield investments, or, at a minimum, excluding those investments that should not be subject to investor-state arbitration (such as countries' sovereign debt);⁴⁶
- (ii) providing treatment and protection guarantees to investors without impinging on the government's right to regulate in the public interest, e.g., in the areas of environment or public health and safety;
- (iii) defining as precisely as possible standards of treatment and protection (most notably, the 'fair and equitable' standard as the one most frequently invoked in ISDS)⁴⁷ and listing specific policy areas where they do not apply;
- (iv) avoiding over-exposure of states to costly litigation and lowering the risk of exorbitant financial liabilities (e.g., if a threshold of liability for finding a violation of the fair and equitable treatment obligation is low, a country may be showered by claims, and litigation expenses alone, often amounting to several million US dollars per case, will divert scarce funds away from development causes);
- (v) stimulating responsible business practices by investors, e.g., by incorporating ILO labour standards and other universally accepted principles of business conduct and ensuring procedural means for enforcing them; and
- (vi) accounting for differences in the level of development in cases where the economic gap between the treaty partners is significant (e.g., by using asymmetrical obligations, technical assistance to a less developed treaty partner) and fostering the investment promotion effects of IIAs (e.g., by providing for exchange of information between the parties, joint activities and/or committees, investment guarantees).

⁴⁵ UNCTAD, *Investment Policy Framework for Sustainable Development*, 2012, available at <http://unctad.org/en/PublicationsLibrary/diaepcb2012d5_en.pdf>.

⁴⁶ See UNCTAD, *Sovereign Debt Restructuring and International Investment Agreements*, IIA Issues Note, No. 2, July 2011, available at <http://unctad.org/en/docs/webdiaepcb2011d3_en.pdf>.

⁴⁷ On this issue, see also UNCTAD, *Fair and Equitable Treatment: A Sequel* (United Nations: New York and Geneva 2012), available at <http://unctad.org/en/Docs/unctaddiaeia2011d5_en.pdf>.

2.3 EU IIAs and MS BITs from a sustainable-development perspective

It is useful to look at the EU IIAs and MS BITs from the perspective of the sustainable-development features set out in the previous section. From the outset, it should be said that the 1,318 extra-EU MS BITs, while having many common characteristics, are not identical and sometimes display significant differences. The great majority of MS BITs, however, are based on the OECD Draft Convention on the Protection of Foreign Property of 1967, with the addition of investor-state arbitration as a means of treaty enforcement. The 31 EU IIAs are not identical either but, again, they display certain general features which form the basis for this discussion. While recognising the limitations of such an analysis, we believe that its value lies in identifying general treaty trends and approaches.

MS BITs focus solely on investor protection and generally fail to take into account other objectives. As mentioned, this may result in the interpretation of the (commonly vague) treaty standards in a one-sided, investor-friendly way. With reference to the criteria set out in the previous section:

- MS BITs adopt an open-ended definition of investment which typically covers any assets of economic value. There is no requirement for investments to be in productive assets, to establish a lasting economic relationship or to contribute to the host state's economic development. Portfolio investments, government bonds, assets for non-business purposes, short-term loans and claims arising out of contracts (even if the contracts are purely one-off commercial deals) are not excluded.
- MS BITs do not include provisions that would safeguard a government's right to regulate in the public interest, either in the form of a general reference in the treaty preamble, or as general exceptions or as clarifications to specific provisions. The matter is thus wholly left to arbitrators who may or may not justify certain measures depending on their interpretation of the terms 'fair and equitable', 'discrimination', 'full protection and security', 'indirect expropriation', etc.
- Principal standards of treatment of protection are formulated broadly and imprecisely leaving it to the interpreter (i.e., arbitral tribunals) to establish their meaning.
- MS BITs do not employ any techniques to limit state exposure to investor claims such as exclusion of certain classes of sensitive disputes from ISDS, a requirement to exhaust local remedies, alternative dispute resolution (mediation and conciliation), limitation on recoverable damages or the introduction of 'limitation periods' within which a claim must be brought, etc.
- MS BITs do not impose any obligations on investors aside from the requirement for an investment to be made in accordance with the local law (e.g., such as a requirement to comply with host State laws at the post-entry stage, incentives to comply with universally recognised standards such as the ILO Tripartite MNE Declaration and the UN Guiding Principles on Business and

Human Rights, or with applicable standards of corporate social responsibility).

- MS BITs do not have special and differential treatment provisions for the benefit of countries with a low level of development, including technical assistance, and do not provide for specific investment-promotion activities.

As mentioned earlier, among MS BITs there are some outliers, especially among the more recent treaties. For example, the 2009 BIT between Belgium/Luxembourg and Colombia contains a number of features not common to traditional MS BITs. In particular this treaty:

- excludes from the definition of investment sovereign debt obligations and commercial contracts for the sale of goods and services;
- excludes certain sensitive policies from the scope of treaty application (tax measures, prudential regulation in the financial sector);
- links the fair and equitable treatment obligation to the minimum standard of treatment under customary international law, thereby preventing extensive interpretation, increasing the threshold of state liability and thus limiting exposure to investor claims;
- sets out exceptions from the free-transfer-of-funds obligation, including in the event of the serious balance-of-payments difficulties or threat thereof;
- contains special obligations relating to the protection of the environment and labour rights;
- clarifies that measures adopted for public purposes such as protection of public health, safety and environment protection do not constitute indirect expropriation, and thus need not be accompanied by compensation to affected investors;
- omits the so-called ‘umbrella’ clause (a clause that makes contractual and other specific obligations granted to investors enforceable through the IIA’s ISDS mechanism, which expands the scope of arbitrable disputes);
- generally, contains more precise and specific formulations, thereby reducing the discretion left to arbitrators.

EU IIAs contain a number of provisions that can be of interest from a sustainable-development perspective (statistical analysis of the relevant treaty features is provided in annex 2). For example, the general treaty exceptions – routinely found in EU IIAs – allow governments to implement certain public-interest policies that could otherwise be in breach of the treaty’s substantive disciplines. These general exceptions sometimes resemble Article XX of the WTO General Agreement on Tariffs and Trade and, among others, include measures necessary to protect public security, safety and morals, maintain public order, protect the environment as well as national treasures of artistic, historic or archaeological value.⁴⁸ Older EU IIAs typically subject treaty provisions to the broadly-formulated ‘*limitations justified on grounds of public policy,*

⁴⁸ EU-CARIFORUM EPA (2008), Art. 224.

public security or public health'.⁴⁹ National security exceptions, which may also have a public-interest dimension, are also a regular feature of EU IIAs and are usually found in a separate article.⁵⁰

A treaty preamble is another place to look. By contrast to a typical MS BIT, whose preamble normally refer only to the desire to create favourable conditions for investors and to promote and protect investments, the majority of EU IIAs mention additional principles, including sustainable development. For instance, the preamble to the EU-Korea FTA (2010) names the following:

- *commitment to sustainable development [...] in its economic, social and environmental dimensions, including economic development, poverty reduction, full and productive employment and decent work for all as well as the protection and preservation of the environment and natural resources*;
- *'the right of the Parties to take measures necessary to achieve legitimate public policy objectives*;
- *desire 'to raise living standards, promote economic growth and stability, create new employment opportunities and improve the general welfare*'; and
- *desire 'to strengthen the development and enforcement of labour and environmental laws and policies, promote basic workers' rights and sustainable development*.

Preambles play an important role in interpreting substantive IIA provisions. Going beyond the narrow investment-protection statements is likely to lead to more balanced interpretations and foster coherence between different policy objectives and bodies of law.

The EPA with CARIFORUM members, the FTA with the Republic of Korea and some other recent treaties concluded by the EU include innovative provisions on investor behaviour and maintenance of standards – they oblige the contracting parties to take all appropriate measures to ensure that foreign investment activity conforms to a number of standards, in particular each Party must:

- ensure that bribery of officials by foreign investors is forbidden;
- ensure investor compliance with core labour standards as required by the ILO Declaration on Fundamental Principles and Rights of Work (1998); and
- ensure fulfilment of international environmental or labour obligations arising from agreements signed by the parties.

These agreements provide further that the Parties shall not encourage FDI by lowering domestic environmental and labour standards or laws.

Inclusion of provisions on investment promotion and technical assistance presents an important innovation in comparison to most MS BITs. Cooperation aims at making the institutional regime and policy environment in target countries more conducive to investment, improving access to information on investment opportunities and facilitating and incentivising investment flows. The

⁴⁹ E.g., EU-Algeria Euro-Mediterranean Agreement (2002), Art. 35(2).

⁵⁰ E.g., EU-Moldova Partnership and Cooperation Agreement (1994), Art. 91.

EU-ACP Partnership Agreement (2000), applicable to 78 ACP countries, is an example of a treaty with detailed stipulations on this matter – it lists relevant cooperation activities in Articles 75 ('Investment promotion'), 76 ('Investment finance and support') and 77 ('Investment guarantees'). In particular, this agreement envisages:

- specific assistance to encourage the EU private sector to invest in ACP countries;
- facilitation of partnerships and joint ventures;
- measures to attract financing for infrastructure investments;
- institutional capacity building, including for investment promotion agencies;
- dissemination of information on investment opportunities;
- establishment and support of the ACP-EU private sector business forum;
- provision of long-term financial resources, including risk capital, grants for technical assistance and policy reforms, for advisory and consulting services and for measures to increase the competitiveness of enterprises;
- guarantees in support of private investment;
- loans or lines of credit on the conditions attached to the Agreement; and
- insurance schemes against political risks.

Some of such activities are implemented through special programmes such as the Facility for Euro-Mediterranean Investment and Partnership (FEMIP). Implemented by the European Investment Bank, this programme is aimed at stimulating private sector development in the Mediterranean region and facilitating a higher level of economic growth, by granting loans and technical assistance for investment projects in the region.⁵¹

The above remarks on the content of MS BITs and EU IIAs are not comprehensive but sufficient to create a general impression. The two types of agreements are not fully comparable given their differences in scope – EU IIAs do not include some key investment protections such as the fair and equitable treatment standard and do not provide for investor-state arbitration. However, on the whole, compared to the majority of MS BITs, EU IIAs appear to be more balanced and display more features that can be characterised as conducive to sustainable development in light of the criteria discussed in section 2.2.

2.4 Way forward and challenges

As mentioned in section 2.1 above, the European Commission has already received the first mandates to negotiate comprehensive investment treaty provisions with several third countries. It appears, however, (at least to an outside observer) that the mandates were issued by the EU Council without arriving at a consensus with the other two EU bodies – the Parliament and the Commission – on how future EU agreements should look. Prior to the mandates, each

⁵¹ See EIB, 'Facility for Euro-Mediterranean Investment and Partnership (FEMIP)', available at <<http://www.eib.europa.eu/projects/regions/med/index.htm>>.

of the three institutions, who all have an important role to play in the treaty making process, issued a statement with their respective visions of the policy development, which revealed several important areas of disagreement. First, the EU Commission set out the basic parameters of the EU investment policy which proposes to retain the core of existing approaches but indicates that investment agreements should be consistent with other policies '*including policies on the protection of the environment, decent work, health and safety at work, consumer protection, cultural diversity, development policy and competition policy*'.⁵² It also made some suggestions for reform of investor-state arbitration: in particular, it acknowledged the problem of atomization of disputes and treaty interpretations, supported measures that would make arbitration proceedings more transparent and suggested to consider the use of quasi-permanent arbitrators and the creation of an appellate mechanism.⁵³ The EU Council's position, which followed several months later, can be summarized as expressing satisfaction with traditional MS BITs and suggesting that the same treaties should be signed by the EU.⁵⁴ The EU Parliament was the last of the three bodies to speak, and its resolution was the most critical of existing MS BITs. It made some specific suggestions, for example it proposed to exclude speculative forms of investment from protection, to exclude sensitive sectors such as culture and education, to find a fairer balance between private and public interests in formulating treaty obligations, to clarify standards of investment protection, and to include social and environmental standards.⁵⁵ Reportedly, a series of 'trilogues' took place between the representatives of the three EU institutions in late 2011 and 2012 but it is unclear whether a consensus was reached.⁵⁶

In summary, while the Lisbon Treaty enables and mandates the EU to speak with a single voice on international investment issues there appears to be lack of agreement about the fundamental features of investment chapters and the detailed formulations of provisions. A sudden side-step in this search for consensus was made by the EU (represented by EU Trade Commissioner Karel De Gucht) by adopting a joint statement with the United States (Deputy Assistant to the President of the United States Michael Froman) on the 'Shared Principles for International Investment' in the context of the EU-US Transatlantic Economic Council (April 2012).⁵⁷ This document, slightly longer than one page, sets out a number of '*essential elements of open investment policies*

⁵² European Commission, *supra* note 19, p. 9.

⁵³ *Ibid.*, p. 10.

⁵⁴ EU Council, *Conclusions on a comprehensive European international investment policy*, 3041st Foreign Affairs Council meeting, 25 October 2010.

⁵⁵ European Parliament, *Resolution on the future European international investment policy*, (2010/2203(INI)), 6 April 2011, paras. 11-35.

⁵⁶ F. Hoffmeister and G. Ünüvar, 'From BITS and Pieces to European Investment Agreements', in M. Bungenberg, A. Reinisch, C. Tietje (eds.), *EU and Investment Agreements, Open questions and Remaining Challenges* (Nomos 2013).

⁵⁷ Statement of the European Union and the United States on Shared Principles for International Investment, April 2012, available at <http://trade.ec.europa.eu/doclib/docs/2012/april/tradoc_149331.pdf>. European Commission, 'EU and US adopt blueprint for open and stable investment climates', Press Release, 10 April 2012, available at <<http://europa.eu/rapid/>

worldwide' including broad market access for foreign investors, non-discrimination, a high level of legal certainty and protection against unfair or harmful treatment, and effective and transparent dispute settlement procedures. It is noteworthy that the joint statement also made references to the need to preserve government authority to regulate in the public interest, promote responsible business conduct and avoid attracting foreign investment by weakening or failing to apply regulatory measures. The Joint Statement can be seen as a signal that the EU recognises the need to reconcile strong investment protections with policies of the sustainable-development part of the spectrum.

Indeed, there is a strong case for the EU, with its mature and well-considered development policy, to give serious weight to sustainable-development considerations in the context of IIAs. The EU has identified sustainable development as its overarching long-term goal in which '*economic growth, social cohesion and environmental protection go hand in hand and are mutually supporting*'.⁵⁸ The EU has pledged to '*promote this approach globally*'.⁵⁹ The 2005 'European Consensus on Development', a joint declaration by the Council, the Commission and the Parliament enshrining their common vision in development cooperation, states that all three institutions see '*development is a central goal by itself; [...] sustainable development includes good governance, human rights and political, economic, social and environmental aspects*' (para. 7). One of the general principles of the EU's external action is '*to foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty*' (Article 21.2(d) of the Treaty on European Union). Since its collective economic and political power will give it greater negotiating leverage with third countries, to maintain its reputation as a global economic and political leader and a benign international actor, this power needs to be balanced by even more responsibility towards its negotiating partners.

CONCLUSIONS

The transfer of FDI competence to the EU level has many positive implications. As shown, the EU offers a more efficient way to conclude investment treaties, with lower transaction costs, greater country coverage and increased bargaining power. With time, the new treaties will eradicate unequal treatment of investors from various EU countries abroad as well as provide third-party investors with equal treatment everywhere in the EU. The transparency of treaty making will be enhanced, thanks also to the involvement of the EU Parliament. The global network of IIAs will move towards consolidation and a higher degree of consistency. If the EU uses its power wisely, it can help creating better, more

pressReleasesAction.do?reference=IP/12/356&format=HTML&aged=0&language=EN&guiLanguage=en>.

⁵⁸ European Commission, *Mainstreaming Sustainable Development into EU policies: 2009 Review of the European Union Strategy for Sustainable Development*, 24 July 2009, COM(2009) 400 final, p. 2.

⁵⁹ *Ibid.*, pp. 2-3.

balanced investment treaties that advance on difficult substantive and procedural issues and avoid one-sidedness by giving due consideration to factors beyond investment protection.

Yet, the EU has been entrusted with an immense task. It has to untangle the investment policies of its member states, solving some of the thorny issues along the way (e.g., involving investor-state dispute settlement, the definition of investment and fair and equitable treatment). Both a blessing and a burden, the EU has a great deal of experience to draw upon – from its member states and third countries, arbitration cases and, not least, the latest international efforts to guide the reform of investment treaty practice. Despite the complexity of the task, the deliberations on EU level are advancing quickly and create high expectations. There are positive signs that the EU is willing to weigh investor protection against public interests. However, how far these balancing efforts will go, what treaty elements they will affect and what methods they will employ remains unclear. Whether the EU can set a new gold standard in global investment treaty making will largely depend on its ability to ensure that its new investment agreements enhance, and do not inhibit, sustainable development in member states and third countries alike.

ANNEX 1

EU INVESTMENT TREATIES (AGREEMENTS WITH PROVISIONS ON INVESTMENT)

No.	Short title	Full title	Year of signature	Substantive or framework
1	EU-ACP	Partnership Agreement between the Members of the African, Caribbean and Pacific Group of States of the One Part, and the European Community and Its Member States, of the Other Part (Cotonou Agreement)	2000	Substantive
2	EU-Albania	Stabilisation and Association Agreement between the European Communities and Their Member States, of the One Part, and the Republic of Albania, of the Other Part	2006	Framework
3	EU-Algeria	Euro-Mediterranean Agreement Establishing an Association between the European Communities and Their Member States, of the One Part, and Algeria, of the Other Part	2002	Substantive
4	EU-Andean Community	Political Dialogue and Cooperation Agreement between the European Community and Its Member States, of the One Part, and the Andean Community and Its Member Countries, Bolivia, Colombia, Ecuador, Peru and Venezuela, of the Other Part	2003	Framework
5	EU-Armenia	Partnership and Cooperation Agreement between the European Communities and Their Member States, of the One Part, and the Republic of Armenia, of the Other Part	1996	Substantive
6	EU-ASEAN	Cooperation Agreement between the European Community and Its Member States and the Member Countries of ASEAN	1980	Framework
7	EU-Azerbaijan	Partnership and Cooperation Agreement between the European Community and Their Members States, of the One Part, and the Republic of Azerbaijan, of the Other Part	1996	Substantive
8	EU-Bangladesh	Cooperation Agreement between the European Community and the People's Republic of Bangladesh on Partnership and Development	2000	Framework
9	EU-Belarus	Partnership and Cooperation Agreement Establishing a Partnership between the European Communities and Their Member States, of the One Part, and Belarus, of the Other Part	1995	Text not available

No.	Short title	Full title	Year of signature	Substantive or framework
10	EU-Bosnia and Herzegovina	Stabilisation and Association Agreement between the European Communities and Their Member States, of the One Part, and Bosnia and Herzegovina, of the Other Part	2008	Substantive
11	EU-Brazil	Framework Agreement for Cooperation between the European Economic Community and the Federative Republic of Brazil	1992	Framework
12	EU-Cambodia	Cooperation Agreement between the European Community and the Kingdom of Cambodia	1997	Framework
13	EU-CARIFORUM	Economic Partnership Agreement between the CARIFORUM States, of the One Part, and the European Community and Its Member States, of the Other Part	2008	Substantive
14	EU-Central America	Agreement Establishing an Association Between Central America, on the One Hand, and the European Union and Its Member States, on the Other	2012	Substantive
15	EU-Chile	Agreement Establishing an Association between the European Community and Its Member States, of the One Part, and the Republic of Chile, of the Other Part	2002	Substantive
16	EU-China	Agreement on Trade and Economic Cooperation between the European Economic Community and the People's Republic of China	1985	Framework
17	EU-Colombia-Peru	Trade Agreement between the European Union and Its Member States, of the One Part, and Colombia and Peru, of the Other Part	2012	Substantive
18	EU-Cote d'Ivoire	Stepping Stone Economic Partnership Agreement between Côte d'Ivoire, of the One Part, and the European Community and Its Member States, of the Other Part	2008	Framework
19	EU-Croatia	Stabilisation and Association Agreement between the European Communities and Their Member States, of the One Part, and the Republic of Croatia, of the Other Part	2001	Substantive
20	EU-EFTA	Agreement on the European Economic Area	1992	Substantive
21	EU-Egypt	Euro-Mediterranean Agreement Establishing an Association between the European Communities and Their Member States, of the One Part, and the Arab Republic of Egypt, of the Other Part	2001	Substantive*

No.	Short title	Full title	Year of signature	Substantive or framework
22	EU-ESA	Interim Agreement Establishing a Framework for an Economic Partnership Agreement between the Eastern and Southern Africa States, on the One Part, and the European Community and Its Member States, on the Other Part	2009	Framework
23	EU-Georgia	Partnership and Cooperation Agreement Establishing a Partnership between the European Communities and Their Member States, of the One Part, and Georgia, of the Other Part	1996	Substantive
24	EU-Gulf Cooperation Council	Cooperation Agreement between the European Economic Community, of the One Part, and the Countries Parties to the Charter of the Cooperation Council for the Arab States of the Gulf (the State of the United Arab Emirates, the State of Bahrain, the Kingdom of Saudi Arabia, the Sultanate of Oman, the State of Qatar and the State of Kuwait), of the Other Part	1988	Framework
25	EU-India	Cooperation Agreement between the European Community and the Republic of India on Partnership and Development	1993	Framework
26	EU-Israel	Euro-Mediterranean Agreement Establishing an Association between the European Communities and Their Member States, of the One Part, and the State of Israel, of the Other Part	1995	Substantive*
27	EU-Jordan	Euro-Mediterranean Agreement Establishing a Partnership between the European Communities and Their Member States, of the One Part, and The Hashemite Kingdom of Jordan, of the Other Part	1997	Substantive
28	EU-Kazakhstan	Partnership and Cooperation Agreement between the European Communities and Their Member States and the Republic of Kazakhstan, of the Other Part	1995	Substantive
29	EU-Kyrgyz	Partnership and Cooperation Agreement Establishing a Partnership between the European Communities and Their Member States, of the One Part, and the Kyrgyz Republic, of the Other Part	1995	Substantive
30	EU-Lao	Cooperation Agreement between the European Community and the Lao People's Democratic Republic	1997	Framework

No.	Short title	Full title	Year of signature	Substantive or framework
31	EU-Lebanon	Euro-Mediterranean Interim Association Agreement between the European Community and Its Members, of the One Part, and the Republic of Lebanon, of the Other Part	2002	Substantive*
32	EU-Macao	Agreement for Trade and Cooperation between the European Economic Community and Macao	1992	Framework
33	EU-Macedonia	Stabilisation and Association Agreement between the European Community, of the One Part, and the Former Yugoslav Republic of Macedonia, of the Other Part	2001	Substantive
34	EU-MERCOSUR	Inter-regional Framework Cooperation Agreement between the European Community and Its Member States, of the One Part, and the Southern Common Market (MERCOSUR) and Its Member States, of the Other Part	1995	Framework
35	EU-Mexico	Economic Partnership, Political Coordination and Cooperation Agreement between the European Community and Its Member States, of the One Part, and the United Mexican States, of the Other Part	1997	Framework
36	EU-Moldova	Cooperation Agreement Establishing a Partnership between the European Communities and Their Member States, of the One Part, and the Republic of Moldova, of the Other Part	1994	Substantive
37	EU-Mongolia	Agreement on Trade and Economic Cooperation between the European Economic Community and Mongolia	1992	Framework
38	EU-Montenegro	Stabilisation and Association Agreement between the European Communities and Their Member States, of the One Part, and the Republic of Montenegro, of the Other Part	2007	Substantive
39	EU-Morocco	Euro-Mediterranean Agreement Establishing an Association between the European Communities and Their Member States, of the One Part, and the Kingdom of Morocco, of the Other Part	1996	Substantive*
40	EU-Nepal	Partnership and Cooperation Agreement Establishing a Partnership between the European Communities and Their Member States, of the One Part, and Nepal, of the Other Part	1995	Framework

No.	Short title	Full title	Year of signature	Substantive or framework
41	EU-OCT	Association of the Overseas Countries and Territories with the European Community	2001	Substantive
42	EU-Pakistan	Cooperation Agreement between the European Community and the Islamic Republic of Pakistan on Partnership and Development	2001	Framework
43	EU-Palestine	Euro-Mediterranean Interim Association Agreement on Trade and Cooperation between the European Community, of the One Part, and the Palestine Liberation Organization (PLO) for the Benefit of the Palestinian Authority of the West Bank and the Gaza Strip, of the Other Part	1997	Substantive*
44	EU-Paraguay	Framework Agreement for cooperation between the European Economic Community and the Republic of Paraguay	1992	Framework
45	EU-Republic of Korea	Free Trade Agreement between the European Union and Its Member States, of the One Part, and the Republic of Korea, of the Other Part	2010	Substantive
46	EU-Russian Federation	Agreement on Partnership and Cooperation Establishing a Partnership between the European Communities and Their Member States, of One Part, and the Russian Federation, of the Other Part	1994	Substantive
47	EU-SADC	Interim Agreement with a view to an Economic Partnership Agreement between the European Community and Its Member States, of the One Part, and the SADC EPA States, of the Other Part	2009	Framework
48	EU-Serbia	Stabilisation and Association Agreement between the European Communities and Their Member States, of the One Part, and the Republic of Serbia, of the Other Part	2001	Substantive
49	EU-South Africa	Agreement on Trade, Development and Cooperation between the European Community and Its Member States, of the One Part, and the Republic of South Africa, of the Other Part	1999	Framework
50	EU-Sri Lanka	Cooperation Agreement between the European Community and the Democratic Socialist Republic of Sri Lanka on Partnership and Development	1994	Framework

No.	Short title	Full title	Year of signature	Substantive or framework
51	EU-Tajikistan	Partnership and Cooperation Agreement Establishing a Partnership between the European Communities and Their Member States, of the One Part, and the Republic of Tajikistan, of the Other Part	2004	Substantive
52	EU-Tunisia	Euro-Mediterranean Agreement Establishing an Association between the European Communities and Their Member States, of the One Part, and the Republic of Tunisia, of the Other Part	1995	Substantive*
53	EU-Turkey	Agreement Establishing an Association Between the European Economic Community and Turkey	1963	Framework
54	EU-Turkmenistan	Partnership and Cooperation Agreement between the European Community and Its Member States, of the One Part, and Turkmenistan, of the Other Part	1998	Text not available
55	EU-Ukraine	Partnership and Cooperation Agreement Establishing a Partnership between the European Communities and Their Member States, of the One Part, and Ukraine, of the Other Part	1994	Substantive
56	EU-Uruguay	Framework Agreement for Cooperation between the European Economic Community and the Eastern Republic of Uruguay	1991	Framework
57	EU-Uzbekistan	Partnership and Cooperation Agreement Establishing a Partnership between the European Communities and Their Member States, of the One Part, and the Republic of Uzbekistan, of the Other Part	1996	Substantive
58	EU-Vietnam	Cooperation Agreement between the European Community and the Socialist Republic of Vietnam	1995	Framework
59	EU-Yemen	Cooperation Agreement between the European Community and the Republic of Yemen	1997	Framework

* Agreement with limited provisions on establishment (e.g., only re-affirming the parties GATS commitments) but with other substantive obligations such as free transfer of capital.

Source: Based on own data and UNCTAD data (as of 1 July 2012)

ANNEX 2

INVESTMENT-RELATED OBLIGATIONS AND OTHER RELEVANT FEATURES IN SUBSTANTIVE EU INVESTMENT TREATIES

Type of provision	Frequency
National Treatment (NT): pre- or post-establishment	Pre-establishment only: 1 Post-establishment only: 2 Pre- and post-establishment: 11 Mixed/asymmetrical: 11* None: 6
NT: scope	Only services covered: 2 Not limited to services: 23 N/A: 6
NT: industries covered	Negative list: 19 Positive list: 6 N/A: 6
Most-favoured-nation treatment (MFN): pre- or post-establishment	Pre- and post-establishment: 21 None: 9 Unclear: 1
MFN: scope	Only services covered: 1 Not limited to services: 20 N/A: 9 Unclear: 1
MFN: industries covered	Negative list: 20 Positive list: 0 Mixed/asymmetrical: 2* N/A: 9
Free transfers	Yes: 30 No: 1
Other substantive obligations on investment: employment of key personnel by subsidiaries and branches	Yes: 21 No: 10
Preamble: reference to sustainable development or similar objectives	Yes: 28 No: 3
General public policy exceptions	Yes: 24 No: 7
National security exceptions	Yes: 29 No: 2
Environmental protection provision(s)	Yes: 31 No: 0
Parties' obligation to ensure investor compliance with ILO labour conventions/ core labour standards	Yes: 5 No: 26
Not-lowering-standards clause (environment and/or labour)	Yes: 4 No: 27
Investment promotion	Yes: 28 No: 3

Technical cooperation/ capacity building	Yes: 29 No: 2
State-State Dispute Settlement	Yes: 29 No: 2

* Refers to a situation where the contracting parties undertake differing levels of obligations. For example, the EU/MS party may agree to grant only post-establishment NT/MFN, while the other party agrees to grant both pre- and post-establishment NT/MFN.

Source: Based on own data