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PART IV

Legal aspects of PTAs: A comparative analysis

PROOF

PROOF

Regulatory regionalism in the WTO: Are ‘deep integration’ processes compatible with the multilateral trading system?

JAMES H. MATHIS

I Introduction

This chapter assesses the proposition that regulatory provisions in preferential trade agreements (PTAs) are implemented on a most-favoured nation basis and therefore complementary to the multilateral trading system in the WTO. The subject is raised because of the documented prominence that regulatory cooperation has attained in later-generation trade agreements, together with an apparent relative decline of the importance of preferential tariff cuts as a primary motivating force for concluding trade agreements. This was documented by the WTO 2011 Annual Report on preferential trade agreements¹ in its survey of over 97 agreements concluded between 1958 and 2010, and reinforced (or perhaps foretold) by Richard Baldwin’s analysis of tariffs and regulations in so-called ‘deep integration’ agreements.² As the reasoning goes, regulatory activities – whether they be WTO ‘plus’ or WTO ‘extra’³ – do not lend themselves to implementation approaches on a preferential basis. To give just one example, if a country establishes a new competition law, its enforcement will neither favour nor punish foreign firms on the basis of their country of origin. There is nothing inherently externally preferential in the design of a competition law, and it does not become preferential because its origins can be traced to a provision in a preferential trade agreement.⁴

1 WTO Secretariat, Economic Research and Statistics Division, ‘The WTO and Preferential Trade Agreements: From Co-existence to Coherence’ (2011) hereinafter, the ‘2011 WTO Report’, available at www.wto.org/english/res_e/reser_e/wtr_e.htm.

2 Richard Baldwin, ‘21st Century Regionalism: Filling the Gap between 21st Century Trade and 20th Century Trade Rules’ (2011) WTO Staff Working Paper, ERSD-2011-08, available at www.wto.org/english/res_e/reser_e/wpaps_e.htm.

3 ‘WTO Plus’ refers to treated policy areas that are already subject to some form of commitment in the WTO Agreements. ‘WTO Extra’ refers to policy areas that are outside the current mandate of the WTO. See, 2011 WTO Report, 128, and citing H. Horn, P. Mavroidis, A. Sapir, ‘Beyond the WTO? An Anatomy of EU and US Preferential Trade Agreements’ (2010) 33 *The World Economy*, 1565–88. This chapter is limited to a discussion of WTO ‘plus’ regulatory policy subjects.

4 2011 WTO Report, 168–9.

This is the MFN thesis for regulatory regionalism. There is a variation on the theme for services market access commitments in the vein of GATS Article XVI. These restrictions are also notably eliminated by altering domestic regulatory policies. Here, the WTO Report finds that notified GATS V economic integration agreements contain significant levels of market access commitments in excess of those made by the same WTO Members in their GATS schedules.⁵ This suggests a possible resulting preferential treatment on behalf of signatory service providers, similar to preferential tariff treatment for trade in goods. However, the WTO Report (and Baldwin) also make the point that it is difficult to establish the country origin of a service in the first instance, and attempts to clarify or enforce origin, by reference to country of incorporation for example, tend to be sufficiently porous to allow foreign third-country affiliates and subsidiaries to derive the benefits from doing business in a trade agreement partner's territory.⁶

These examples make a good intuitive case for the proposition that the new regulatory regionalism is more complementary to the multilateral trade system than the old tariff barrier regionalism. If new policies introduced in any given PTA tend to benefit all, then everyone with a stake in the multilateral trading system should be satisfied.⁷ While acknowledging this general proposition, this chapter examines the possibilities that might arise for preferential application of regional regulatory policies to determine if any of these activities might have a residual preferential character. If so, it will consider whether they would be subject to an applicable WTO MFN provision and then possibly qualify for an exception under either GATT Article XXIV or GATS Article V.⁸

Several factors motivate this inquiry. First, as the WTO Report notes, there is not much known about the de facto implementation of trade agreement regulatory policies, the manner by which country implementations actually occur. An example provided by the report is the granting of licenses. The process may be non-discriminatory on its face, but whether it is tilted in favour of certain applicants bidding for a limited number of licenses is not so discernible.⁹ Unfortunately, any validation of a de facto pattern of discriminatory implementation is also not so discernible, buried as it would be within the practices of different agencies and not likely to be a matter of common documentation. Thus, the literature on country implementation of trade agreement regulatory policies is scarce and an inquiry along those lines, at this time, does not appear to be fruitful.¹⁰

5 *Ibid.*, 134. 6 *Ibid.*, 168, Baldwin, *supra* note 2, 27.

7 Except as Baldwin also notes, the WTO itself risks losing its pre-eminence as the 'rule maker' in the international trading system. Baldwin, *supra* note 2, 31.

8 This chapter does not consider preferential trade agreements notified under the 1979 Enabling Clause.

9 2011 WTO Report, 168. The Report notes that the opposite can also be the case, that a provision which is preferential on its face might not be preferential in implementation.

10 As has been noted for implementation of TBT provisions in bilateral free-trade agreements. C. Lesser, 'Do Bilateral and Regional Approaches for Reducing Technical Barriers to Trade Converge Towards the Multilateral Trading System?' (2007) OECD Trade Policy Working Paper No. 58, 26. For a case study

A second factor flows from the continuing drive by countries for more PTAs and raises the question: if it is a given that tariff preferences are no longer the motivation for forming them, and if we accept the thesis that the regulatory benefits from one trade agreement automatically accrue to all other WTO Members, then what is the continuing motivation for any country to seek a regulatory-enhanced PTA with any other country that is already in a pre-existing deep integration agreement? In other words, why would a country seek a new bargain to achieve what it already has received for free?

There may be good reasons for the continuing PTA drive that do not undermine the regulatory MFN proposition, including motivations that are more about politics than about trade,¹¹ or the fact that the policies from agreement to agreement are simply not the same. An example can be cited in the intellectual property (IP) WTO 'extra' area where the choice of subjects (and referenced international IP treaties) in a US trade agreement will vary from those covered in an EU trade agreement. Another example can be found in service-provider licensing provisions, in which different countries seek admission for different types of services that are also regulated by different agencies of a country government. This array of different policies across an array of trade agreements might raise its own headaches for the multilateral system, a sort of 'regulatory spaghetti bowl' if you like,¹² but again, it should not raise any MFN issue. A multiplicity of regulatory policies across a range of PTAs should, if the MFN thesis holds, be automatically transmitted to all other Members of the WTO. This would not necessarily occur by the operation of a governing WTO MFN provision, but by the non-discriminatory nature of the regulatory policy itself as implemented. The result should arguably be more a beneficial multilateral 'accumulation' of global regulatory enhancements than a system-damaging 'fragmentation'.

Thus, regulatory policy subject areas may not be the issue. A counter proposition posed here is that any discrimination determined is more the result of the *processes* that are taken up in current PTAs in their approaches to regulatory cooperation and mutual recognition, transparency and participation, and consultation and dispute settlement. Here, the discussion turns more to institutional questions than to the examination of substantive policies. What is suggested is that many of the regulatory processes – *inter alia*, the various committees and working groups, inclusion of economic operators, structured contact points and scheduled meetings – do not lend themselves very well to a multilateral application, nor are they designed for

dealing with transparency implementation in OECD countries, E. Moïse, 'Transparency Mechanisms and Non-tariff Measures' (2011) OECD Trade Policy Papers No. 111, discussed in, L. Biuković, 'Transparency Norms, the World Trade System and Free Trade Agreements: The Case of CETA' (2011) 39 *Legal Issues of Economic Integration* 1, 93–107, 96, which also reviews EU and Canada transparency provisions in their respective regional trade agreements.

11 See for example, J. Ravenhill 'The "New East Asian Regionalism": A Political Domino Effect', (2010) 17 *Review of International Political Economy* 2, 178–208.

12 Cf. J. Bhagwati. See also, WTO News, 'Lamy warns rise of regional trade agreements could lead to "policy fragmentation"' 20 September 2012, available at www.wto.org/english/news_e/sppl_e/sppl246_e.htm.

that. They are oriented instead to establishing closer bilateral relationships between the signatories in order to (hopefully) create effective processes that can reach existing and potential regulatory barriers. Whether any final results (the elimination of an internal barrier to trade) are also preferentially applied is a matter of case-to-case analysis and not examined here, but the processes by which regulatory cooperation is arranged are not necessarily 'open' for the participation of third countries, unless and until they negotiate their own separate regulatory-oriented trade agreement with those signatories. On that occasion, the pre-existing relationship is not necessarily enlarged to accommodate a new partner in a new plurilateral regulatory process, but is rather a new and additional bilateral relationship with all its processes commenced.

The chapter proceeds to distil these processes, from generally applied provisions for transparency, cooperation and dispute settlement, to selected subject areas, with an emphasis on WTO 'plus' subjects that have connections to underlying WTO agreements and their non-discrimination rules. These MFN provisions and possible regional exceptions will be considered as relevant. The trade agreement provisions examined are drawn from the four most recently ratified EU and US free-trade area agreements including their respective agreements with Korea,¹³ the US agreement with Panama,¹⁴ and the EU agreement with the CARIFORUM states.¹⁵ The choice of EU and US agreements may be considered arbitrary, but it is based on the idea that they are both economically developed territories with advanced regulatory systems. Thus, their trade agreements could reasonably be expected to have an emphasis on regulatory issues, and they should offer some examples of advanced regulatory activities that appear in newer generation agreements.

II. General provisions affecting regulatory treatment

A. Transparency chapters and provisions

Both the US agreements and the EU–Korea agreement have separate chapters on transparency.¹⁶ They cover the same subjects of publication, provision of

13 Respectively, Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, (EU–Korea agreement) OJ L 127/6, 14 May 2011; and, Free Trade Agreement Between The United States Of America And The Republic Of Korea (KORUS agreement), ratified in 2011. USTR available at www.ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text.

14 United States–Panama Trade Promotion Agreement, (US–Panama agreement), ratified 2011. USTR available at www.ustr.gov/trade-agreements/free-trade-agreements/panama-tpa/final-text.

15 Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part, (EU–Cariforum agreement), OJ L289/13, 30 October 2008.

16 KORUS agreement, Chapter Twenty One; US–Panama agreement, Chapter Eighteen; EU–Korea agreement, Chapter Twelve. This agreement defines 'interested persons' as natural or legal persons subject to rights and obligations under measures of general application, within the meaning of 'economic operators, especially small ones doing business in their territory'. EU–Korea agreement, Arts. 12.1,12.2.

information, administrative proceedings, review and appeal. The US agreements treat anti-corruption. With some minor differences, all three of them establish regulatory transparency for the primary benefit of 'interested persons'.¹⁷ They require publication of existing laws of general application, and that the parties (to the extent possible or by 'endeavouring') inform interested persons of proposals for such general laws so that they may become acquainted with them and be given time to provide the opportunity to comment.¹⁸ The US agreements require parties to provide information and to respond to questions by the requesting party, while the EU agreement provides that opportunity to interested persons.¹⁹ An emphasis on persons is continued in similar fashion for the three agreements' articles on administrative and review proceedings. Wherever possible, persons directly affected by a proceeding are to receive reasonable notice and have a reasonable opportunity to present their arguments. The parties are obligated to insure proceedings for review and the parties in these proceedings shall be given the opportunity to support or defend their positions.²⁰

The EU–Korea chapter concludes with a non-discrimination clause granting national treatment, but also no less favourable treatment for transparency standards accorded to interested persons of any third country or to a third country, 'whichever are the best'.²¹

The EU–Cariforum agreement has a single Article 235 which obliges the parties to ensure that laws of general application will be promptly published and brought to the attention of the other party. There is no reference to persons. There are no provisions governing administrative procedures, hearings and reviews, at the level of general provisions.

The focus on interested persons in the agreements with transparency chapters raises the question of whether treatment guaranteed for them need necessarily be extended to the interested persons of third countries, those that have not bargained for any reciprocal transparency treatment in their respective trade agreements. Subjects such as publication and administrative proceedings would seem most easily established and maintained on an MFN basis, since bifurcating these aspects among the interested persons of different parties would seem difficult, if not impossible, to organize and effectively operate. However, the focus on the treatment of interested

17 The US–Panama agreement has a provision for contact points and the KORUS agreement is shaded with additional detail for its treatment of central level regulations.

18 The KORUS agreement goes on to specify for central level regulations, required official journal publication with an explanation of their purpose and a 40-day period for comments. KORUS agreement, Art. 21.1.3. See also, transparency letters exchanged confirming Korea's commitment to a change of law to provide for the 40-day period.

19 The EU–Korea agreement does this by establishing 'appropriate mechanisms' for responding to enquiries from any interested person for laws proposed or in force. EU–Korea agreement, Art. 12.4.

20 KORUS agreement, Arts. 21.3, 21.4; US–Panama agreement, Arts. 18.4, 18.5; EU–Korea agreement, Arts. 12.5, 12.6.

21 EU–Korea agreement, Art. 12.8.

persons in rights to comment and receive responses, or the availability of structured inquiry points for them, might generate a differentiation among interested persons on the basis of country origin.²²

This differentiation may or may not in fact occur, but consider how a party with two agreements manages where the transparency provisions vary between them. The KORUS agreement has a provision of information requirements for the benefit of the other signatory party while the EU–Korea agreement extends this to interested persons, the economic operators doing business in ‘their’ territories. While it seem more expedient to simply extend the additional treatment to all economic operators of any party doing business in the territory, the question still lingers: why extend that treatment to another party that has not bargained for it and is not required to grant it on a reciprocal basis? That the EU–Korea agreement also has an MFN provision for transparency treatment granted to interested persons of third parties does not close the point, but does suggest that preferential treatment in transparency procedures is possible.

GATT Article X provides the context for trade in goods. This requires transparency for prompt publication of trade regulations so that governments and traders can become acquainted with them. Review tribunals are also required for customs matters to be independent of agencies of enforcement. Reference is made to appeals lodged by importers, and private parties are therefore clearly contemplated. Each contracting party is to maintain its laws in a uniform, impartial and reasonable manner, inferring non-discriminatory treatment for trade transparency regulations. The GATT Article is narrower than the broader regulatory scope of the trade agreements discussed and it lacks material dealing with proposals for laws and for interested persons to engage that process. GATS Article III requires publication and notification to the Council for any measure of general application pertaining to or affecting the operation of the GATS agreement, and requires the establishment for inquiry points for Members (not interested persons) operated upon request. This broader transparency article still does not deal with proposals for laws and guarantees for private participation. General GATT and GATS Articles may however have some reach to equalize any differentiation generated by a trade agreement. Matters covered by GATT Article III.4 include any measure affecting the internal sale of an imported product and are subject to GATT Article I MFN. GATS Article II MFN refers to ‘any measure covered by this Agreement’, and as defined in GATS Article I, the agreement applies to measures ‘affecting’ trade in services. What one can conclude from this is that while there is a potential for preferential treatment in some transparency procedures, there is also possible scope for general GATT and GATS MFN Articles to reach that differential treatment. What remains unanswered is whether the

22 Moïsé states that for OECD countries, RTA provisions do not provide foreign stakeholders any additional opportunities of participation beyond what is already offered in those domestic frameworks. *Supra* note 10, 11.

practical difficulties of implementing differential transparency treatment outweigh the preferential opportunity to do so.

B. Dispute settlement chapters

While not entirely uniform, all four agreements conform to the well-known pattern of state-to-state dispute resolution, from consultations to panel establishment, implementation of reports and compliance reviews. Without detailing dispute settlement procedures, the scope of application of the chapters refers to matters covered by the agreements as between the parties to the agreements. Dispute settlement provisions in a regional trade agreement are an institutional remedy to which only the parties to the agreement can avail themselves. This means that for whatever other MFN characteristics that might attach to the regulatory policies engaged in the agreements for the benefit of third states, *de facto* or *de jure*, they do not extend to creating any rights of recourse for violations of those provisions in a state-to-state regional dispute settlement forum. Thus, for example, while economic operators of a third state could well be the beneficiaries of an enhanced administrative due process procedure as a result of another territory's trade agreement, those economic operators cannot rely on their home state to compel that treatment to be extended by the host state according to the terms of any trade agreement. The power to engage consultation and charge a violation before an arbitral panel – and to claim compliance review and compensation – is wholly preferential to the parties of that trade agreement.²³ If there is a parallel WTO obligation that may also be violated, then depending upon the choice of forum clause used in the trade agreement, the WTO forum may be exclusive²⁴ or be cumulative.²⁵ If cumulative, the trade agreement party has a choice of forums that a non-signatory does not have. The cause of action may also be distinct to the trade agreement. A WTO complaint may necessarily have to be formed on the basis of discrimination. If the underlying trade agreement obligation does not have a parallel WTO obligation, the non-party may have to form its WTO claim on the basis of discriminatory effects of that policy measure. The trade agreement complainant may, however, be able to fashion its claim on the basis of non-performance of the trade agreement provision itself.

The EU–Korea agreement has an additional device besides the traditional consultation/arbitration panel dispute settlement procedure. This is the 'Mediation Mechanism for Non-Tariff Measures' that is to address measures believed to be

23 This is where the recourse allowed by the trade agreement is strictly state to state. It does not consider whether a party may grant direct effect to individuals of the agreement's provisions in the national courts, or any action brought in a national court under the domestic law.

24 I.e., that a party must choose one forum to the exclusion of the other or that the WTO forum is designated as the only available forum.

25 I.e., that a party may choose one of the forums without excluding the other for a later action, or employ both forums in parallel.

adversely affecting trade in goods other than customs duties.²⁶ This is a softer legal procedure than panel arbitration that allows for the appointment of an expert mediator to give an advisory opinion and proposed solution, and to facilitate a mutually agreed solution between the parties. The procedure itself is not compulsory, but the requested party shall 'favourably consider the request' to which a response is required.²⁷ The availability of this instrument is limited to the parties to the trade agreement and is wholly preferential.

III Trade in goods, WTO 'plus' subjects

The most prevalent WTO 'plus' subjects are ranked by frequency in the 2011 WTO Report and include (in this order) industrial tariffs, agricultural tariffs, customs, anti-dumping, countervailing measures, export taxes, TBT, GATS, TRIPS, state aid, public procurement and SPS. Selecting for the more regulatory-oriented subjects, the list of customs, TBT, GATS, TRIPS, state aids, public procurement and SPS emerges. The order considered here will be customs, TBT and SPS, TRIPS, public procurement, state aids and then GATS. This bundles some related subject areas together for trade in goods and separates trade in services (GATS) for separate treatment.

A. Customs cooperation

The general approach to this subject is to emphasize transparency, efficiency and simplicity in the procedures, with attention to promoting electronic clearance technology. The EU agreements make repetitive reference to international protocols and accords as the context for bilateral cooperation between customs authorities.²⁸ While many of the expressions are set with some obligatory tone, their content can tend to be less so, as in, 'the parties shall cooperate'. Most activities are of a sort that one would assume would be implemented for all importers irrespective of origin; electronic clearance, for example. Each EU agreement establishes a bilateral committee charged with guiding the chapter's implementation and resolving differences and issues as they emerge. This is understood to be a more bilateral process as a part of facilitating the objectives of the free-trade agreements. Some other elements of enhanced cooperation might also be engaged on a bilateral basis, such as the exchange of customs officers, the harmonization of documents, and perhaps early notification of changes to rules, obligations for forming advanced rulings and the maintenance of contact points.

26 Mediation Mechanism for Non-Tariff Measures, EU-Korea agreement, Annex 14-A, L 127/1336-37.

27 *Ibid.*, Annex 14-A, Art. 3.2.

28 Generally, EU-Korea agreement, Chapter Six, Arts. 6.1-6.16; EU-Cariforum agreement, Chapter 4, Arts. 29-36.

The US agreements²⁹ provide for the same topics dealing with the release of goods, automation, advance rulings, etc., with the addition of provisions for information to assist investigations into possibly unlawful activities and provisions made for express shipments. The US agreements do not establish committees. Other than bilaterally agreed-upon definitions applied to facilitate the passage of information for unlawful activities, there otherwise appears to be little else projected in the manner of bilateral regulatory processes. This conclusion assumes that provisions to facilitate express shipments would also be generally applied and implemented for all foreign express shipment providers.

Summarizing, the customs cooperation subject area is quite benign in its preferential processes. Most of the processes that would be engaged in exclusively by the signatories are also softer law in content and therefore might have less legal traction in allowing for the effect of distinct preferential treatment. The subject area is also well captured by GATT Article I since the general MFN obligation extends to 'all rules and formalities in connection with importation and exportation'. This would include those matters treated in GATT Article X's provisions for *Publication and Administration of Trade Regulations* to the extent that they are able to be characterized as GATT Article I's 'rules and formalities'.

B. TBT and SPS measures

There is a pattern common to all the agreements surveyed in which the parties' rights and obligations under the WTO TBT and SPS Agreements are affirmed, and then supplemented with bilateral regulatory cooperation activities of varying levels of intensity.

1. TBT type provisions

The two US agreements are very similar. Both include a commitment to a process of joint cooperation, provisions for conformity assessment procedures and their potential recognition, transparency notifications, information exchanges, and the establishment of joint committees to facilitate the above.³⁰ The two US agreements have several points of administrative interaction where the process of cooperation is strengthened somewhat from what the WTO TBT Agreement contains. This includes a right to request and receive a response for an explanation when one party does not accept the results of a conformity assessment procedure in the other's territory,³¹ and

29 Generally, KORUS agreement, Chapter Seven; US–Panama agreement, Chapter Five.

30 Generally, KORUS agreement, Chapter Nine, US–Panama agreement, Chapter Seven. The agreements are nearly identical and the example provisions in the text here are drawn from the KORUS Agreement. One difference noted is in the US–Panama agreement where there is an obligation to explain why one party has not accepted a technical regulation of the other as equivalent. US–Panama agreement, Art. 7.6. The sectoral provisions for automobiles in the EU–Korea and KORUS agreements are not covered here.

31 KORUS agreement, Art. 9.5.2. The US agreements do not contain provisions for mutual recognition of technical regulations.

a number of activities detailed for transparency including a right to allow persons of the other party to participate in the development of standards, technical regulations and conformity assessment procedures, coupled with a national treatment obligation for persons of the other party, and a separate bilateral notification to the other party when either notifies in accordance with WTO TBT Agreement notification requirements.³² This separate notification is to provide an explanation of the objectives meant to be served by the proposal and a transmission of the proposal electronically to the established inquiry point of the other party.³³ The transparency provisions are concluded by a request and response paragraph whereby

each Party shall provide the other Party with additional available information regarding the objective of, and rationale for, a standard, technical regulation, or conformity assessment procedure that the Party has adopted or is proposing to adopt. Such requests may include requests for information regarding the matter the technical regulation or conformity assessment procedure is designed to address, alternative approaches the Party considered, and the merits of the particular approach the Party chose.³⁴

It may well be that these activities can be similarly accomplished in the WTO TBT Committee, but here the process of information and exchange is promoted on a bilateral basis with supervision by the regional agreement's designated committee. The emphasis in the notification process is upon early notice with an accorded right to participate to 'persons', and the right to receive the other party's statements on two elements critical to the application of the TBT Agreement provisions to a given technical regulation. The first is information regarding the objective sought to be accomplished, an element that is necessary to consider in applying both TBT Articles 2.1 and 2.2.³⁵ The second is an accounting of what alternatives were considered and the party's explanation of the merits of the approach adopted. This goes to the core of TBT Article 2.2 in determining whether lesser restrictive alternatives might have been considered, and if so, why they were not adopted.

After the usual affirmation of the WTO TBT Agreement, the two EU agreements go on to set forth some enhancements for regulatory cooperation, transparency and conformity assessment.³⁶ The agreements are, however, somewhat 'lighter' than the US examples discussed above, being less detailed and specific on cooperation and transparency activities, and notably less so in the EU-Cariforum agreement. Both establish 'coordinators' or 'contact points' rather than structured committees. Two points of clear detail are noted for the EU-Korea agreement. One is a stated timeline of 60 days for receiving the other party's comments for TBT Agreement notifications.³⁷

32 *Ibid.*, Art. 9.6. 33 *Ibid.*, Arts. 9.6.3, 9.6.4. 34 *Ibid.*, Art. 9.7.

35 For national treatment and for prescribing that regulations shall not be unnecessary obstacles to trade, respectively.

36 EU-Korea agreement, Chapter Four; EU-Cariforum agreement, Chapter Six.

37 EU-Korea agreement, Art. 4.4.1(f).

The other is for information on technical regulations to be transmitted to the other party's 'economic operators' including 'written guidance on compliance with their technical regulations' upon request.³⁸ Neither of these activities is necessarily bilateral, although the second provision could be. As in the US agreements, there are no statements promoting or establishing processes for equivalency recognition of technical regulations and no on-going process is established for identifying possible priorities for equivalency.

2. SPS type provisions

The SPS chapters in the EU agreements are not similar to one another.³⁹ The EU–Korea agreement establishes an on-going committee and pays some detailed attention to determining pest- or disease-free areas by a two year 'confidence-building activity', to be eventually confirmed by the WTO SPS Committee.⁴⁰ In addition, the parties specify the possibility of consultations if a party rejects the determination of the other. Both agree to be open for inspection, testing and other procedures.⁴¹ The EU–Cariforum agreement is more oriented to cooperation for technical assistance for SPS-type measures within the region and to promoting harmonization of standards with the possibility of bilateral equivalency agreements. No committee is created.

The SPS chapters of US agreements are fairly brief, primarily functioning to establish a bilateral committee for consultation and coordination for understanding one another's SPS measures and their implementation.⁴² Both agreements exempt their SPS chapters from regional dispute settlement procedures, although the only actionable matters in the chapter relate to the responsibilities to establish the committee and hold its meetings. A single exception to the lightly cooperative approach of the US agreements is the side agreement between Panama and the US providing for Panama's recognition of US sanitary, phytosanitary and related regulatory systems as equivalent to Panama's for meat, poultry, dairy and processed products.⁴³

3. SPS and TBT implications

The most detailed bilateral approach of the four agreements surveyed here is the KORUS TBT annex, with its bilateral notification requirements, the designated right for persons to participate in the rule-making process, and the right of request and response regarding objectives and alternatives considered. This is not to say that these aspects might not also be implemented on a multilateral basis in practice, but there is nothing inherently multilateral about them and they can be applied on a bilateral basis. Multilateral application or not, they do raise the application of the TBT

38 *Ibid.*, Art. 4.4.1(d). 39 EU–Korea agreement, Chapter Five; EU–Cariforum agreement, Chapter Seven.

40 EU–Korea agreement, Art. 5.8.3. 41 *Ibid.*, 5.8.4–5.

42 KORUS agreement, Chapter Eight, US–Panama agreement, Chapter Six.

43 Agreement Regarding Certain Sanitary and Phytosanitary Measures and Technical Standards Affecting Trade in Agriculture Products, dated 20 December, 2006, paras 2, 4.

Agreement's Article 2 provisions for the 'preparation, adoption and application of technical regulations'. It is not clear whether the broader scope of Article 2's title is captured in the actual scope of the MFN obligation of TBT Article 2.1, for which treatment no less favourable is required in respect of technical regulations for 'products imported from the territory of any Member'. Rather than referring to any measure 'affecting' the internal sale of a product, this TBT Article appears limited to existing and applied technical regulations rather than to their process of adoption. The subjects discussed above are more about the processes of considering and adopting technical regulations. GATT Article III.4 (as subject to GATT Article I MFN) arguably does have that broader scope of application for laws, regulations and requirements affecting internal sale, and if preferential notification provisions in a trade agreement were to be equated with 'regulations' or 'requirements' then perhaps a discriminatory measure could be identified, thus calling forth the possible defensive application of either GATT Article XX or GATT Article XXIV.

Both TBT and SPS regional measures present a somewhat protracted analysis for the application of most-favoured nation and subsequently the possible application of the Article XXIV regional exception. This has been visited periodically by a number of authors and is not going to be re-visited here, other than to note the trend in case law and opinion that GATT exceptions (Articles XX and XXIV) do not appear to be applicable to justify violations of obligations contained in other WTO Annex 1A agreements.⁴⁴ In addition, for a discriminatory technical regulation process violation of GATT Article I (as it applies to matters covered by GATT Article III.4) to be justified by invoking GATT Article XXIV would require that the measure was 'necessary' as an elimination of a restrictive regulation of commerce (ORRC) in the sense of Article XXIV paragraph 8. The opinion here is that it would be neither an ORRC nor necessary to eliminate in order to complete the regional formation.⁴⁵

The agreements are otherwise about enhancing cooperation with the use of non-obligatory instruments. As such, while the cooperation is decidedly bilateral in nature (joint committees), there is a real question whether any of the provisions have a

44 Recent examples include J. Trachtman, 'The Limits of PTAs: WTO Legal Restrictions on the Use of WTO-Plus Standards Regulation in PTAs', in K. Bagwell and P. Mavroidis (eds.), *Preferential Trade Agreements: A Law and Economic Analysis*, (Cambridge: Columbia Studies in WTO Law and Policy, 2011), 115–49; J. Mathis, 'Multilateral Aspects of Advanced Regulatory Cooperation: Considerations for a Canada-EU Comprehensive Trade Agreement (CETA)' (2012) 39 *Legal Issues of Economic Integration* 1, 73–91; B. Rigod, 'TBT-Plus Rules in Preferential Trade Agreements', (2013) 40 *Legal Issues of Economic Integration* 3, 247–70, 269–70, noting also that Trachtman (*ibid.*) argues that the Art. XXIV should apply to the TBT and SPS agreements by the principle of effective interpretation. Rigod, *ibid.*, at note 110. Trachtman however also concludes that TBT and SPS harmonization or recognition would not pass the GATT Art. XXIV necessity requirement. Trachtman, *ibid.*, 134.

45 On the necessity of TBT liberalising measures (for EU mutual recognition), L. Bartels, 'The Legality of the EC Mutual Recognition Clause Under WTO Law' (2006), 8 *Journal of International Economic Law* 3, 691–720, 713; and generally, J. Mathis, 'Regional Trade Agreements and Domestic Regulation: What Reach for "Other Restrictive Regulations of Commerce"?' in L. Bartels and F. Ortino, (eds.), *Regional Trade Agreements and the WTO Legal System* (Oxford: Oxford University Press, 2006) 79–108.

sufficient legal character in either obligatory requirements or specific content to summon any meaningful degree of preferential behaviour in the sense of the term 'discriminatory'. While the activities may be bilateral and therefore preferential, the legal obligatory quality of the cooperation would understandably be a consideration in determining whether the process is sufficiently discriminatory to constitute being a 'measure' in the sense of a WTO provision requiring non-discriminatory treatment. At the same time, this lighter preferential cooperative behaviour is intended to generate some ultimate effects on the trade relationship of the signatories to the agreements, in that the processes are set in place to facilitate the objectives of the agreement, and the primary objective is market access. In that sense, the activities, non-legal or 'softer law' as they may be, are potentially able to generate a market effect (better market access) and possibly a corresponding legal effect (discrimination). Aside from that possible and perhaps tenuous connector, it is otherwise difficult to assign a role for a WTO MFN provision in the absence of a measure upon which MFN would be able to attach. The establishment of a committee is not likely to be a measure (committees in trade agreements are ubiquitous) and it would seem that only the activities of the committee could be so designated to the extent they had legal effect. While the concept of a 'measure' is broad enough to include 'practices', it is questionable whether an 'obligation' to 'encourage understanding' of the parties' respective regulations, or to 'facilitate coordination' rises to that level.

C. Intellectual property (IP) rights

The discussion here is related to TRIPS 'plus' aspects, those IP subjects that are also treated in the WTO TRIPS agreement. This subject area demonstrates well the proposition that regulatory provisions tend to be applied on a multilateral basis. This is strongly characterized in IP laws where differential treatment of IP rights on the basis of origin is not practiced by national jurisdictions, as well the TRIPS Agreement's MFN provision regarding the protection of intellectual property. Its scope is broad 'with regard to the protection of intellectual property', extending to all Members any advantage granted by a Member to the nationals of any other country.⁴⁶

The trade agreements affirm existing TRIPS rights and obligations and go on to complement and specify the regimes, for definitional substance as well as enforcement procedures. There is little bilateral institutional structure for regulatory cooperation established in any of the agreements. The entire field of cooperation is wholly absent from the US agreements, while the EU agreements provide for exchange of information, experiences of enforcement and capacity building.⁴⁷ The

46 WTO TRIPS agreement, Art. 4, and subject to its listed exemptions. On TRIPS MFN application, see R. Valdés and R. Tavengwa, 'Intellectual Property Provisions in Regional Trade Agreements', (2012) WTO Staff Working Paper, ESRD-2012-21, 40, para 152.

47 EU-Korea agreement, Art. 10.69, for example. The agreement does establish a working group for geographical indications. *Ibid.*, Art. 10.25.

EU–Cariforum agreement places emphasis on regional capacity building and also has as an objective the harmonization of IP protection ‘across their respective regions’ which is taken to be a reference to the separate regions of each party.⁴⁸

The EU–Korea agreement’s section on geographical indications (GIs) should be noted as a possible deviation from the multilateral character of IP protection. This establishes a reciprocal recognition of the other party’s GI list (as annexed) together with an undertaking to enforce the list.⁴⁹ This is based upon an acknowledgment that the elements of registration, verification, control and objection are met in the domestic system of each party.⁵⁰ While each of these territories employs a *sui generis* system for listing and protecting GIs that is open to non-territory applicants, the action here bypasses the process of individual producer applications by recognizing those already made and approved in the other territory.⁵¹ A territory’s GI enforcement policy is clearly subject to the TRIPS MFN obligation,⁵² and the question arises whether MFN extends this recognition system either to third countries that request a reciprocal treatment on the same terms, or even to those that might request a unilateral recognition of their listed GIs. The recognition activity in this agreement can be compared to an equivalency recognition for technical regulations to the extent that the underlying quality of a national system is assessed and approved. This suggests a conditional form of MFN (as some argue the TBT Agreement might permit), but the TRIPS Agreement has no comparable article encouraging bilateral or preferential agreements for the extension of the substance or the enforcement of rights.⁵³ The Appellate Body ruled in *EC – Geographic Indications* that the conditioning of GI listing on reciprocal treatment was a violation of GATT Article III.4.⁵⁴ The issue there was one of national treatment because an EU member state did not have to meet the same conditions for protection under the EU Regulation. While the EU now registers individual non-EU products by application to the Commission without reciprocity, the issue presented here is whether a territory’s listing of products would be recognized either reciprocally or unilaterally.

48 EU–Cariforum agreement, Art. 141. 49 EU–Korea agreement, Art. 10.18(1–5).

50 *Ibid.*, Art. 10.18(6)(a–f).

51 An individual producer application would need a local language translation and likely use of a local agent for facilitating the process. This is yet perceived as less burdensome than systems which rely on unfair competition or consumer protection laws. O’Connor and Company Report for the European Commission, ‘Geographical Indications and TRIPs: 10 Years Later . . . A roadmap for EU GI holders to get protection in other WTO Members’, (2007), 13, available at, http://trade.ec.europa.eu/doclib/docs/2007/june/tradoc_135088.pdf.

52 The TRIPS MFN provision is not limited to IP protection as provided only in the TRIPS Agreement, nor is it even limited to the referenced subject areas covered by the TRIPS Agreement. See, footnote 3 to TRIPS Articles 3 and 4.

53 TRIPS Art. 4(d) MFN exempts only prior notified international agreements. TRIPS Art. 24 refers to negotiations to conclude bilateral or multilateral agreements, within the context of TRIPS Art. 23, for wines and spirits.

54 *EC–Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs*, WT/DS290/R, 15–03–2005, para 2.272.

In contrast, the KORUS agreement only provides that each party shall recognize that GIs are eligible as trademarks.⁵⁵ Further, if a party does have a system for recognition of GIs by trademark or otherwise (as Korea maintains), then as regards to the US, the KORUS agreement specifies an objection procedure and the grounds for refusing or cancelling registration if the GI is likely to cause confusion with a trademark that is in earlier pending application, or for a trademark that is 'well known' in the party's territory.⁵⁶ The EU agreement does not specify conditions for objection, but possibly renders the two separate regimes coherent where it provides that the GI protection accorded is without prejudice to the continued use of a trademark which has been applied for, registered or established, with certain conditions.⁵⁷

This might be a benign example of multiple regulatory regimes being extended to all in the trading system by the operation of WTO MFN clauses or the inherent multilateral character of the regulatory activity. If so, it is not difficult to see the potential for conflict when one regime focuses on the protection of a subject area and the other focuses on the exceptions to that protection. If they do go into conflict, then the system of MFN extension would serve to spread that conflict rather than resolving it, since all Members would have access to both conflicting regimes. It is understood that one agreement cannot be a modification of the other in respect of a party who is not a signatory to the second agreement. Perhaps those facts are not present here, but a regulatory conflict could be conceptualized that could not be resolved other than by triggering a violation of the first agreement, and arguably the MFN rights to those regulatory provisions held by all other WTO Members by operation of the multilateral extension.

It becomes apparent from this example that EU and Korea are not likely to envisage this GI regime as being applied in a multilateral manner. They appear to be of sufficiently like minds on the extension of the existing TRIPS provisions to provide for a more institutionalized bilateral system of GI protection and have made that exchange. The US is on record in the WTO negotiations as not supporting extension of the existing TRIPS GI protection for wines and spirits,⁵⁸ and perhaps carries the opinion that its trade agreement has either mollified (or modified) the characteristics of the Korea regime so that US trademarks and their (potential) registration remain safe. The US and Korea may view this as a multilateral provision where those exceptions as defined in the KORUS agreement would be applied by both to all WTO Members. On Korea's behalf, this assumedly is accomplished without raising any conflict in the agreed-upon GI regime with the EU.

A note on processes is raised also for GIs in the EU-Korea agreement's provisions for the establishment of a working group to 'intensify the cooperation' and manage

55 KORUS agreement, Art. 18.2.2. 56 *Ibid.*, Art. 18.2.15(a). 57 EU-Korea agreement, Art. 10.21.5.

58 See, WTO, Geographical Indications, 'Background of the current situation', updated November, 2008, available at, www.wto.org/english/tratop_e/trips_e/gi_background_e.htm#protection.

the regime by consensus decisions.⁵⁹ The group has the authority to add GIs to the regime and to remove those that are no longer recognized in the country of origin. This is another distinctly bilateral activity. Even if there was an extension of recognition of a GI regime to a non-signatory, this would not likely be accompanied with participation in this working group.

A final note is made about a regional exception that could rescue an MFN violation made within a trade agreement. The WTO TRIPS agreement does not have regional exception and the ability to link preferential IP protection to the terms of GATT Article XXIV would seem to require locating a separate violation GATT Article I (as applying to matters within GATT Article III.4) or GATT Article III.4 by itself.⁶⁰ The regional exception of Article XXIV could be invoked by the respondent on the violation, but to be 'necessary' for the violation to fall within the Article XXIV exception, it would have to be demonstrated that the IP protection eliminated a 'restrictive regulation of commerce', a term that seems more fit for eliminating barriers to trade than for positive recognition and enforcement regimes.

D. Public procurement

Public procurement is a chapter subject in each of the four trade agreements. There is an initial distinction to be made in the preferential character of the agreements between those made by signatories to the WTO Agreement on Government Procurement ('a GPA party')⁶¹ and those made with non-members to that WTO agreement.⁶² The agreements with non-GPA parties install the same or similar commitments of the GPA agreement between them and thus establish a bilateral public procurement agreement.⁶³ All the processes that are referenced in the bilateral agreement remain wholly preferential on the side of the non-GPA party in favour of the other signatory to the extent that those activities fall under the GATT procurement exemption from the general GATT national treatment obligation⁶⁴ or the GATS Articles exempting procurement for trade in services.⁶⁵ Procurement undertakings incurred by the GPA member with a non-GPA member also remain preferential in respect to other WTO Members for the general GATT and GATS

59 EU–Korea agreement, Art. 10.25.

60 See discussion, *supra* note 44. Here the question is Art. XXIV's application *outside* of WTO Annex 1A. If GATT Art. XXIV applies to TRIPS violations, then arguably GATT Art. XX should also apply to excuse TRIPS violations. It seems increasingly clear that GATT exceptions do not apply to other Annex IA agreements unless referenced, and the argument to make the application outside of Annex IA would not seem to be an easier bridge to cross.

61 EU–Korea agreement, Chapter Nine; KORUS agreement, Chapter Seventeen.

62 EU–Cariforum agreement, Chapter Three; US–Panama agreement, Chapter Nine.

63 For an overview of procurement provisions in RTAs, J. Bourgeois, K. Dawar, S. Evenett, 'A Comparative Analysis of Selected Provisions in Free Trade Agreements', (2007), *DG Trade*, 99–116, available at http://eulib.com/documents/tradoc_138103.pdf.

64 GATT Art. III.8(a).

65 GATS Art. XII, exempting government procurement from GATS Articles II, XVI and XVII.

Articles (as above) and also in respect of WTO GPA parties. This last point may seem incongruous, but the non-discrimination provision in the WTO procurement agreement only extends advantages to GPA parties that are accorded to other GPA parties.⁶⁶

The WTO procurement agreement's non-discrimination obligations do reach to agreements made by WTO GPA members. However, there is also a limitation on the scope of the non-discrimination article, which refers to 'laws, regulations, procedures and practices regarding government procurement covered by this Agreement'.⁶⁷ Any additional procurement coverage in a bilateral trade agreement would therefore have to be assessed for whether or not it is 'covered' by the WTO procurement agreement.⁶⁸ Preferential results are therefore possible depending upon the determined scope of the WTO procurement agreement.

Institutionally, the agreements provide for working groups and/or contact points for the purpose of engaging in cooperation and information. These are relatively light provisions that do not set clear legal targets or provide for identifiable recourse.

E. State aids (and state owned enterprises/monopolies)

The US agreements do not treat state aids. There are references in the KORUS agreement to state monopolies and enterprises obliging the parties to render their conduct consistent with the obligations of the agreement and to act solely in accordance with commercial considerations.⁶⁹ These provisions should be seen as being applied in a non-preferential manner and they somewhat mimic the GATT agreement's commercial requirements for state-trading enterprises. The EU–Cariforum agreement also calls for the elimination of trade distortions by public and special or exclusive rights enterprises and for them to be subject to competition rules.⁷⁰ This would also seem to be a generally applicable provision that would not be preferentially implemented. An additional rule on state monopolies calls for them

66 WTO Agreement on Government Procurement, Art. III.1(b) refers to suppliers of any other 'Party'. The agreement's preamble refers to '*Parties to this Agreement (hereinafter referred to as "Parties")*'. Therefore an advantage given to another territory not a 'Party' to the procurement agreement need not be extended to other 'Parties' of the procurement agreement. This possibility of offering treatment 'better than' that accorded to WTO procurement parties may not be a likely occurrence in any trade agreement between a WTO procurement party and a non-party.

67 WTO procurement agreement, Art. III.1. Compare with the TRIPS agreement provisions which refer to treatment or advantages 'with regard to the protection of intellectual property'. TRIPS agreement, Arts. 3.1 and 4.

68 A possible example is drawn from the EU–Korea agreement for EU public works concessions and Korea 'build-operate transfer' (BOT) contracts. According to one source, this is an area 'not covered in the GPA'; European Commission, 'The EU–Korea Free Trade Agreement in Practice' (2011) 14 located at, http://trade.ec.europa.eu/doclib/docs/2011/october/tradoc_148303.pdf. See, EU–Korea agreement, Annex 9, L127/1317.

69 KORUS agreement, Arts. 16.2, 16.3. 70 EU–Cariforum agreement, Art. 129.2.

to operate in a commercial manner and without discrimination for the sale of goods and services as between the two territories.⁷¹ As limited only to the trade of the parties, depending upon the nature of the discrimination eliminated, this requirement could conceivably be implemented in a preferential manner. Any recourse available to enforce a violation would be wholly preferential between the parties to the agreement.

State aids are only treated in the EU–Korea agreement and by primary reference to the WTO subsidies agreement. Supplementing that agreement is an elaboration of what is deemed to be specific and prohibited as according to Article 2 of the WTO agreement in regards to subsidies covering debts of certain enterprises and those for insolvent enterprises without credible restructuring plans.⁷² Bilateral transparency reporting requirements are also applied for the specific subsidies affecting trade.⁷³ These requirements are not inherently multilateral. The definitions for specificity need not be applied to trade relations with third parties. While they are deemed to be specific for meeting the conditions of the WTO subsidies agreement, Article 11.11 states that they ‘shall be prohibited for the purposes of this Agreement in so far as they adversely affect international trade of the Parties’. While the transparency requirements are very similar to the WTO subsidies agreement,⁷⁴ what is determined to be specific and therefore required to be notified to the WTO is subject to that agreement, not the EU–Korea agreement. The WTO subsidies agreement lacks a non-discrimination clause that would catch differential bilateral treatment.

F. Trade in goods conclusion

One can see the mixed bag that emerges on regulatory processes that splits between those that are clearly multilateral because of their character or applicable WTO rules, like customs cooperation, and those that target treatment on a bilateral basis and do not appear to be required to be extended by WTO rules, such as the state aid definitions for specificity or processes that apply only to the trade between the parties. The mixed bag has another splitting of elements between policies that are ‘legal’ enough to call forth obligations, such as some of the TBT provisions guaranteeing interested persons participation or requiring party responses to requests for information, and those that clearly remain softly cooperative and seem to be more about relationships than about law. The latter are being established on a bilateral basis but they do not appear preferential in the sense of triggering WTO rules. This is to say that a lighter form of cooperation may not qualify as a measure. If WTO rules cannot be invoked, then it is hard to conclude that any legal compatibility issues arise for the

71 *Ibid.*, Art. 129.3. 72 EU–Korea agreement, Art. 11.11(a) and (b). 73 *Ibid.*, Art. 11.12.

74 WTO Agreement on Subsidies and Countervailing Measures, Art. 25.

multilateral trading system. Between these two elements of preferentialism and legality, we can configure the possible combinations as follows:

- preferential and legal;
- preferential and non-legal;
- non-preferential and legal;
- non-preferential and non-legal.

If the WTO compatibility issue is only raised by the first category of preferential and legal measures, one can conclude that there are occasional points of process operating even within otherwise multilaterally applied regulatory policies that raise the possibility of preferential incompatibility with WTO rules and the multilateral trading system. Examples provided in the section above included preferential transparency notifications and dispute settlement provisions. An example that is preferential but perhaps straddles the line on legality is the non-tariff measure instrument found in the EU–Korea agreement. This is a softer law instrument (mediation) but with potential for having legal effects in the resolution of non-tariff barriers between Parties. Such a resolution may be multilaterally applied or may be specific to the product issue of the other party and preferential. This is not to suggest that the instrument is necessarily ‘reachable’ on an MFN claim in the WTO, but that its legal results may be.

It is also clear that the analysis repeatedly turns on the scope of the relevant WTO MFN provisions and the scope of GATT Article XXIV. For the latter, guidance is derived from WTO case law. Those arguing a broad scope for the Article XXIV exception must emphasize the liberalizing character of the trade agreement provisions in question, as in Article XXIV.4’s statement that the purpose of a free-trade area or customs union is to liberalize trade between the constituent parties and not to raise barriers to the trade of non-members. Thus, anything in a trade agreement that assists liberalization while not harming non-members should fall within the exception granted by Article XXIV. A simple difficulty with this approach is that paragraph 4, ‘contains purposive, and not operative, language’.⁷⁵ The legal requirements for an Article XXIV ‘defence’, which establish the scope of the Article XXIV exception, are actually located in paragraphs 5 and 8 of the Article.⁷⁶ This view of the regional exception may appear restrictive to some given the arguably liberalizing elements of new approaches possible for treating administrative participation, transparency, technical regulations and IP enforcement systems, and for the various arbitral possibilities to resolve non-tariff barriers. However, it also describes the WTO law

75 The Appellate Body, in reversing the panel’s application of an ‘effective interpretation’ which gave a legal effect to paragraph 4. *Turkey – Restrictions on Imports of Textile and Clothing Products*, WT/DS34/AB/R, para 57.

76 *Turkey Textiles*, *ibid.*, at para 58: ‘that the measure at issue is introduced upon the formation of a customs union that fully meets the requirements of sub-paragraph 8(a) and 5(a) of Article XXIV’.

‘as it is’ and respects a principle that exceptions be narrowly rather than broadly interpreted.

One can finally identify an issue regarding the scope of Article XXIV as to institutional processes more generally. We tend to view the regional exception as dealing with substantive policies, first identifying a measure that is a GATT Article violation and then examining the possibility that the violating measure is eliminating either a tariff duty or an ‘other restrictive regulation of commerce’ (ORRC). We thus consider that what is ‘necessary’ for elimination between the regional parties is granted an exception by Article XXIV. What is suggested here is that if the policy is redeemed by the scope of elimination of duties or ORRC as applied, then the complementary processes to achieve that elimination would also fall within the exception. Thus, for example, a regional dispute settlement process to insure the elimination of duty according to the agreement’s schedule would understandably also fall within the Article XXIV exception. For an example contrary, if an enhanced regional participation policy for addressing non-tariff barrier product standards was found to violate GATT Article I (as applied to matters covered by Article III.4) and not validated as falling within the scope of ORRC, then it would seem to follow accordingly that the processes facilitating that enhanced participation would also not find validation under Article XXIV.

IV. Trade in services

All the agreements have fairly extensive chapters dealing with international trade services. In order to isolate the processes involved, they are treated here by considering, in turn, generally applicable provisions treating origin, transparency, regulatory cooperation, and then the distinctive processes relating to sectoral treatment. The point has been made by others that policies addressing liberalization in an economic integration agreement (EIA), centred as they are on domestic regulatory changes, tend to be less preferential in final effects than the comparable treatment of preferential border taxation which governs liberalization for trade in goods agreements.⁷⁷ Further, even if these domestic regulation regimes might provide for superior preferential treatment, the rules of origin provisions of GATS Article V.6 require services agreements (for a developed-country partner) to provide its benefits to juridical persons constituted under the laws of a regional party with ‘substantial business operations’ within the territory. This is understood to limit the preferential effect that could otherwise be generated by imposing national control and ownership rules as a condition of origin.⁷⁸

77 P. Sauvé and A. Shingle, ‘Reflections on the Preferential Liberalization of Services Trade’ (2011) 45 *Journal of World Trade* 5, 953–63, 958–9. Although, agreements on trade in goods also treat regulatory issues.

78 Sauvé and Shingle, *ibid.*, 959–60. The lack of restrictive origin rules may offset the preferential nature of a first mover advantage for network and infrastructure service sectors. See also, P. Latrille and J. Lee, ‘Services Rules in Regional Trade Agreements – How Diverse and How Creative as Compared to the GATS Multilateral Rules’ (2012) WTO Staff Working Paper, ERSD-2012–19, 15–17.

This suggests that while there is much attention in economic integration agreements to domestic regulations and their processes, the ability to render them preferential is arguably more limited and a more multilateral liberalization occurs as a matter of course. Thus, the approach here is to survey the selected agreements for their origin rules and their accompanying 'denial of benefits' provisions to confirm that compliance with GATT Article V.6 is or is not the on-going practice. Two caveats are noted. First, an open origin rule for enterprises does not pre-judge whatever preferential possibilities of regulatory benefits might occur when accorded to 'parties' to the agreements rather than to their operators. In those cases, how a party chooses to extend those benefits or represent enterprises of its choice would be more a matter of domestic law and practice than a matter governed by the origin definitions of the trade agreement.⁷⁹ Second, an open origin rule does not say anything about whether there may be territorial characteristics that would limit the ability for non-party enterprises to establish substantial business operations in a party territory. If a party maintains restrictions on foreign ownership of domestic enterprise sectors, foreign operators are not going to be established as substantial business operations in the territory no matter what the origin rule says in the trade agreement.

A. *Service provider origin*

The US agreements follow the GATS V.6 origin rule with some variations, allowing denial of benefits for service supplies of the other party, whether controlled or owned by a non-party, when the denying party does not maintain diplomatic relations with the non-party⁸⁰ or 'normal economic relations' with the non-party,⁸¹ or the denying party maintains a prohibition on transactions that would be circumvented by granting the benefits of the services chapter. These conditions have more the sense of security or economic sanction exceptions. The rest of the denial of benefits provisions are made subject to the substantial business operations rule and are not more restrictive than GATS V.6.⁸² The EU agreements also have a general definition for 'juridical person' that denies that status for a registered company not engaging in substantial business operations in the territory.⁸³ Except as perhaps otherwise modified in more specialized sections of the agreements, the preferential character of the

79 This also depends on whether the agreement is given direct effect in domestic law.

80 US–Panama agreement, Art. 11.11. 81 KORUS agreement, Art. 12.11.

82 The KORUS agreement has some difficult phrasing on this requirement where the placement of the word 'or' could also suggest that non-ownership or control is alone sufficient to deny the benefit. 'A Party may deny the benefits of this Chapter to a service supplier of the other Party if the service supplier is an enterprise owned or controlled by persons of a non-Party *or* of the denying Party that has no substantial business activities in the territory of the other Party.' Latrille and Lee do not however note this agreement as one deviating from the GATS V.6 rule. *Supra* note 78, 16–17.

83 EU–Cariforum agreement, Art. 61(e); EU–Korea agreement, Art. 7.2(f)(i), with a notation permitting an 'effective and continuous link' as equivalent to substantial business operations.

provisions in the services chapters have an inherently 'porous' character, allowing benefits to be extended to non-party operators with substantial business operations in one of the parties.

B. Transparency and regulatory cooperation for services

The EU agreements follow the form of providing a 'regulatory framework' section (or chapter),⁸⁴ containing 'provisions of general application', which include mutual recognition and transparency, with the EU–Cariforum agreement containing an article for procedures, and in the EU–Korea agreement, articles for domestic regulation and governance. Regulatory aspects are then put in detail for particular service sectors.⁸⁵ The US agreements place these regulatory topics in their respective chapters for cross-border services and both of them include transparency, domestic regulation and mutual recognition. Separate annexes then treat the sectors.⁸⁶

1. Transparency

EU agreements provide for response to requests by parties, but the EU–Korea agreement goes on to refer to the rights of applicants to be informed of the status of an application and the reasons for denial. A time provision is also inserted requiring an authority to rule on a pending application within 120 days or provide notification to the applicant.⁸⁷ US agreements establish mechanisms for responding to inquiries from interested persons. The agreements then vary; the KORUS agreement requires a party to address in writing the reasons for not allowing advance notice and opportunity for comments on proposed regulations, while the Panama agreement indicates that at the time of final adoption, a party shall (to the extent possible) also address in writing the substantive comments received from interested persons. The variations in these provisions, as subtle as they may be, raise again the question of whether this kind of treatment can be bifurcated in respect of the different parties' rights with a common signatory, and if not, then how is the baseline (assumedly the more liberal) treatment to be accorded to all?

2. Domestic regulation

The subject of domestic regulation is covered in three of the agreements. The US agreements are nearly identical; both compel applications to be decided within a reasonable time, and recite a portion of GATS Article VI.4, ensuring that

84 EU–Korea agreement, Section E, Arts. 7.21–7.24; EU–Cariforum agreement, Chapter 5, Arts. 85–7.

85 These include for both of the EU agreements, computer, postal and courier, telecommunications, financial, maritime transport and E-commerce. The EU–Cariforum agreement has an additional section for tourism services, not covered here.

86 US–Panama agreement, Chapter Seven, Arts. 11.7–11.9; KORUS agreement, Chapter Twelve, Arts. 12.7–12.9. The US agreements' annexes treat financial services, telecommunications and electronic commerce.

87 EU–Korea agreement, Art. 7.22 (4–6).

qualification requirements, *et. al.*, shall not constitute unnecessary barriers to trade. Any results from WTO negotiations related to Article VI of the GATS shall be incorporated into the trade agreement.⁸⁸ The EU–Korea agreement tracks these provisions nearly verbatim, with some additional recitation from GATS Article VI.⁸⁹ Because these agreements add nothing to the material that is already provided in GATS Article VI, they have no preferential character, other than that they adopt the proposed disciplines of Article VI.4(a–c) as operative between the parties.⁹⁰

3. Recognition

The two EU agreements and the KORUS agreement follow a very similar approach to recognition of certificates and qualifications for professional services. They encourage the professional associations to develop recommendations on mutual recognition, and for the trade committee of the agreement to review and approve those recommendations if consistent with the agreement. The parties (or the appropriate bodies) then go on to negotiate a mutual recognition agreement.⁹¹ The EU agreements both indicate that any recognition negotiated will be in conformity with GATS Article VII, which requires notification and the possibility for other WTO Members to join the negotiation and potentially join the agreement.

One can imagine that this area could be quite fruitful for preferential treatment if an institutional process was set in motion with the authority to obtain results. However, the processes involved here are highly voluntary, and while perhaps results will be derived over time from these encouraged relationships, they certainly have little if any preferential traction based on the provisions alone. If agreements are realized and not relegated to the GATS Article VII process (the EU agreements appear to pledge notification according to GATS Article VII), then there would be a different preferential discussion to be had over whether GATS Article V can accommodate recognition within its requirements and thereby excuse the regional parties from violating the GATS Article VII participation rights of other WTO

88 US–Panama agreement, Chapter Seven, Art. 11.8; KORUS agreement, Chapter Twelve, Art. 12.7.

89 EU–Korea agreement, Section E, Art. 7.23.

90 Whereas GATS Art. VI refers to future disciplines with those elements. It has been noted that the US agreements extend the disciplines to services other than those subject to commitments. Latrille and Lee, *supra* note 78, 27–8. The absence of ambitious domestic regulatory treatment in the US and EU agreements with Korea has been discussed elsewhere. E. Laurenzo and J. Mathis, ‘Regulatory Cooperation for Trade in Services in the EU and US Trade Agreements with the Republic of Korea: How Deep and How Compatible?’ (2013) 14 *Melbourne Journal of International Law*, 1, 171–204.

91 The US–Panama agreement does not have professional service recognition provisions. Slight differences among the EU agreements include the identification of priority sectors in the EU–Cariforum agreement (architecture, engineering and tourism), and establishment of a working group for recognition in the EU–Korea agreement. Generally, EU–Cariforum agreement Art. 87; EU–Korea agreement, Art. 7.21. The KORUS agreement provisions for professional service recognition are found in ANNEX 12 – A to the cross-border services chapter.

Members. At least for these agreements and the results obtained thus far, that discussion is premature and may remain so for quite some time.⁹²

C. Sector treatment

The regulatory material in the sectoral annexes or sections is too plentiful to detail for the purposes of this chapter. What can be expediently done is to apply the rule of origin analysis discussed above to determine whether the scope of origin and the denial of benefits provisions apply generally through the sectoral agreements.⁹³ To the extent that they remain 'open' in the sense that the GATS Article V.6 definition is respected, then we can say that for the benefits extended on behalf of economic operators, the sectoral agreements continue the MFN liberalizing demeanour. The same caveats made above for benefits extended to parties rather than operators and for any domestic limitations on the establishment of foreign providers apply here as well.

1. Financial services

Both US financial services annexes expressly incorporate definitions (or other provisions) from the cross-border services chapters. Both incorporate the denial of benefit definitions and therefore apply the substantial business operations test without a nationality or control requirement. The EU agreements refer to financial service suppliers and define that term as any natural or juridical person of a party seeking to provide services.⁹⁴ A juridical person is defined by the general services chapter definitions and, as noted above, the agreements incorporate the substantial operations test as per GATS Article V.6.

2. Telecommunications

The US annexes do not have an express incorporation provision and cross-border chapter definitions would therefore apply unless otherwise modified, including the denial of benefits provision, which is not modified by the telecommunications annex. Benefits of the annex are extended to 'service suppliers of the other party' which in the KORUS agreement is defined as a party that is either a covered investment in the territory of the party or a person of the other party that seeks to supply or supplies services in or into the territory.⁹⁵ This definition appears consistent with the general definition applied in the cross-border services

92 This is not to say that the subject of qualifying MRAs under GATS Art. V has not otherwise been raised. See for example, C.M. Cantore, 'How Does It Feel to Be on Your Own? – Mutual Recognition Agreements and Non-discrimination in the GATS: A Third Party's Perspective' (2010) 11 *German Law Journal* 11, 706. For a discussion of whether GATS Article XVIII might serve to qualify MRAs under GATS V, see Mathis, supra note 44, 84.

93 Also for expediency, and unless stated otherwise, only the US and EU agreements with Korea are used for this sectoral section.

94 EU–Korea agreement, Art. 7.37. 95 KORUS agreement, Art. 14.24.

chapter.⁹⁶ The EU sections for telecommunications also do not modify the general definition of suppliers.

3. Electronic commerce

The annexes or sections of both US and EU agreements refer to the WTO Agreement on electronic commerce and prohibit the charging of customs duties on deliveries by electronic means. Neither agreement provides definitions of origin for digital products, although the KORUS agreement annex incorporates any relevant provision of the cross-border services chapter.⁹⁷ However, if that electronic commerce is about products rather than service providers, the origin concepts from the general services chapters would not apply. Rather, the origin rules from the chapters on goods would apply. Thus, to the extent that regulatory provisions in the electronic commerce sections here could be preferential in character, discrimination may not be diffused by the porous nature of services origin rules. The EU electronic commerce section sets out a dialogue for regulatory cooperation and closes the section with a listing of general exceptions as also found in GATS Article XIV and GATT Article XX. There is no highly beneficial preferential treatment being accorded here by either party.

4. Additional sectors, EU–Korea agreement

The other sectoral sections are not covered in US annexes so only the EU sections are reviewed.⁹⁸ These sections include computer services, in which a set of agreed-upon definitions, but not referring to the origin of the services or their providers, is established; and postal and courier services, in which a three-year period to set out a regulatory framework for competition in those markets is established. Maritime services are accorded non-discrimination (national treatment) status on behalf of ships flying the flag of the other party or operated by service suppliers of the other party. Even if a party accorded its flags on the basis of nationality, the general service supplier definitions would apply to allow operators with substantial business operations in the territory to have access to the provisions in this section.

D. Trade in services conclusion

This is an admittedly brief pass over a very extensive subject area that contains a large number of different party processes. As limited to a survey of the applicable origin rules, the results here for general subjects and sectoral treatment support the MFN thesis, that the regulatory subjects and the processes open to operators are not being established on the basis of restrictive origin rules. Since this section has not treated party benefits explicitly, no conclusion is rendered on any aspects that only benefit the parties rather than the service providers. For example, the section has not detailed

⁹⁶ *Ibid.*, Art. 12.13. ⁹⁷ *Ibid.*, Art. 15.2.

⁹⁸ EU–Korea agreement, computer services from Art. 7.25 and maritime services from Art. 7.47.

any dispute settlement provisions in favour of parties. On mutual recognition, we see the commencement of a process rather than a mutual recognition agreement. If and when such agreements flow from the processes established, they will either be notified under GATS Article VII or they will not be. To the extent they are not, then the opinion here is that a GATS violation can be framed that is not salvageable by a reference to the exceptional requirements of GATS Article V.⁹⁹

V. Conclusion

While this inquiry has located some points of likely or possible preferential regulatory treatment, the results are necessarily ambivalent both for those identified as preferential and for those found not to be so preferential in character. This is for two reasons. First, as noted in the introduction, there is not sufficient secondary source material describing the way domestic agencies actually implement regulatory provisions. Thus, while one can identify the possibility of preferential transparency provisions in favour of interested persons of another party, this still does not say anything about what actually happens in the application of those rules and whether domestic treatment is ever bifurcated or not.

Second is the somewhat opaque nature of deep integration provisions themselves. It is evident that the purpose of the regulatory agreements in many instances is to frame expectations for the future rather than to prescribe applicable legal regimes. The term 'soft law' comes to mind when a provision is located that is firm in obligation but soft in content (or the other way around). But sometimes even soft law is absent, suggesting that the regulatory relationships may not be about law at all, but rather about creating (again) 'frameworks of expectations'. Sometimes one discerns that the nature of the expectation framed may ultimately result in a legal act, an analysable measure if you will. At other times it seems that no legal result of any kind is intended and that the expectation to be realized is to 'discuss' and 'cooperate'.

This puts the question of compatibility with the multilateral trading system in a slightly different light, suggesting that the exercise of assessing compatibility could be somewhat premature. That a later assessment might bear more legal fruit would be based on an optimistic view that the regulatory processes in these agreements might result in identifiable legal acts or regimes. If one takes the more pessimistic view that the agreements have only a low potential to realize legal results, then another conclusion comes forward. This would hold that the question of compatibility with the multilateral trading rules is irrelevant because the agreements are too weak to cross the initial threshold of providing anything for those multilateral rules to examine.

⁹⁹ One argument to consider for the GATS Art. V scope to include MRA's within its exception is by reference to GATS Art. XVIII for 'Additional Commitments', which is also located in Part III of the GATS for 'Specific Commitments'. See for discussion, Mathis, *supra* note 44, 85–6.

The view here is that the regulatory agreements are generating both low and high sets of expectations and that more could be coming in the way of legal outcomes from these processes. It is also likely that what we perceive now as the 'state of the art' moves along over time. One can imagine stronger mediation instruments to address non-tariff barriers, additional participation rights for private actors and stronger mutual recognition processes. These types of process enhancements would present more interesting compatibility issues for the multilateral trading system.

For now, what can be said of the regional regulatory processes and the multilateral trading system is that while some of them might translate well to a larger group exercise in the WTO, they instead remain exclusive to the bilateral relationships established by the trade agreement parties. If non-party WTO Members might wish, for whatever reasons, to be a part of those processes, the mechanisms for opening or duplicating them for the larger group will have to be commenced by WTO Members themselves. To the extent they choose not to engage with more advanced regulatory processes in the larger club, this omission will also contribute to widening a gap of compatibility as regulatory regionalism continues to develop.