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CONSUMER RIGHTS IN INTERNATIONAL TRADE AGREEMENTS

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CONTENT

EXECUTIVE SUMMARY

Consumer organisations on both sides of the Atlantic have been involved in the controversial debate regarding current trade negotiations and discuss how a consumer friendly trade policy could look like. In principle, increased trade resulting from trade agreements can offer consumers access to particularly competitive goods and services which are less expensive or of higher quality. At the same time, there is a risk that rules in trade and investment agreements limit the sovereign right of states to adopt measures for consumer protection at the domestic level. Hence, much depends on how these agreements are designed.

The present study contributes to the discussion concerning a consumer-friendly trade policy by giving an overview of consumer rights in recent trade agreements.

At the international level, the UN Guidelines on Consumer Protection, among others, define important consumer rights and interests. In order to determine whether and to what extent international trade agreements recognise and promote these rights, the study analyses five existing trade agreements and four WTO agreements. These are the trade agreements of: the EU with Canada (CETA), Korea and Vietnam respectively; the US with Korea; and the Transpacific Partnership (TPP). The WTO agreements in question are: the General Agreement on Tariffs and Trade (GATT 1994), the Agreement on Technical Barriers to Trade (TBT Agreement), the Agreement on Sanitary and Phytosanitary Measures (SPS Agreement), and the General Agreement on Trade in Services (GATS).

The study focuses on a number of chapters in the aforementioned trade agreements that are important for consumer rights. In particular, the chapters on TBT and SPS measures, trade in services, including electronic commerce, as well as trade and sustainable development or environment are being examined. These chapters are then compared to the corresponding WTO agreements. The chapters of the trade agreements and the corresponding WTO agreements contain a number of consumer-related provisions, in particular as regards the: (i) protection of human life and health;(ii) prevention of deceptive and fraudulent commercial practices;(iii) protection of personal information; (iv) regulation of services trade for the pursuit of public policy objectives in general and financial services for prudential reasons in particular, as (v) well as the public participation in the development of TBT measures and in respect of trade and sustainable development / environment.

There are some differences as to which consumer-related provisions are contained in the different agreements and how they look like, yet by and large the provisions are similar. Only in the areas of electronic commerce and trade and sustainable development / environment, there are considerable differences. Both the similarities and the divergences can be related to the (non)existence of WTO rules. In those areas where WTO agreements exist, the trade agreements refer to, or incorporate, these WTO agreements. This leads to a legal alignment, in the sense of minimum harmonization. In the areas of electronic commerce and trade and sustainable development / environment respectively, there are no corresponding WTO agreements. Therefore, consumer-related provisions on these issues are rather different from each other, both with respect to their mandatory/non-mandatory character and their level of regulatory ambition.

The study concludes that some of the consumer-related rules in international trade agreements should be improved. This includes the following aspects: The public interests protected by the general exception clauses in trade agreements cover many consumer-related issues, but should be supplemented by more explicitly mentioning “consumer protection” as a public interest. The contracting parties’ right to regulate trade in services for achieving public policy objectives should be emphasized more strongly in trade agreements. Moreover, the criteria defining if and when a service is supplied in the exercise of governmental authority should be phrased more clearly, since such “public” services are excluded from the scope of the chapters on services trade. As regards electronic commerce, the provisions on the protection of personal information as well as those on the protection of consumers against deceptive and fraudulent commercial practices could be formulated in a more precise as well as in a legally binding way. Moreover, the involvement of consumer organisations in consultations and debates on the implementation of the respective trade agreements should be enhanced by defining appropriate rules.

I. INTRODUCTION

Prompted primarily by the establishment of the World Trade Organization (WTO), for more than twenty years there has been intense political and academic discussion at the national and international levels over the relationship between trade policies and agreements on the one side and policy objectives such as the protection of the environment and health as well as the rights of workers and consumers on the other side. Ever since the EU negotiations over extensive trade and investment protection agreements with Canada and the United States, this topic has received greater attention in the broader public in the European Union.

The negotiated agreement between the EU and Canada (Comprehensive Economic and Trade Agreement, CETA), the agreement between the EU and the United States (Transatlantic Trade and Investment Partnership, TTIP), the future of which is more than uncertain due to lack of support from the new US administration[1], and the transpacific trade agreement (Trans-Pacific Partnership, TPP) between the USA and a number of other Pacific-rim countries, which have already been signed but may not come into force after the new US administration terminated the ratification in the US, are often described by advocates as a new generation of trade agreements that set so-called gold standards.

Whether this assessment is true from the consumer perspective is, however, an unanswered question. Consumer organisations on both sides of the Atlantic have been involved in the controversial debate regarding current trade negotiations[2] and discuss how a consumer friendly trade policy could look like. In principle, increased trade resulting from trade agreements can offer consumers access to particularly competitive goods and services, which are less expensive, or of higher quality. At the same time, there is a risk that rules in trade and investment agreements limit the sovereign right of states to adopt measures for consumer protection at the domestic level.

The present study contributes to the discussion concerning a consumer-friendly trade policy by giving an overview of consumer rights in recent trade agreements.

Since trade agreements are made between states, they primarily contain rights and obligations for states, not for private entities subject to civil law such as businesses and individual consumers. State rights and obligations with respect to consumer protection based on trade agreements are therefore also the focus of this study. Such consumer-related rights and obligations can be enshrined in trade agreements in various ways, for example as the obligation of states to take measures to protect these interests or in the express acknowledgement of individual state or international provisions for the protection of consumer interests through corresponding exceptions provisions.

This study is based on an analysis of existing literature and legal texts. We have taken case law into consideration only in a few cases. The study does not contain any sweeping political or economic assessment of whether or not trade agreements as a whole are desirable from the consumer perspective. Our objective is instead to demonstrate

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[1] Cf. *New York Times* dated 23 January 2017, Trump Abandons Trans-Pacific Partnership, https://www.nytimes.com/2017/01/23/us/politics/tpp-trump-trade-nafta.html?_r=0

[2] Cf. for example the many policy statements by the Transatlantic Consumer Dialogue on the TTIP at http://test.tacd.org/ttip-policy-statements/; VZBV 2014.

possibilities for designing trade agreements to be more consumer-friendly based on already negotiated agreements.

The study first portrays how trade agreements can fundamentally impact consumer rights and interests (Section II). After that, we analyse five more recent trade agreements as to the extent that they contain and protect the identified consumer rights (Section III). In conclusion, we will present recommendations for consumer organisations for enshrining consumer rights in trade agreements (Section IV).

This study does not cover the enforceability of consumer rights in trade agreements. That is the topic of a second study.[3]

II. CONSUMER RIGHTS AND TRADE AGREEMENTS: FUNDAMENTAL CONSIDERATIONS

Important consumer rights are laid down in documents of international organisations and policy statements of consumer organisations. In connection with international trade agreements, however, not all of the internationally recognised or demanded consumer rights are relevant; some consumer rights bear little reference to international trade. In this section, we present important consumer rights that are internationally recognised or demanded while addressing whether and to what extent they can be protected and promoted or impaired by international trade agreements.

Internationally recognised demands on consumer policy and the protection of consumer rights are contained in particular in the UN Guidelines on Consumer Protection (in the following referred to as “UN Guidelines”) adopted by the UN General Assembly.[4] Since the UN Guidelines are probably the most representative demands made on states with regard to consumer protection worldwide, they will be drawn upon in the following as a basis for the discussion of consumer rights in connection with trade agreements. Wherever relevant, we will also refer to other international documents (e.g. by the OECD) as well as position papers by consumer organisations.

To the extent evident, in the academic literature the topic of consumer protection in international trade agreements has received less attention than, for example, the relationship between trade and the environment. However, there is a quite extensive amount of literature concerning specific aspects, such as the compatibility of provisions concerning product labelling with WTO law.[5] In the course of the discussions about the TTIP and CETA, moreover, some studies have been done recently on trade policy issues from the consumer perspective; these also refer in part to the UN Guidelines as their starting point for the consumer policy assessment of trade agreements.[6]

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[3] Gerstetter/Donat 2016

[4] The UN Guidelines were most recently revised in 2015 and the new version was also adopted by the UN General Assembly. The latest version can be found at http://unctad.org/en/Pages/DITC/CompetitionLaw/UN-Guidelines-on-Consumer-Protection.aspx.

[5] Cf. e.g. Cheyne 2009; Morgan/Goh 2004; Vranes 2010.

[6] Cf. Diels/Thorun 2014, pp. 17 f.

1. THE UN GUIDELINES ON CONSUMER PROTECTION

The UN Guidelines demand measures be taken by states in various areas in order to protect specific consumer interests:

- **The protection of consumers in their interactions with businesses**: The UN Guidelines cite measures such as the protection of privacy as well as the provision of certain information by businesses. In this area, trade agreements basically play an indirect role since, due to their international legal nature, they basically create direct legal obligations only for states.[7] Although it is conceivable for trade agreements to oblige states to take certain measures with respect to businesses, in practice such clauses in trade agreements are mainly contained in more recent agreements and they are neither very detailed nor far-reaching.[8] With regard to the protection of consumers in their relationship with businesses, therefore, trade agreements are only of limited significance.
- **The protection of consumers from product-related risks** as well as **demands on the safety and quality of products and services**: States are called upon to ensure that products are physically safe for consumers and that consumers receive safety-relevant product information. States should also draw up relevant national and international standards. The UN Guidelines also refer to the fact that businesses should provide relevant information. With regard to internationally traded products, international trade agreements are an important legal framework in this respect. In the scope of the WTO, there is an Agreement on Technical Barriers to Trade (TBT), which contains demands on technical standards and product labelling. A further WTO agreement, the SPS Agreement, regulates national state measures on the protection of health. Both the TBT and the SPS Agreements refer to international standards (e.g. on health protection). With regard to consumer protection, trade agreements are also relevant insofar as they expressly prohibit many trade-restricting measures (e.g. bans on imports). It is possible, though, that in certain situations consumers can only be protected from product-related risks through import-restricting measures. Some legal systems, such as that in the EU, are based in this respect on the precautionary principle. The precautionary principle, as enshrined in EU primary law[9], says that if there are indications that a good or process is hazardous, measures can be taken to protect against the relevant risks without the hazardous nature being definitively scientifically proven. In specific constellations, such protective measures can also be trade-restricting measures.[10] This leads to the question of whether and under what circumstances trade agreements can permit such trade restrictions in exceptional cases. Insofar as trade agreements stipulate

[7] However, national courts in some instances derive rights for private entities subject to civil law, i.e. individuals or businesses, from international obligations. The Court of Justice of the European Union recognises such individual rights derived from international agreements where the relevant international obligations are unconditional and sufficiently defined.

[8] Cf. e.g. Peel et al. 2016, pp. 9 ff.

[9] The precautionary principle is only embedded expressly for environmental policy in Article 191.2 of the TFEU, but is also recognised in relation to measures for the protection of health in the jurisdiction of European courts.

[10] Cf. VZVB 2014, pp. 32 ff. There has been extensive academic discussion on the relationship between the precautionary principle and WTO law, see Eggers 2001; Gehring/Cordonnier; Segger 2003; Herwig/Joerges 2013; Scott/Vos 2002.

measures to harmonise product-related legal rules in different states, from the consumer perspective it is also important that this harmonisation contains a high level of consumer policy protection.[11]

- **The promotion and protection of the economic interests of consumers:** In this context, the UN Guidelines call upon states to take measures, for example, in respect of competition law and product liability as well as the availability of product-related information for consumer protection. On principle, trade agreements can serve the economic interests of consumers by ensuring that high quality or inexpensive products are available. Trade agreements such as the WTO law also occasionally contain demands on competition regulations where they affect internationally traded products and services. For example, WTO law contains rules on anti-dumping measures and subsidies, other international trade agreements have their own chapters on competition policy.[12] Economic interests of consumers can moreover be influenced positively or negatively by states taking on liberalisation obligations in trade agreements with regard to services that are elements of public services and where, as a result, the corresponding sectors would be organised more on a market basis. Consumer interests can also be impaired when trade agreements limit the ability of states to make legal demands on the quality of products and services.[13]
- **Access to essential goods and services:** States should consider setting up mechanisms for the distribution of essential products and services. This demand, which is likely to be especially relevant for developing countries, has little recognisable reference to trade agreements; it is primarily a stipulation for international policy.[14]
- **Availability of consumer dispute resolution and redress:** States should create various options for consumers to make complaints and demand redress even in cross-border cases. The UN Guidelines mention national mechanisms. Such mechanisms, which can be used by individual consumers or NGOs, are not regularly the focus of trade agreements. However, trade agreements regularly provide for inter-state mechanisms for dispute resolution through the interpretation of the respective agreement as well as, in part, certain possibilities for legal claims or complaints for businesses and/or NGOs. With regard to trade agreements, the question is therefore whether appropriate mechanisms exist that can also be employed by consumer organisations. Embedding such mechanisms in trade agreements is called for by consumer organisations.[15]
- **Consumer education:** The UN Guidelines call upon the states to develop consumer education programmes. This refers to national activity without any recognisable reference to trade agreements.
- **The promotion of sustainable consumption patterns:** The UN Guidelines call upon states to implement measures promoting sustainable consumption in various

[11] Cf. e.g. VZBV 2014, p. 4.

[12] Cf. e.g. Chapter 17 of CETA.

[13] Cf. e.g. BEUC 2015, p. 2, referring to the negotiations on the multilateral Trade in Services Agreement (TiSA).

[14] One example of the way that international trade agreements can be directly relevant for the supply of essential goods is, however, the discussion about the provisions on patent law in WTO law and their impacts on access to medications, in particular in developing countries. The Doha Declaration on TRIPS and Public Health contains provisions concerning this for the WTO context, https://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm.

[15] Cf. e.g. BEUC 2015, p. 6, referring to the negotiations on the multilateral Trade in Services Agreement (TiSA).

areas including product design as well as suitable handling of hazardous substances. Trade agreements can both promote sustainable consumption and impede state measures aimed at it. Trade agreements can promote sustainable consumption where they negotiate preference rules for sustainable products and services insofar as the consumption of local products and services is not already more sustainable. For example, the current negotiations over an Environmental Goods Agreement in which the EU is participating aims to facilitate trade with environmentally friendly products.[16] Conversely, provisions in trade agreements can also impede national measures aimed at ensuring that traded products and services are sustainable. For instance, trade agreements contain the basic provision that imported products cannot be given poorer treatment than the same types of national products (principle of national treatment). It has, however, not been sufficiently clarified whether, for example, differing resource consumption in production leads to the products not being alike so they can therefore be treated differently.[17] Also, certain trade-restricting measures are prohibited on principle even if they concern particularly environmentally hazardous products. Whenever provisions in trade agreements restrict national measures for the purpose of giving preference to trade with sustainable products, we must pose the question of exceptions provisions that permit such preferential treatment in exceptional cases. Another related question is what legal relationship trade agreements have with other international agreements that obligate states to act more sustainably or at least allow this (e.g. international environmental agreements).[18]

- **Electronic commerce**: According to the UN Guidelines, states should adopt transparent and effective consumer protection policies in electronic commerce. The OECD Guidelines for Consumer Protection in the Context of Electronic Commerce[19] (in the following referred to as the “OECD Guidelines”) contain more specific standards than the UN Guidelines. In them, governments are called upon to ensure that consumers are no less protected when shopping online as offline. The OECD Guidelines furthermore define various demands on businesses. Among other things, they call upon businesses to observe the following behaviours: suitable elaboration of advertising claims and measures, provision of clear and easily accessible information for consumers about the business, provision of suitable information about the products or services offered as well as terms and conditions, confirmation of transactions from the business and granting options to withdraw from or cancel transactions. In addition, they refer to older OECD guidelines[20] on privacy protection for consumers and call for the application of corresponding standards in electronic commerce as well.[21] The obligations are not for states and are not restricted to cross-border trade. They can nevertheless serve indirectly as a benchmark for the

[16] For more information see European Commission, Environmental Goods Agreement, http://trade.ec.europa.eu/doclib/press/index.cfm?id=1116.

[17] For more on this problem, which is much debated in the literature, see for example Broude/Levy 2014; Choi 2003; Conrad 2011; Vranes 2009, 187 ff.

[18] This issue has been intensively treated academically whereby the focus is on the relationship between WTO law and multilateral environmental agreements, see only Marceau 2001, Neumann 2002, Pauwelyn 2003.

[19] Online at https://www.oecd.org/sti/consumer/34023811.pdf

[20] OECD Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data(1980) as well as the OECD Ministerial Declaration on the Protection of Privacy on Global Networks (1998), online at https://www.oecd.org/sti/ieconomy/oecdguidelinesontheprotectionofprivacyandtransborderflowsofpersonaldata.htm

[21] Cf. on consumer protection in the context of e-commerce also VZBV 2014, pp. 7 f, 19 ff

assessment of trade agreements from the consumer perspective. The decisive question then is whether the trade agreements contain obligations for the states to adopt corresponding measures for consumer protection in their relationship with businesses.

- **Financial services**: The UN Guidelines call upon states to protect consumers with regard to financial services. They cite, for example, the creation of suitable market surveillance bodies including controls and enforcement measures as well as demands with respect to the behaviours of businesses. The Guidelines concerning financial services refer at first to national legislation. More recent trade agreements, however, also contain provisions for cross-border trade in services including financial services. Thus, the question of what effects international trade agreements can have on the consumer friendliness of financial services is relevant. In this context, consumer organisations have demanded that trade agreements be designed in such a way that they do not prevent robust and exacting regulation of financial services.[22]

The demands in these various areas are intended to protect specific consumer interests, which are explicitly mentioned in the UN Guidelines. Some of these interests are very directly linked to state measures in one of the areas mentioned above. The UN Guidelines cite consumer interests, for example the protection of consumers from health and safety risks. In addition, the UN Guidelines also refer to some overarching consumer interests: the **protection of vulnerable and disadvantaged consumers**, **access to information** as well as the **freedom to form consumer organisations.** Trade agreements can have distinct effects on some of these interests. This applies, for example, to access to information since trade agreements often contain rules for product labelling. The protection of consumer data is also an issue that is relevant to trade agreements. On the other hand, trade agreements are less strongly linked to others of these consumer interests mentioned, for example, provisions for states on the freedom of consumers to form organisations would more likely to be sought in international human rights conventions. Also, the protection of disadvantaged consumers should primarily be a matter of state social policy, even if they can basically benefit from access to a wider product selection or less expensive products as a result of trade agreements.

2. RESULT: BASIS FOR ASSESSMENT

In the above section we illustrated what effects trade agreements can have on central, internationally recognised or demanded consumer standards. The following section provides an analysis of individual trade agreements with respect to the consumer-related provisions they contain; particular attention will be paid to the following issues on the basis of the previous analysis:

- With regard to consumer protection against product-related risks as well as demands on the safety and quality of products and services, we analyse the rules on technical and other quality requirements for products and services with regard to their relation to consumer interests. This also includes demands on provisions concerning product labelling, etc.
- Promotion and protection of the economic interests of consumers and the promotion of sustainable consumption. In this context, we analyse which exemptions are included in trade agreements in favour of non-trade-related objectives, in particular

[22] Cf. Transatlantic Consumer Dialogue 2013

consumer protection, and what rules in these agreements relate to the relationship to other international laws. Such rules may in fact allow certain state measures, which are not allowed under trade agreements, to protect the economic interests of consumers or to promote sustainable consumption.

- Consumer-related provisions in the field of trade in services, with particular attention to financial services
- Consumer-related provisions on electronic commerce and data protection

We will also analyse two further aspects that can have an influence on how consumer friendly trade agreements are. First, the following chapter analyses what objectives are contained in trade agreements. When consumer protection is cited as an objective of an agreement or individual chapters this facilitates a consumer-friendly interpretation of the corresponding provisions. Secondly, we portray what institutional provisions there are concerning the involvement of consumer organisations in the scope of trade agreements. Such institutional involvement could take place, for example, in the committees for trade and sustainable development or regulatory cooperation established in the scopes of some trade agreements.

III. CONSUMER RIGHTS IN EXISTING TRADE AGREEMENTS

This chapter examines selected EU and US trade agreements as well as WTO agreements for whether they contain provisions concerning certain rights as well as protection of consumers against certain hazards or risks (referred to in the following as “consumer-related provisions”). This study is oriented on the basis for assessment described in the previous chapter (see above II.2.).

1. SELECTION OF AGREEMENTS

We chose the bilateral and plurilateral trade agreements referenced here – also on the basis of a survey of the literature[23] – with a view to how great the (assumed) probability is that they contain consumer-related provisions. On principle, other trade agreements – including those in which the EU and USA are not negotiating or contractual parties – come into consideration as objects of study for our subject matter, but we had to limit the selection to a manageable number of trade agreements.

[23] Electronic sources: WTO working papers (between 2010 and 2016): https://www.wto.org/english/res_e/reser_e/wpaps_e.htm; OECD Trade Policy Papers (between 2007 and 2016): http://www.oecd-ilibrary.org/trade/oecd-trade-policy-working-papers_18166873; World Bank Policy Research Working Papers (between 2014 and 2016), http://econ.worldbank.org/WBSITE/EXTERNAL/EXTDEC/EXTRESEARCH/0,,contentMDK:23513927~pagePK:64165401~piPK:64165026~theSitePK:469382,00.html; European Commission, GD Handel, Analysis, Chief Economist Notes (between 2007 and 2016), http://ec.europa.eu/trade/policy/policy-making/analysis/#_notes; ICTSD E 15 Initiative (between 2015 and 2016), http://www.ictsd.org/research?f[0]=field_tag%3A372#main-content-container. Journals: *Journal of International Economic Law* (between 2010 and 2016); *World Trade Review* (between 2010 and 2016). Monographs: Bagwell/Mavroidis 2011, Baldwin/Low 2009, Bartels/Ortino 2006, Estevadeordal/Suominen/Teh 2009, Gantz 2013, Hilf/Oeter 2010, Hoeckman/Kostecki 2009; Lowenfeld 2008, Mattoo/Stern/Zanini 2008, Tietje 2009.

The EU and US bilateral and plurilateral trade agreements examined here are:

- **EU-Republic of Korea:** The trade agreement between the EU and South Korea was preliminarily applied as from 1 July 2011 and came into force on 13 December 2015.[24] It is the first EU trade agreement belonging to a "new generation" of such agreements with which the EU goes beyond traditional market opening (see more details below). This agreement significantly increased the mutual exports of both parties and transformed the previous EU deficit in foreign trade with Korea into a distinct surplus.[25] Korea was not a party in TPP negotiations and is therefore also not a signatory state.
- **EU-Vietnam**: The negotiations for the EU trade agreement with Vietnam were concluded in December 2014; the text of the agreement is still in the process of legal review; a German language version of the agreement is not yet available for this reason.[26] The EU Commission calls the trade agreement with Vietnam "the most ambitious and comprehensive FTA that the EU has ever concluded with a developing country" while hoping that this agreement, after the EU-Singapore agreement, would serve as a further building block towards the EU's ultimate objective of an ambitious and comprehensive region-to-region EU-ASEAN FTA.[27] From the trade policy perspective it is of interest that Vietnam is one of the TPP signatory states.
- **EU-Canada (CETA):** The EU trade agreement with Canada, called CETA, is the most recent and possibly the most extensive trade agreement that the EU has signed to date.[28] The signing was preceded by broad protests on behalf of parts of the European civil society and a certain degree of resistance from some member states. In response, the EU and Canada adopted a joint interpretation instrument that sets down certain legally binding principles with respect to the interpretation of CETA and its provisions.[29] With regard to the rights of the parties to legal enactment, it states "CETA preserves the ability of the European Union and its Member States and Canada to adopt and apply their own laws and regulations that regulate economic activity in the public interest, to achieve legitimate public policy objectives

[24] The agreement is published in the Official Journal of the EU, L 127, 14 May 2011, pp. 6 ff. The website of the European Commission Directorate-General for Trade contains an overview of this agreement along with references to other studies about its trade-policy and economic impacts at http://ec.europa.eu/trade/policy/countries-and-regions/countries/south-korea/.

[25] See the overview of the bilateral imports and exports in trades in goods and services on the website of the European Commission Directorate-General for Trade: http://ec.europa.eu/trade/policy/countries-and-regions/countries/south-korea/.

[26] See the relevant notice by the European Commission Directorate-General for Trade on its website where additional information about this trade agreement can also be retrieved: http://ec.europa.eu/trade/policy/countries-and-regions/countries/vietnam/. The process of legal review is not intended to change or renegotiate the negotiated commitments, but is a purely technical process whereby the negotiated commitments are examined to determine whether they are drawn up in an impeccable legal language. Where necessary, the negotiated contract text is modified linguistically without altering the core content of the obligation concerned.

[27] According to the European Commission in its memo "EU and Vietnam reach agreement on free trade deal" dated 4 August 2015, retrievable on the website of the European Commission Directorate-General for Trade: http://trade.ec.europa.eu/doclib/docs/2015/august/tradoc_153674.pdf.

[28] The agreement was signed on 30 October 2016; see the website of the European Commission Directorate-General for Trade: http://ec.europa.eu/trade/policy/in-focus/ceta/.

[29] "Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States," retrievable on the website of the European Commission: http://www.consilium.europa.eu/en/press/press-releases/2016/10/28-eu-canada-trade-agreement/.

such as […] **consumer protection, privacy and data protection** […]" (emphasis added).[30] For the EU Commission, CETA is "the best trade agreement the EU has ever negotiated," also with regard to its consumer protection standards.[31]

- **USA-Republic of Korea (KORUS):** The trade agreement between the United States and South Korea (called KORUS) was signed by both parties in 2007 but re-negotiated due to demands by the US before it was finally concluded in late 2010. The KORUS agreement came into force on 15 March 2012 and, with the exception of the TPP, is the most significant US trade agreement to date from an economic perspective.[32]
- **Trans-Pacific Partnership Agreement (TPP):** In addition to the US, eleven other Pacific-rim states bordering are involved in the TPP, among them Australia, Japan, Canada, Mexico, New Zealand and Vietnam.[33] If the TPP were ratified by all twelve of the signatory states it would create a free trade zone consisting of approximately 40 percent of the worldwide gross domestic product.[34] However, whether the United States will actually ratify the TPP is now more than uncertain, because elected US presidential candidate Trump clearly opposed ratification of the TPP both during the campaign and after his election. If the United States were to refrain from ratifying the TPP under his administration, TPP could not enter into force. Although ratification by six of the twelve signatory states is sufficient for its entry into force, these six states must account for 85 per cent of the joint gross domestic product of *all* signatory states;[35] this threshold cannot be achieved without the US.

The choice of these agreements, which, with the exception of the EU-Korea and KOR-US Agreements, are not yet in force,[36] is based primarily on two aspects: For one, all of these agreements are rather recent since consumer protection has only recently become a focus in connection with trade agreements; consequently there is a greater probability in the newer than in older agreements that they contain consumer-related provisions. Secondly, these agreements were negotiated by the EU or the US, which, due to their conventional understanding of values and law, (may) tend in a particular way to adopt consumer-related provisions in their trade agreements and be called upon

[30] Section 2 of the Joint Interpretive Instrument; see also the summary of the final results of negotiations dated February 2016, p. 1; retrievable on the website of the European Commission Directorate-General for Trade: http://ec.europa.eu/trade/policy/in-focus/ceta/.

[31] Malmström, "CETA – An Effective, Progressive Deal for Europe," address at the Civil Society Dialogue meeting, 19.09.2016, pp. 2, 5; retrievable on the website of the European Commission Directorate-General for Trade: http://trade.ec.europa.eu/doclib/press/index.cfm?id=1542&title=Commissioner-Malmström-meets-civil-society-organisations-in-Brussels-on-CETA.

[32] KORUS is retrievable on the website of the Office of the United States Trade Representative (USTR): https://ustr.gov/trade-agreements/free-trade-agreements.

[33] See the overview of signatory states and the text of the TPP on the website of the Office of the United States Trade Representative (USTR): https://ustr.gov/tpp/.

[34] See *Bridges Weekly*, volume 20, number 6 (18 February 2016), "Trade, Economic Ties in Focus as US, ASEAN Leaders Meet," p. 2.

[35] Article 30.5 TPP.

[36] The examination of trade agreements that have not yet come into force is based on the assumption that these agreements will come into force in future although this does not seem absolutely certain with regard to CETA and TPP.

by their civil society to do so.[37] This does not imply that other states or economic communities do not value justified consumer concerns or do not consider them in their trade agreements.

The EU trade agreements examined here belong to a "new generation" of EU trade agreements. With them, the European Union is attempting to eliminate non-tariff trade barriers as well as traditional tariff barriers, to open or to regulate other economic sectors or interests such as the trade in services, foreign direct investment, public procurement, intellectual property rights and competition. In addition, they address certain cross-sectional issues such as "trade and sustainable development" or "trade and environment".[38]

We do not examine the planned bilateral agreement on the Transatlantic Trade and Investment Partnership between the EU and the US (TTIP) here or the plurilateral Trade in Services Agreement (TiSA).[39] There are no available final agreements for either the TTIP[40] or the TiSA[41], which could serve as the basis for an analysis.

In addition to the above bilateral and plurilateral EU and US trade agreements, we will also look at certain (multilateral) WTO agreements. For the **trade in goods** these are the following WTO agreements:

- General Agreement on Tariffs and Trade (GATT 1994),
- Agreement on Technical Barriers to Trade (TBT Agreement) and
- Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement).

For **trade in services** we look at the General Agreement on Trade in Services (GATS).

Unlike the trade agreements of the EU and USA referenced here, the WTO agreements are already around twenty years old, however, we take them into account since the bi-

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[37] In a recent talk, EU trade commissioner Malmström again stressed that the foreign trade policy of the EU must build on the values of the Union: "The third and final strand of our strategy is to ensure trade is based on our values. Trade policy is not just about economic interests. It is also about promoting and defending our shared values. That means, first of all, safeguarding the European social and regulatory model at home. *No trade agreement will ever lower levels of consumer, environmental or social and labour protection.* Any change to levels of protection can only be upward. And we will never give up our right to make policy in the public interest." (emphasis added) European trade policy at a crossroads, 18.11.2016, Directorate-General for Trade: http://trade.ec.europa.eu/doclib/press/index.cfm?id=1581.

[38] See the Communications from the European Commission "Global Europe - Competing in the world" (COM (2006) 567 final, 04.10.2006); "Trade, Growth and World Affairs Trade Policy as a core component of the EU's 2020 strategy" (COM (2010) 612 final, 09.11.2010); and "Trade for all – towards a more responsible trade and investment policy" (14.10.2015, retrievable on: http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf). See also the articles in Bungenberg/Herrmann (eds.) 2016, passim.

[39] An overview of TiSA is contained in the Fact Sheet of the European Commission dated 26 September 2016, retrievable on the website of the European Commission Directorate-General for Trade: http://trade.ec.europa.eu/doclib/docs/2016/september/tradoc_154971.doc.pdf. Another overview is provided by *ENTREPRISE ROMANDE* dated 12 February 2016, pp. 6 – 7 (author's copy). See also Adlung 2015, pp. 117 ff.

[40] On the status of the negotiations, see the last two reports of the European Commission on the fourteenth (11–15 July 2016) and fifteenth (3–7 October 2016) TTIP rounds on the website of the European Commission Directorate-General for Trade: http://ec.europa.eu/trade/policy/in-focus/ttip/. See also Pitschas 2015, pp. 141 ff.

[41] See the most recent EU report on the 21st TiSA negotiation round, which took place from 2–10 November 2016, on the website of the European Commission Directorate-General for Trade: http://trade.ec.europa.eu/doclib/docs/2016/november/tradoc_155095.pdf. Conclusion of these negotiations are no longer to be expected this year, see "TiSA Ministerial Cancelled, Officials To Prepare for 2017," *Bridges Weekly*, volume 20, number 40, 24 November 2016, pp. 4 f. (retrievable on: http://www.ictsd.org/bridges-news/bridges/overview.

and plurilateral trade agreements of the EU and USA refer to and incorporate them (and other WTO agreements, not examined here).[42] The WTO agreements therefore constitute a reference framework for bilateral and plurilateral trade agreements between the EU and the USA. In addition, there are a large number of dispute settlements dealing with the referenced WTO agreements, which are legally binding on the involved parties and which greatly affect the interpretation of these WTO agreements.[43] This dispute settlement practice can also be of significance in the interpretation of identical or comparable provisions of the EU and US bi- and plurilateral trade agreements, at least insofar as these agreements refer to the legally valid reports of the WTO dispute settlement bodies as binding means of interpretation.[44] Although we make only selective reference to these dispute settlement practices in the context of this study, on principle, they speak in favour of including the WTO agreements. This is all the more true since there are as yet no significant dispute settlement practices within the framework of the EU and US bi- and plurilateral trade agreements.[45]

2. RELEVANT CHAPTERS

In the previous chapter, we described what aspects of trade agreements appear particularly relevant to consumers on principle. These aspects are always taken up in the trade agreements considered here in the following chapters:

- Objectives and definitions,
- National treatment and market access for goods,
- Technical barriers to trade (TBT),
- Sanitary and phytosanitary measures (SPS),
- Trade in services, establishment/investment and electronic commerce,
- Trade and sustainable development as well as trade and environment,
- Institutional, general and final provisions.

In the following, we will describe what consumer-related provisions are contained in these chapters while also addressing each of the relevant WTO agreements.

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[42] See Ehring 2015, pp. 73, 88 ff on this incorporation of WTO law in bilateral trade agreements.

[43] See the overview of the WTO website on WTO dispute settlement: https://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm; see also Pitschas/Neumann/Herrmann 2005, passim.

[44] See for example Article 14.16 EU-Korea ("Where an obligation under this Agreement is identical to an obligation under the WTO Agreement, the arbitration panel shall adopt an interpretation which is consistent with any relevant interpretation established in rulings of the WTO Dispute Settlement Body (hereinafter referred to as the 'DSB')") and Article 29.17, p. 2 CETA ("The arbitration panel shall also take into account relevant interpretations in reports of Panels and the Appellate Body adopted by the WTO Dispute Settlement Body."). See also Article 28.11, (3), pp. 2 TPP ("In addition, with respect to any obligation of any WTO agreement that has been incorporated into this Agreement, the panel shall also consider relevant interpretations in reports of panels and the WTO Appellate Body adopted by the WTO Dispute Settlement Body.").

[45] One exception to this is the North American Free Trade Agreement (NAFTA) not considered here.

3. ANALYSIS OF THE INDIVIDUAL TOPICS

3.1 Objectives of the agreements

The EU-Korea Agreement expressly cites the objectives of the agreement, without expressly stating consumer protection. Two objectives, however, are of note:

- Article 1.1, (g) mentions the aspiration to contribute to the objective of sustainable development as well as recognition that sustainable development is an overarching objective. This is significant for consumers insofar as the parties recognise "that economic development, social development and environmental protection are interdependent and mutually reinforcing components of sustainable development."[46]
- With respect to the promotion of foreign direct investment, Article 1.1, (h) declares that the parties will not lower or reduce environmental, labour or occupational health and safety standards in the application and enforcement of environmental and labour laws. This is significant for consumers insofar as the parties thereby declare that neither labour nor environmental standards affecting the protection of health and the environment or work safety are considered as proprietary of one another's investors.

As opposed to the EU-Korea Agreement, the EU-Vietnam, CETA, KORUS and TPP Agreements do not contain any comparable, comprehensive provisions stating objectives. Instead, they cite merely the objective of liberalising and facilitating trade and investments between the parties in accordance with the provisions of the agreement[47] or to establish a free trade zone for goods and services within the meaning of the relevant provisions of GATT 1994 and GATS.[48] Therefore, nothing can be derived for the concerns of consumer protection from the objectives stipulated in these agreements.

3.2 Market access for goods

General exceptions provision

The chapters of the EU-Korea and EU-Vietnam trade agreements on market access for goods contain general exceptions provisions.[49] These two general exceptions provisions refer to Article XX of the GATT 1994 and declare that standard "part of this agreement." In CETA, KORUS and TPP there is a general exceptions provision in a separate chapter on exceptions from obligations enshrined in CETA, KORUS and TPP.[50] These general exceptions provisions also refer to Article XX of the GATT 1994 and incorporate it in the respective agreement. However, there is one important difference between them and the EU-Korea and EU-Vietnam Agreements: While their general exceptions provisions are limited to the respective chapter on market access for goods, the general exceptions provisions in CETA, KORUS and TPP apply for multiple or (almost) all

[46] Article 13.1, (2) EU-Korea

[47] Article 1.2 (Chapter 1) EU-Vietnam

[48] Article 1.4 CETA; Article 1.1 KORUS; Article 1.1 TPP

[49] Article 2.15 EU-Korea; Article 20 (Chapter 2) EU-Vietnam

[50] Article 28.3, (1) CETA; Article 23.1, (1) KORUS; Article 29.1, (1 and 2) TPP

chapters on trade in goods; the general exceptions provisions of these three agreements expressly cite those chapters on the trade in goods to which they are applied.[51]

Article XX of the GATT 1994

With regard to consumer-related provisions, the incorporation of Article XX of the GATT 1994 is significant in the above trade agreements. Article XX of the GATT 1994 allows, among other things, such measures as are needed to protect the lives and health of humans, animals and plants or to ensure compliance of GATT-conforming national laws or provisions, including those to prevent deceptive practices. This also applies when the respective measures violate obligations from GATT 1994. Article XX of the GATT 1994 is therefore to be understood as an exceptions provision.[52] The provision also has this function in the scope of the above trade agreements. However, such measures must not discriminate in an arbitrary or unjustified manner between countries where the same conditions prevail, or restrict international trade in disguised form. This restriction serves as a corrective to exclude such measures from justification that do not actually or exclusively pursue the stated objectives, such as the protection of health or the prevention of deceptive practices, but are rather motivated or at least have the effect of (unfairly) discriminating against trade partners or impeding trade (in a non-transparent way). This would constitute a misuse of rights.[53]

WTO members have invoked Article XX of the GATT 1994 in a variety of WTO disputes to justify actions that are contrary to their obligations under GATT 1994. Without discussing legal details here, two points deserve special attention: Some of the legal interests referred to in this standard – including the protection of human life and health – require that measures to protect them are necessary to achieve the intended protection. In order to establish such a need, case law requires a consideration of various aspects, taking into account, in particular, the importance of the legal interests involved, the extent to which the measure in question contributes to the protection objective being achieved, and its trade-restricting intensity.[54] Furthermore, the measure in question is to be compared with an alternative measure that is reasonably (and not merely theoretically) available, contributes in the same way to the protection purpose and is less restrictive to trade.[55] In a number of disputes, the WTO dispute settlement bodies, after a thorough examination of the measures in question, found that there was no need for the necessary measures and that the measures in question were therefore not justified under Article XX of the GATT 1994. Even if a measure is deemed necessary, it must, at a second stage, satisfy the above prohibition of abuse of law. In that respect, case law has determined that discrimination on the part of trade partners in the same circumstances is justified only if such discrimination has a rational or objectively traceable link

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[51] In addition, Article 28.3, (1) CETA, Article 23.1, (1) KORUS and Article 29.1, (2) TPP set down that Article XX(b) of the GATT 1994 also encompasses environmental measures required to protect the life and health of humans, animals and plants, and Article XX (g) of the GATT 1994 includes measures that serve the conservation of living and non-living exhaustible natural resources. Therefore, these exceptions provisions include such interpretations of Article XX of the GATT 1994 by the WTO dispute settlement practice.

[52] See the Report of the Appellate Body, *US – Gasoline* (WT/DS2/AB/R, WT/DS4/AB/R), p. 24.

[53] *Id.*, p. 22; confirmed, inter alia, by the Reports of the Appellate Body, *Brazil – Retreaded Tyres* (WT/DS332/AB/R), para. 224, and *EC – Seal Products* (WT/DS400/AB/R, WT/DS401/AB/R), para. 5.297

[54] Reports of the Appellate Body, *Brazil – Retreaded Tyres*, loc. cit., Rn. 178; *EC – Seal Products*, loc. cit., para. 5.169

[55] Reports of the Appellate Body, *Brazil – Retreaded Tyres*, loc. cit., para. 156; *EC – Seal Products*, loc. cit., para. 5.214 f., 5.261

with the protection objective pursued by the measure in question. If this is not the case, discrimination is unjustified.[56] The interpretation of this provision in the previous WTO dispute cases is assessed rather controversially in the academic literature: some criticise the fact that the previous interpretation of GATT Article XX would create unreasonable obstacles to the justification of measures by WTO members.[57] Others, by contrast, support the interpretation as an appropriate consideration of different interests.[58]

3.3 Technical barriers to trade (TBT)

Forms of technical barriers to trade

The chapters of the EU-Korea, EU-Vietnam, CETA, KORUS and TPP Agreements on technical barriers to trade (referred to as TBT chapters) deal with standards, technical regulations and conformity assessment procedures (within the meaning of the WTO TBT Agreement), the formulation, approval and application of which can affect bilateral trade in goods between the parties.[59] The EU-Korea and EU-Vietnam trade agreements make the TBT Agreement part of the respective agreement,[60] whereas CETA and TPP merely incorporate certain provisions of the TBT Agreement.[61] The TBT chapter of the KORUS agreement affirms the rights and obligations of the parties under the TBT Agreement without incorporating it.

The standards, technical regulations and conformity assessment procedures covered by the TBT chapters are highly significant in terms of consumer protection because they either serve to define (mandatory) characteristics for goods, including their packaging, marking and labelling, as well as their production methods and procedures, or provide for inspections as to whether the goods to be imported into the territory of a party fulfil the (mandatory) regulations that apply to them. Standards, technical regulations and conformity assessment procedures are also crucial for the safety of goods and hence for the safety of those who acquire and/or use these goods.[62]

Types of technical barriers to trade under the WTO TBT Agreement

The WTO TBT Agreement contains the following definitions for various types of technical barriers to trade[63] that are also relevant to bilateral and plurilateral agreements:

Technical regulations are mandatory (i.e. not voluntary) regulations relating e.g. to product characteristics or labelling. **Standards** are corresponding provisions compli-

[56] Reports of the Appellate Body, *Brazil – Retreaded Tyres*, loc. cit., para. 227; *EC – Seal Products*, loc. cit., para. 5.303, 5.306

[57] Along these lines for example Du 2011, 651; Gaines 2001, 745, 773;

[58] See for example Andenas/ Zleptnig 2007, p. 412.

[59] Article 4.2 EU-Korea; Article 3.1 (Chapter 6) EU-Vietnam; Article 4.1 CETA; Article 9.2, (1) KORUS; Article 8.3, (1) TPP. Excluding sanitary and phytosanitary (SPS) measures. The definitions in Annex 1 to the TBT Agreement also apply for the purposes of the respective TBT chapter, Article 4.2, (3) EU-Korea; Article 3.3 (Chapter 6) EU-Vietnam; Article 4.2, (1) CETA; Article 8.1, (1) TPP. By contrast, KORUS does not make reference to Annex 1 of the TBT Agreement.

[60] Article 4.1 EU-Korea; Article 1 (Chapter 6) EU-Vietnam.

[61] Article 4.2, (1) CETA; Article 8.4, (1) TPP.

[62] See WTO, id., p. 15.

[63] See Annex 1 to the TBT Agreement, No. 1 (Technical regulation), No. 2 (Standard) and No. 3 (Conformity assessment procedures). For these different categories, see WTO, *The WTO Agreements Series, Technical Barriers to Trade* (2014), pp. 14 f.

ance with which is not mandatory, i.e. voluntary. **Conformity assessments** are procedures aimed at assessing whether products meet the requirements that apply to them, for example regarding certain technical characteristics.

Transparency and the right to be heard in consultation procedures

The EU-Vietnam, CETA, KORUS and TPP trade agreements oblige the contracting parties to respect the principle of transparency in the formulation, approval and application of technical regulations, standards and conformity assessment procedures;[64] the EU-Korea trade agreement limits the application of the transparency principle to technical regulations.[65]

This also includes the obligation that “economic operators and other interested persons of the other party” are allowed to participate in any formal public consultation process concerning the development of technical regulations, standards and conformity assessment procedures on terms no less favourable than those the party to the agreement accords to its own legal or natural persons.[66] Hence, apart from the economic operators, there are other interested (legal and natural) persons with a right to be heard in the framework of such consultation procedures; the group of persons accordingly entitled to be heard in principle also includes consumers / consumer organisations.

The above-mentioned trade agreements therefore do not automatically grant (legal and natural) persons a right to be heard in the framework of formal public consultation procedures of the other party to the agreement, but make the emergence and scope of such right to be heard contingent on the domestic legislation of the respective party: insofar as the domestic legislation of one party to the agreement grants its own (natural and legal) persons a right to be heard in the framework of such consultation procedures, this must also apply to the (natural and legal) persons of the other party to the agreement, and on terms that are no less favourable. Therefore, this is an opening clause that consumers or their organisations from one party to the agreement can avail themselves of to contribute to the drafting of technical regulations, standards and conformity assessment procedures by another party to the agreement, albeit in accordance with the domestic law of the latter.

Technical regulations

The EU-Korea and EU-Vietnam trade agreements oblige the parties to apply the principle of good regulatory practice in the “best possible” way in the formulation, approval and application of technical regulations.[67] This includes the obligation to use international standards as a basis for technical regulations unless the relevant international standards are inefficient or not suited to attain the “legitimate objectives” pursued by the

[64] Article 7 (Chapter 6) EU-Vietnam; Article 4.6 CETA (this provision, however, does not include the formulation of standards); Article 9.6 KORUS; Article 8.7 TPP.

[65] Article 4.4 EU-Korea.

[66] Article 7 (b) (Chapter 6) EU-Vietnam; Article 4.6, (1) CETA (including conformity assessment procedures); Article 4.4, (2) EU-Korea; Article 9.6, (1) KORUS and Article 8.7, (1) TPP (these standards speak of participation / participate rather than consultation / consult and include not only technical regulations but also standards and conformity assessment procedures).

[67] Article 4.4., (1) EU-Korea; Article 4.1 (Chapter 6) EU-Vietnam. On the significance of good regulatory practice, see WTO, *The WTO Agreements Series, Technical Barriers to Trade* (2014), pp. 30 f.

parties.[68] The relevant provisions do not specify which objectives are considered legitimate, but legitimate objectives specified with regard to technical regulations in the TBT Agreement, which is incorporated in both agreements, include, for example, national security requirements, the prevention of deceptive practices and the protection of human health and safety, animal or plant life or health, and the environment.[69]

Accordingly, regulations for consumer protection, for instance the prevention of deceptive practices or the protection of human health or safety can be subsumed under the term “legitimate objectives.”[70] Where international standards are an insufficiently suitable or efficient basis for technical regulations to protect consumers against such dangers or risks, the parties may deviate from or disregard international standards when drafting technical regulations.

In CETA and TPP, an obligation to this effect follows from Article 2.4 of the TBT Agreement, which is incorporated in CETA and TPP. In addition, CETA contains an obligation for the parties to cooperate in order to ensure that their respective technical regulations are compatible with one another. To this end, a party to the agreement must, at the request of the other party, provide the information used by the former in preparing a technical regulation when the latter intends to draw up a technical regulation that is equivalent or comparable with this technical regulation.[71] It should be pointed out that this is an obligation to cooperate, the purpose of which is to facilitate compatibility of (future) technical regulations of both sides. This is, however, not an obligation to develop technical regulations in accordance with or in line with the technical regulations of the other side.

In a recent WTO dispute between Mexico and the United States about US labelling requirements for tuna, particularly with regard to “dolphin-safe” tuna fishing methods, one of the disputed issues was whether provisions regarding the definition of and certification as “dolphin-safe” in the framework of the “Agreement on the International Dolphin Conservation Program” (AIDCP) constituted an international standard within the meaning of Article 2.4 of the TBT Agreement.

In the final analysis, the Appellate Body denied this because the AIDCP – contrary to the requirements of the TBT Agreement – was not open to the relevant bodies of all WTO members and therefore did not constitute an international standardisation organisation within the meaning of the TBT Agreement.[72] Consequently, the United States were not obliged to base their relevant labelling requirements on the AIDCP definition and certification.

Regarding the question of which purposes are to be considered legitimate under Article 2 of the TBT Agreement, the Appellate Body made the following statement in the same dispute:

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[68] Article 4.4, 1. (b) EU-Korea; Article 4.1 (b) (Chapter 6) EU-Vietnam. On the use of international standards as a basis for technical regulations see Fliess et al. 2010 and Wijkström/McDaniels 2013; in this regard it has been repeatedly criticised that industry is massively involved in the development of international standards and the relevant standards reflect economic interests, cf. for example Bogdandy 2001, p. 637.

[69] See Article 2.2 of the TBT Agreement.

[70] Cheyne 2012, pp. 309, 325 f.

[71] Article 4.4, (1) CETA. Confidential information may be excluded from the exchange of information.

[72] Report of the Appellate Body, *US – Tuna II* (WT/DS381/AB/R), para. 399.

> "...a 'legitimate objective' is an aim or target that is lawful, justifiable, or proper. Furthermore, the use of the words 'inter alia' in Article 2.2 suggests that the provision does not set out a closed list of legitimate objectives, but rather lists several examples of legitimate objectives. We consider that those objectives expressly listed provide a reference point for which other objectives may be considered to be legitimate in the sense of Article 2.2. […] we consider that objectives recognised in the provisions of other covered agreements may provide guidance for, or may inform, the analysis of what might be considered to be a legitimate objective under Article 2.2 of the TBT Agreement."[73]

In another more recent WTO dispute between the USA on one side and Canada and Mexico on the other side over US labelling requirements for meat, the Appellate Body pointed out how the burden of proof is distributed between the conflicting parties in order to provide proof that a technical regulation constitutes an unnecessary trade restriction within the meaning of Article 2.2 of the TBT Agreement:

> "In order to demonstrate that a technical regulation is inconsistent with Article 2.2, the complainant must make a prima facie case by presenting evidence and arguments sufficient to establish that the challenged measure is more trade restrictive than necessary to achieve the contribution it makes to the legitimate objective, taking account of the risks non-fulfilment would create. A complainant may, and in most cases will, also seek to identify a possible alternative measure that is less trade restrictive, makes an equivalent contribution to the relevant objective, and is reasonably available. It is then for the respondent to rebut the complainant's prima facie case by presenting evidence and arguments showing that the challenged measure is not more trade restrictive than necessary to achieve the contribution it makes toward the objective pursued, for example, by demonstrating that the alternative measure identified by the complainant is not, in fact, 'reasonably available', is not less trade restrictive, or does not make an equivalent contribution to the achievement of the relevant legitimate objective."[74]

These "instructions" point out the criteria that have to be fulfilled in order to be able to qualify a technical regulation as an unnecessary obstacle to trade within the meaning of Article 2.2 of the TBT Agreement. The elements specified by the Appellate Body in this regard are more or less identical with those of the necessity test under Article XX of the GATT 1994 (see above, market access for goods, 3.2).

Conformity assessment procedures

Conformity assessment procedures have considerable importance for consumers because they serve to test or inspect whether goods meet the applicable requirements, e.g. in respect of the properties or manufacturing procedures applicable to the goods. The conformity assessment procedures are thus decisive for the admission of goods to trade and therefore whether or not consumers can purchase or use the goods.

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[73] Id., para. 313; confirmed by the report of the Appellate Body, *US – COOL* (WT/DS384/AB/R, WT/DS386/AB/R), para. 370.

[74] Report of the Appellate Body, *US – COOL*, loc. cit., para. 379, referring to the report of the Appellate Body, *US – Tuna II*, loc. cit.. A prima facie case exists where the complainant is able to provide evidence and arguments for their allegation that the respondent infringed a rule which the arbitration body judges to be sufficient to consider the allegation as proven, unless the respondent can invalidate the complainant's reasoning through sufficient counter-evidence and arguments, see the report of the Appellate Body, *Canada – Dairy* (Art. 21.5 – New Zealand and United States II) (WT/DS103/AB/RW2; WT/DS113/AB/RW2), para. 66.

The EU-Korea, EU-Vietnam, KORUS and TPP Agreements acknowledge that a broad range of mechanisms exists to facilitate the acceptance of the results of conformity assessment procedures carried out in the territory of the other party.[75] In this respect, the parties undertake to exchange information on their conformity assessment procedures with the aim of facilitating the mutual recognition of the results of such procedures.[76] In addition, the parties to the EU-Korea and EU-Vietnam undertake not to impose or apply any conformity assessment procedures that restrict trade more than is necessary to ensure that the goods to be imported meet the applicable technical regulations or standards.[77]

Within the framework of CETA, the parties to the agreement have agreed on a protocol on the mutual acceptance of the results of conformity assessment procedures.[78] The TBT chapters of KORUS and TPP contain detailed requirements for the acceptance of conformity assessment bodies and procedures.[79]

Marking and labelling

The EU-Korea and EU-Vietnam Agreements address the marking and labelling of goods in detail. In this respect, the parties undertake to observe Article 2.2 of the TBT Agreement where their technical regulations contain mandatory marking or labelling provisions.[80]

In addition, the two agreements contain certain principles and obligations that apply when a party to the agreement requires mandatory marking or labelling for goods.[81] According to the EU-Korea Agreement, these principles include the endeavour to minimise the requirements for marking or labelling, unless such marking or labelling is “relevant to consumers or users of the product.”[82] The EU-Vietnam Agreement provides that the marking or labelling provisions may only require information which is relevant for consumers or users of the product and/or to indicate the product's conformity with the mandatory technical requirements.[83] Although the wording differs, the basic meaning of the two provisions is identical.

These provisions are based on the understanding that the marking or labelling of a product is intended to enable the consumer to make an appropriate decision on the purchase or use of the product concerned. However, the provisions do not specify which information is “relevant” to consumers in order to make an appropriate decision on the purchase or use of a product. In this regard, the parties to the agreement have some latitude of discretion as to which (minimum) level of information average consumers should have access to. The parties can shape this latitude in line with the general

[75] Article 4.6, 1. EU-Korea; Article 6 (3) (Chapter 6) EU-Vietnam; Article 9.5, (1) KORUS; Article 8.9, (1) TPP. These standards list a number of mechanisms as examples without obliging the parties to apply these mechanisms.

[76] Article 4.6, 1. (a) – (c) EU-Korea, Article 6 (4) (Chapter 6) EU-Vietnam; Article 9.5, (1) KORUS; Article 8.9,(4) TPP.

[77] Article 4.6, 2. (d) EU-Korea, Article 6 (2) (Chapter 6) EU-Vietnam.

[78] Article 4.5 CETA.

[79] Article 9.5 KORUS; Article 8.6 TPP.

[80] Article 4.9, 1. EU-Korea; Article 10 (1) (Chapter 6) EU-Vietnam. Article 2.2 of the TBT Agreement prohibits preparing, adopting or applying technical regulations with a view to or with the effect of creating unnecessary obstacles to international trade.

[81] Article 4.9, 2. EU-Korea; Article 10 (2) (Chapter 6) EU-Vietnam. In contrast to these two agreements, the TBT chapters of CETA, KORUS and TPP do not deal with marking and labelling requirements for goods.

[82] Article 4.9, 2. (a) EU-Korea.

[83] Article 10, 2. (a) (Chapter 6) EU-Vietnam.

principles they pursue in their consumer policy. It should, however, be considered whether future trade agreements should define a “minimum” of information that may be stipulated by marking and labelling provisions for goods.

The TBT Agreement does not contain any specific provisions on the marking or labelling of goods, whether for consumer information or for other reasons. The provisions that are rather applicable in this regard are the provisions of the TBT Agreement on technical regulations and standards as far as these regulate the marking or labelling of goods in *mandatory* or *non-mandatory* form. This can be illustrated by means of two WTO dispute settlements cases, which have already been mentioned (see "Technical regulations" above).

One case concerned the designation of tuna and tuna products as “dolphin-safe” in the United States: the United States requested that only tuna products that met certain requirements regarding the fishing methods for tuna could be designated as “dolphin-safe”;[84] these requirements were considered to constitute technical regulations within the meaning of the TBT Agreement.[85] However, the WTO dispute settlement bodies concluded that these requirements violated the equal treatment requirement under Article 2.1 of the TBT Agreement: The requirements impaired the conditions of competition in the US market for tuna caught by Mexican vessels because such tuna, contrary to tuna caught by US vessels, could not be described as “dolphin-safe.”[86] This impairment of competition was not, however, based on a legitimate regulatory consideration because the requirements for the designation as “dolphin-safe” were only directed at one specific fishing method (used by Mexican vessels) but did not take into account whether other fishing methods (used by US vessels) constituted a significant (mortality) risk for dolphins.[87] In contrast, these requirements were not considered to constitute an unnecessary trade barrier according to Article 2.2 of the TBT Agreement.[88]

The other case concerned the labelling of beef and pork in the United States to provide information about the country of origin of the animals or of the meat derived from them.[89] The relevant provisions established five different labelling categories based on whether the animals or the meat derived from them were exclusively of domestic or (also) foreign origin.[90] These provisions were considered to constitute technical regulations within the meaning of TBT Agreement. The WTO dispute settlement bodies reached the conclusion that these provisions violated the equal treatment provision under Article 2.1 of the TBT Agreement: The provisions resulted in an incentive for retailers to use exclusively domestic animals for the production of meat.[91] There was no legitimate regulatory reason for the disadvantage resulting for animals imported into the United States for the purpose of meat processing: the requirements were designed in such way that it was more inexpensive, without exception, to process domestic live-

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[84] Report of the Appellate Body, *US – Tuna II* (WT/DS381/AB/R), para. 172 ff., 178 ff.

[85] Id., para. 183 ff., 190 ff., 199.

[86] *Id.*, para. 233 ff.,

[87] *Id.*, para.241 ff., 282 ff., 286 ff., 292 ff., 297.

[88] *Id.*, para. 311 ff., 324 ff., 331.

[89] Report of the Appellate Body, *US – COOL* (WT/DS384/AB/R, WT/DS386/AB/R), para. 239 ff.

[90] *Id.*, para. 243 ff.

[91] *Id.*, para. 286 ff., 291 ff.

stock into meat. In addition, the use of foreign animals for meat production led to labelling that gave misleading information to end consumers.[92] Moreover, the extent of the information requirements imposed on meat producers and processors was disproportionate compared to the amount of information ultimately conveyed to the end consumers through the labelling of the meat.[93] By contrast, the infringement of Article 2.2 of the TBT Agreement (unnecessary obstacles to trade) presumed by the Panel was rejected by the Appellate Body.[94]

3.4 SPS measures

The chapters of the EU-Korea, EU-Vietnam, CETA, KORUS and TPP Agreements dealing with sanitary and phytosanitary measures (referred to as “SPS measures” or “SPS chapters” below) concern SPS measures directly or indirectly affecting bilateral trade between the parties to the agreements.[95] In this respect, the parties confirm their rights and obligations under the SPS Agreement.[96]

All measures defined in Annex A to the SPS Agreement of the WTO are considered to constitute SPS measures within the meaning of the SPS chapters of the EU-Korea, EU-Vietnam, CETA and TPP Agreements;[97] the SPS chapter of the KORUS Agreement does not provide a definition of SPS measures. Generally speaking, the purpose of SPS measures is, among others, to protect human life and health from risks posed by pests, diseases, disease-carrying or disease-causing organisms in animals, plants, food and feed. SPS measures consequently serve to protect the life and health of humans and thus of consumers.[98] This purpose of protection is specifically emphasised by the SPS chapters of the EU-Korea, EU-Vietnam, CETA, KORUS and TPP Agreements.[99]

An aspect that is particularly important in the context of SPS measures is the recognition by a party to the agreement that the SPS measures of the other party are equivalent to their own SPS measures. This recognition of equivalence essentially means that the SPS measures of the other party provide the same level of protection as the SPS measures by the recognising party.[100] Such recognition of equivalence is directly relevant to consumers because, for the goods concerned, such as food, it provides access to the market of the party that declares such recognition. As opposed to the EU-Korea

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[92] *Id*., para. 327 ff., 332 ff., 341 ff., 345 ff.

[93] *Id*., para. 347 ff.

[94] *Id*., para. 351 ff., 470 ff.

[95] Article 5.2 EU-Korea; Article 1, (1) (Chapter 7) EU-Vietnam; Article 5.3 CETA; Article 8.1 KORUS; Article 7.3, (1) TPP.

[96] Article 5.4 EU-Korea; Article 4, (1) (Chapter 7) EU-Vietnam; Article 5.4 CETA; Article 8.2 KORUS; Article 7.4, (1) TPP.

[97] Article 5.3 EU-Korea (here, however, only with regard to paragraph 1 of Annex A to the SPS Agreement); Article 3, (2) (Chapter 7) EU-Vietnam; Article 5.1, no. 1 CETA, Article 7.1, (1) TPP. The SPS measures covered by the SPS chapters include those that aim to protect human life or health in the territory of the parties from risks arising from: (a) additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs, and (b) diseases carried by animals, plants or products thereof, or from the entry, establishment or spread of pests. See also WTO, *The WTO Agreements Series, Sanitary and Phytosanitary Measures* (2010), p. 17.

[98] See WTO, *The WTO Agreements Series, Sanitary and Phytosanitary Measures* (2010), p. 9.

[99] Article 5.1, (1) EU-Korea; Article 2 (b) (Chapter 7) EU-Vietnam; Article 5.2, No. 1 CETA; Objectives of chapter 8 KORUS; Article 7.2, a) TPP.

[100] WTO 2010a, p. 11.

and KORUS Agreements[101] the EU-Vietnam, CETA and TPP Agreements contain provisions on the conditions subject to which a party to the agreement can or must recognise the SPS measures of the other party as equivalent to its own SPS measures. Accordingly, recognition of equivalence must be made when the exporting party can objectively prove that one of its SPS measures reaches the level of protection considered appropriate by the importing party.[102]

The SPS Agreement of the WTO confirms the right of WTO members to take SPS measures that are necessary to protect the lives and health of humans, animals or plants,[103] provided that such measures are compatible with the SPS Agreement.[104] This is the case where the SPS measures: (a) are based on scientific principles, (b) are not maintained without sufficient scientific evidence, except as provided for in Article 5.7 of the SPS Agreement, and (c) are only applied to the extent necessary to protect human, animal or plant life or health.[105]

The risk assessment required for the adoption of SPS measures based on scientific principles is regulated in Article 5 of the SPS Agreement. It also contains a provision regarding the level of protection to be achieved by these measures. WTO members may establish the level of protection deemed appropriate by them;[106] this may therefore also be a protection level that defines a zero-tolerance limit for (potential) risks.[107]

Article 5.7 of the SPS Agreement establishes a special provision for such constellations in which the available scientific evidence is insufficient to carry out a comprehensive risk assessment.[108] In such cases, WTO members may temporarily adopt SPS measures on the basis of the available information, but they must then seek additional information that is necessary for a more objective risk assessment and must review the temporarily adopted SPS measures within a reasonable period of time. Article 5.7 of the SPS Agreement reflects the precautionary principle.[109] However, as Article 5.7 of the SPS Agreement provides for an exception to the principle of scientific proof, the significance the precautionary principle takes on in the SPS Agreement differs from its significance as enshrined in the legal order of the EU. This can (but does not necessarily have to) entail that risks to the life and health of humans, animals and plants are being assessed differently under the SPS Agreement than in the framework of the EU legal order. This became evident, for example, in the WTO dispute between the EU on one

[101] The EU-Korea and KORUS Agreements do not contain any provisions on the recognition of equivalence, but Article 4 of the SPS Agreement contains a provision to this effect.

[102] Article 10 (2) (Chapter 7) EU-Vietnam; Article 5.6, (1) CETA (Annex 5-D to CETA lays down principles and guidelines for a recognition of equivalence); Article 7.8, 6 (a) TPP ((b) of this provision states, as an alternative possibility, the objective demonstration that the exporting party's SPS measure has the same effect in achieving the respective objective of protection as the importing party's SPS measure).

[103] This is the only permissible legal interest for taking SPS measures, see WTO 2010a, p. 15.

[104] Article 2.1 SPS Agreement.

[105] Article 2.2 SPS Agreement.

[106] No. 5 of the Annex to the SPS Agreement.

[107] Report of the Appellate Body, *Australia – Salmon* (WT/DS18/AB/R), para. 125.

[108] For more details see Van den Bossche/Zdouc 2013, pp. 907, 926 ff.

[109] Report of the Appellate Body, *US/Canada – Continued Suspension* (WT/DS320/AB/R, WT/DS321/AB/R), para. 680. However, Art. 5.7 of the SPS Agreement is not identical with the precautionary principle as recognised in European law; on the differences cf. for example Cheyne 2006, in particular pp.274 ff..

side and Canada and the USA on the other side regarding the import of hormone-treated beef into the EU.[110]

Apart from that, the scientific evidence required on principle by the SPS Agreement regarding the necessity of SPS measures does not prevent WTO members from establishing further requirements of the goods concerned, which are not aimed at protecting the life and health of humans, animals and plants, but the objective of which is, for example, the application of sustainable or socially acceptable methods of production. Such requirements should not to be assessed under the SPS Agreement, but under other WTO agreements, for example the TBT Agreement.[111]

3.5 Trade in services, establishment/investment and electronic commerce

The EU-Korea and EU-Vietnam Agreements contain a uniform chapter on cross-border trade in services, establishment/investment and electronic commerce (hereinafter referred to as services chapter), whereas CETA, KORUS and TPP deal with these issues in separate chapters.

The EU-Korea and EU-Vietnam Agreements state in an introductory provision that trade in services and establishment/investment should be liberalised and cooperation on electronic commerce should be promoted.[112] CETA, KORUS and TPP do not contain any provision stating such an objective.

Regulation of the pursuit of legitimate public objectives

The EU-Korea and EU-Vietnam Agreements maintain at the outset that each party to the agreement retains its right to adopt provisions or measures to pursue legitimate public objectives.[113] In this respect, the EU-Vietnam Agreement mentions, among others, the protection of the environment, public health and the integrity and stability of the financial system. The protection of consumers from certain dangers and risks is, without doubt, a legitimate public objective the pursuit of which justifies taking the necessary measures.[114] Both agreements, however, contain the provison that the parties should exercise their right of regulation in accordance with the respective services chapter.[115] By contrast, CETA does not provide for a comparable requirement. However, the joint interpretative instrument on the CETA confirms that the parties may continue to exercise their right to regulate in order to pursue legitimate public objectives, including consumer protection.[116] KORUS and TPP mention the right of the parties to

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[110] *EC – Hormones* (WT/DS26, WT/DS48).

[111] See WTO, *The WTO Agreements Series, Technical Barriers to Trade* (2014), pp. 12 f.

[112] Article 7.1, (1) EU-Korea; Article 1, (1) (Chapter 8, section 1) EU-Vietnam.

[113] Article 7.1,(4) EU-Korea; Article 1, (2) (Chapter 8, section 1) EU-Vietnam.

[114] The general exceptions provisions of the TiS chapters of both agreements also support this interpretation. Consumer protection is generally considered an overriding regulatory objective in the field of trade in services, see for example Nordås 2014, pp. 47, 48; see also WTO 2011, pp. 1-2.

[115] This proviso is partially viewed critically because it does not take sufficient account of the necessary balance between regulatory flexibility and legal certainty; cf. on this balance for example Djordjevic 2002, pp. 305 f; Krajewski 2014,pp. 88 ff.

[116] "*Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States*", retrievable on the website of the European Commission: http://www.consilium.europa.eu/en/press/press-releases/2016/10/28-eu-canada-trade-agreement/.

adopt regulations to pursue public objectives in the context of a “should” regulation according to which (certain) measures to regulate trade in services do not constitute unnecessary barriers.[117]

In its preamble, the GATS recognises the right of WTO members to regulate trade in services in order to pursue national public objectives; these objectives undoubtedly also include consumer protection.[118] In addition, Article VI of the GATS lays down specific rules for the domestic regulation of trade in services by WTO members. These rules fall into two categories. Firstly, there are rules concerning the regulation of service sectors in which the WTO members have undertaken specific commitments regarding market access and national treatment. Secondly, there are rules concerning the regulation of trade in services irrespective of any specific commitments of WTO members.[119] The rules laid down in Article VI of the GATS regarding regulatory measures of WTO members do not exceed the minimum standard that results from rule-of-law or “due process” requirements. In other words, these are rules for good regulation practice,[120] as are customary at least in the industrial countries and usually derive from their constitutional principles. Finally, Article VII of the GATS imposes specific requirements on WTO members regarding the recognition of training, professional experience, authorisations, certificates or requirements obtained from, fulfilled in or issued by a third state. This standard is relevant to consumers given that it may affect or safeguard the quality of services provided.

The above statements regarding the provisions of the GATS in principle also apply to Article VI.4 of the GATS, which sets out requirements for the negotiations of WTO members on new demands on certain regulatory measures in the field of trade in services;[121] this relates to qualification requirements and procedures, licensing requirements and procedures as well as technical standards. Until such time as the WTO members have reached an agreement in these negotiations, a standstill obligation applies to new regulatory measures in the service sectors where WTO members undertook specific commitments.[122] However, this standstill obligation does not constitute a “sharp sword” because the introduction of new regulatory measures would only violate this obligation where other WTO members could reasonably trust in no new regulatory measures being taken in the sector concerned;[123] such situation of trust is unlikely to apply on a regular basis. The negotiations of the WTO members led to a draft text in 2011, the individual parts of which are, however, disputed between the WTO members.[124] The so-called necessity test is particularly disputed,[125] as it is rejected by many

[117] Article 12.7, (2) KORUS; Article 10.8, (2) TPP.

[118] Pitschas 2003, p. 540, para. 127; WTO 2011b, para. 3.

[119] See Lim/De Meester 2014, pp. 1, 9.

[120] See Lim/De Meester, id.; Mattoo/Sauvé 2003, pp. 1, 3.

[121] See the overview in WTO, loc. cit., para. 18.

[122] Trachtman 2003, pp. 57, 67.

[123] See Pitschas, loc. cit., p. 543, para. 138.

[124] See WTO, loc. cit., para. 19 ff.

[125] See WTO 2012, pp. 212 f.; Delimatsis 2014, pp. 95 ff.

WTO members. No progress has been made in the negotiations since then. Most recently, some WTO members, including the EU, submitted a proposal dealing solely with authorisations for service providers.[126]

Exception for services in the exercise of governmental authority

All agreements – EU-Korea, EU-Vietnam, CETA, KORUS and TPP – exclude services from the scope of application of the respective Services chapter that are supplied in the exercise of governmental power.[127] For the purpose of the agreement, a service is associated with the exercise of sovereign power where it is supplied neither on a commercial basis nor in competition with one or more service suppliers.[128] This exception applies irrespective of the sector involved, which means that it is applicable to any service sector falling under the relevant Services chapter. A regular presumption according to which “public” services (of general public interest) are generally supplied in the exercise of sovereign power cannot be established.[129] As shown by the similar example in the GATS, the scope of this exceptions provision is controversial.[130]

Audio-visual services and air transport services are exempt from the scope of application of the services chapters of the EU-Korea, EU-Vietnam and CETA Agreements, irrespective of whether or not they are supplied in the exercise of sovereign power;[131] the services chapters von KORUS and TPP merely exclude air transport services from their respective scope of application.[132] The GATS equally excludes only the sector of air transport services from its substantive scope of application.[133]

Regulation of financial services

The services chapters of the EU-Korea and EU-Vietnam Agreements establish a regulatory framework that contains, on the one hand, generally applicable provisions and, on the other hand, special provisions for specific service sectors; these also include provisions on the regulation of financial services.[134] CETA, KORUS and TPP contain a separate chapter on financial services, including applicable regulatory principles.[135]

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[126] Working Party on Domestic Regulation, Communication from Australia et al., Domestic Regulation – Administration of Measures (27 September 2016, JOB/SERV/239).

[127] Article 7.4, 3 (b) EU-Korea; Article 1, 4 (j) (Chapter 8, section 1) EU-Vietnam; Article 9.2, (2a) CETA; Article 12.1,(6) KORUS; Article 10.2, c) TPP.

[128] Article 7.4, 3 (c) EU-Korea; Article 1, 4 (k) (Chapter 8, section 1) EU-Vietnam; Article 9.1 CETA; Article 12.1,(6) KORUS; Article 10.1 TPP. These are cumulative conditions.

[129] Cf. Zacharias 2008, Article I GATS, para. 60.

[130] See Adlung 2006, pp. 49, 59 ff.; Krajewski 2003, pp. 68 ff.; Ohler 2007, p. 388 with further references.

[131] Article 7.4, 1 (a) and (c) EU-Korea (the standard additionally excludes national maritime cabotage in (b)); Article 1, (a) and (c) (Chapter 8, section 3) EU-Vietnam (the standard additionally excludes national maritime cabotage in (b); Article 9.2, 2 (b) and (e) CETA.

[132] Article 12.1, 4 (c) KORUS; Article 10.2,(5) TPP.

[133] See no. 2 of the Annex on Air Transport Services to the GATS.

[134] Article 7.37 ff. EU-Korea; Chapter 8, section 5, subsection 6 EU-Vietnam.

[135] Chapter 13 CETA; Chapter 13 KORUS; Chapter 11 TPP.

The subsections of the services chapters in the EU-Korea and EU-Vietnam Agreements on the regulation of financial services apply both to insurance services and insurance-related services as well as banking and other financial services;[136] the same applies to the CETA, KORUS and TPP chapters on financial services.[137] The subsections on the regulation of financial services in the EU-Korea and EU-Vietnam Agreements as well as the chapters on financial services in the CETA, KORUS and TPP Agreements contain a prudential carve-out clause.[138] This provision authorises the parties to adopt two types of measures for prudential reasons[139]: (a) measures for the protection of investors, depositors, policyholders, or persons to whom a financial service supplier owes a fiduciary duty; and (b) measures ensuring the integrity and stability of the respective party's financial system. The prudential carve-out provision in the CETA chapter on financial services furthermore includes a third category of measures, namely measures for the maintenance of the safety, soundness, integrity, or financial responsibility of a financial institution or financial service supplier.[140]

These measures operate at different levels: measures for the protection of investors etc. or, in the case of CETA, for the maintenance of the safety etc. of financial service suppliers usually apply to individual financial service suppliers in order to protect their clients against the illiquidity or insolvency of this financial service supplier or to prevent the financial service supplier from going bankrupt (micro level). Measures to ensure the integrity etc. of the financial system generally relate to a whole sector of the financial services industry in order to prevent a collapse or fundamental crisis in this sector that could jeopardise the financial system in its entirety (macro level).[141] Measures at the micro level are intended to protect consumers of financial services from the loss of their savings, deposits or investments or a substantial reduction of their value.[142] Measures at the macro level do not pursue this specific objective of protection, but they eventually produce the same result (provided they are effective).

Moreover, according to the subsections on the regulation of financial services in the EU-Korea and EU-Vietnam Agreements, the parties should ensure that internationally agreed standards for regulation and supervision in the financial services sector and for the fight against tax evasion and avoidance are implemented and applied, "to the extent

[136] Article 7.37, 2 (a) and (b) EU-Korea; Article 7, 2 (a) (Chapter 8, section 5) EU-Vietnam.

[137] Article 13.1 CETA; Article 13.20 KORUS; Article 11.1 TPP.

[138] Article 7.38 EU-Korea; Article 8 (Chapter 8, section 5) EU-Vietnam; Article 13.16 CETA; Article 13.10, (1) KORUS; Article 11.11, (1) TPP. In CETA, the prudential carve-out is supplemented by an understanding on its application (Annex 13-B to CETA). It specifies certain principles that should guide the parties to the agreement in the application of the prudential carve-out provision.

[139] In the EU-Korea Agreement it is understood that the term "prudential reasons" may include the maintenance of the safety, soundness, integrity or financial responsibility of individual financial service suppliers, footnote 40 to Article 7.38 of the EU-Korea Agreement; the definition of "prudential reasons" is quite similar in Article 13.10, (1) KORUS and Article 11.11, footnote 10 TPP (the latter adds the safety and financial and operational integrity of payment and clearing systems as a prudential reason).

[140] Article 13.16.1 (b) CETA. This category corresponds to the definition of prudential grounds in the EU-Korea, KORUS and TPP agreements, see footnote above.

[141] More details on the regulation of financial markets from different perspectives Grote/Marauhn 2006.

[142] On the protection of consumers based on the regulation of financial services see Claessens 2003, pp. 129, 135 f.

practicable", in their territory.[143] It is therefore a weakened form of the obligation, which is not found in the CETA, KORUS and TPP chapters on financial services.

In addition to the prudential carve-out provision, the subsections on the regulation of financial services in the Services chapters of the EU-Korea and EU-Vietnam Agreements and the CETA chapter on financial services contain a provision on data processing by financial service suppliers of the other party established in a party's territory.[144] According to this provision, financial service suppliers should be permitted to transfer information in electronic or other form into and out of their territory for data processing if such processing is required in the "ordinary course of business of the respective financial service supplier." In this respect, each party is obliged to take or maintain adequate safeguards to protect privacy and personal information.[145] The CETA chapter on financial services further specifies this obligation, stating that the data transfer should be in accordance with the legislation governing the protection of personal information.[146]

Accordingly, data processing and transmission by financial service providers of another party may not undermine the privacy of clients, i.e. consumers; the parties are obliged to take appropriate measures to prevent this and to apply and ensure compliance with the protection standards applicable under their domestic law. KORUS and TPP, however, do not contain any corresponding provision regarding the protection of personal data when it comes to financial service providers transferring data.

The above-mentioned prudential carve-out, which is contained in all Services chapters and financial services chapters of the discussed trade agreements, is based on a provision largely to the same effect in the (first) Annex to the GATS on financial services.[147] The corresponding GATS provision, like the above-mentioned prudential carve-out provisions, allows WTO members to take measures for prudential reasons. This includes measures to protect investors, depositors, policyholders, or persons to whom a financial service supplier owes a fiduciary duty, or to ensure the integrity and stability of the financial system; the list of fundamentally permissible measures is not exhaustive.[148]

Measures by WTO members based on this carve-out provision may be taken irrespective of all other obligations under the GATS.[149] However, the provision requires that such measures not be used to circumvent obligations or commitments of a WTO member under the GATS. This requirement is to be understood to reflect the principle of pro-

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[143] Article 7.24 EU-Korea; Article 8,(4) (Chapter 8, section 5) EU-Vietnam. The regulations mention some examples of internationally agreed standards, such as the principles for effective banking supervision by the Basel Committee on Banking Supervision; see also Claessens 2003, pp. 134 f.

[144] Article 7.43 EU-Korea; Article 11 (Chapter 8, section 5) EU-Vietnam; Article 13.15 CETA (this provision also covers financial service suppliers not established in the territory of a party).

[145] Article 7.43, (b) EU-Korea; Article 11 (Chapter 8, section 5) EU-Vietnam; Article 13.15, (2) CETA.

[146] Article 13.15, (2) CETA.

[147] The Annexes to the GATS form an integral part of the GATS (Article XXIX GATS) and hence have the same legal relevance and status as the GATS.

[148] See Pitschas 2003, p. 553, para. 171; WTO2010b, para. 29. See also the Report of the Appellate Body, *Argentina – Financial Services* (WT/DS453/AB/R), para. 6.259 f.

[149] WTO 2010b, para. 28. See also the Report of the Appellate Body, *Argentina – Financial Services*, cit., para. 6.254 f.

hibiting abuse of rights – comparable to the second examination stage within the framework of the general exceptions of Article XIV of the GATS (see in more detail below).[150] Consequently, prudential measures of the WTO members may, however, contravene the provisions of the GATS, but such contravention may not be the reason for the measure in question; it may in fact only be motivated by genuinely prudential reasons.[151]

Electronic commerce

The services chapters of the EU-Korea and EU-Vietnam Agreements each contain a separate section on electronic commerce; CETA, KORUS and TPP each contain a separate chapter on this topic. The material scope of application of these chapters has not been explicitly defined in each of the agreements: EU-Korea and EU-Vietnam contain no definition but refer to the increase of trade opportunities provided by electronic commerce,[152] whereas CETA defines electronic commerce as “commerce conducted through telecommunications, alone or in conjunction with other information and communication technologies.”[153] KORUS and TPP, however reflect a broader understanding of electronic commerce as they also make reference to digital products that are defined almost identically by the two agreements: “A computer programme, text, video, image, sound recording or other product that is digitally encoded, produced for commercial sale or distribution, and that can be transmitted electronically.”[154]

The relevant section of the EU-Korea Agreement sets forth the agreement of the parties that the development of electronic commerce “must be fully compatible with the international standards of data protection” in order to ensure the confidence of users of electronic commerce.[155] The latter include consumers. However, the provision does not specify which international data protection standards it relates to. The above-mentioned chapters of CETA and TPP go further than the relevant section of the EU-Korea Agreement: The CETA and TPP chapters require the parties to adopt or maintain laws, regulations or administrative measures for the protection of personal information of users engaged in electronic commerce; when doing so, they must take into due consideration international standards of data protection of relevant international organisations of which they are a member.[156] Here, too, the international data protection standards coming into question are not explicitly mentioned. The EU-Vietnam and KORUS Agreements do not contain any provision on the protection of personal information comparable to the EU-Korea, CETA and TPP Agreements.[157]

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[150] WTO 2010b, para. 30 with further references. Dissenting: Dietrich/Finke/Tietje 2010, p. 20.

[151] WTO 2010b, loc. cit., para. 30 f.

[152] Article 7.48, (1) EU-Korea; Article 1 (Chapter 8, section 6) EU-Vietnam.

[153] Article 16.1 CETA.

[154] Article 14.1 TPP; Article 15.9 KORUS.

[155] Article 7.48, (2) EU-Korea. In a recent speech to the European Parliament on e-commerce, EU Trade Commissioner Malmström emphasised that respect for privacy and the protection of personal data are not on the negotiating table when trade deals are made, Trade in a digital world, 17 November 2016, p. 2; retrievable on the website of the European Commission: http://trade.ec.europa.eu/doclib/press/index.cfm?id=1580.

[156] Article 16.4 CETA; Article 14.8 TPP (This provision only makes general reference to the principles and guidelines of relevant international bodies, irrespective of whether the parties are members of these bodies as parties).

[157] A first overview is provided by Ahmed/Chander 2015, pp. 6 f.

In the respective sections on electronic commerce, the parties to the EU-Korea, EU-Vietnam, CETA and TPP Agreements moreover undertake to maintain a dialogue on the regulatory issues raised by electronic commerce and to exchange information and share experiences in this regard, in fact also on “the protection of consumers in the sphere of electronic commerce.”[158] Consumer protection is thus explicitly recognised as a regulatory matter having to be dealt with in the context of electronic commerce.[159] However, this only includes an obligation to engage in dialogue or exchange, but not to impose specific measures ensuring consumer protection.[160] This dialogue or exchange should also include an exchange of information on the respective national regulations and their implementation by the parties.[161]

The chapters on electronic commerce in the KORUS and TPP Agreements each devote one provision to consumer protection. The parties recognise the importance of maintaining and adopting transparent and effective measures to protect consumers from fraudulent and deceptive commercial practices when they engage in electronic commerce.[162] The parties further recognise the importance of cooperation between their respective national consumer protection agencies on activities related to electronic commerce in order to enhance consumer welfare.[163] Under KORUS, such cooperation between the national agencies for the enforcement of consumer protection should include cases of mutual concern in the enforcement of laws against fraudulent and deceptive commercial practices in electronic commerce.[164] The parties to the TPP undertake to maintain or adopt consumer protection laws to proscribe fraudulent and deceptive commercial activities that cause (potential) harm to consumers engaged in online commercial activities.[165]

The GATS contains no specific provision on electronic commerce and hence also not on the considerable matter of consumer protection in this sphere. Since the most recent (Tenth) WTO Ministerial Conference in Nairobi, the WTO members have begun seriously discussing specific rules on electronic commerce in the framework of the Doha Round;[166] these discussions are, however, still in their initial stages.

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[158] Article 7.49, 1 (d) EU-Korea; Article 3, (1) (Chapter 8, section 6) EU-Vietnam; Article 16.6, 1 (d) CETA (this standard not only makes reference to the protection of consumers but also to the protection of personal information and in this regard refers to protection from fraudulent and deceptive commercial practices in the sphere of electronic commerce); Article 14.15, (b) (ii) TPP.

[159] On the regulation of electronic commerce, including the protection of consumers, see Primo Braga 2008, pp. 459 ff.

[160] However, an obligation to this effect is contained in a number of other trade agreements, see Herman, 2010, pp. 12-13, 16.

[161] Article 7.49,(3) EU-Korea; Article 3,(3) (Chapter 8, section 6) EU-Vietnam; Article 16.6, (2) CETA (Article 16.6,(3) CETA reflects the recognition of the global nature of electronic commerce by the parties and their affirmation of the importance of actively participating in multilateral fora to promote the development of electronic commerce); Article 14.15, b) TPP.

[162] Article 15.5, (1) KORUS; Article 14.7, (1) TPP.

[163] Article 15.5, (2) KORUS; Article 14.7,(3) TPP.

[164] Article 15.5,(3) KORUS.

[165] Article 14.7, (2) TPP.

[166] See the overview of the work of the WTO members on electronic commerce on the website of the WTO: https://www.wto.org/english/tratop_e/ecom_e/ecom_e.htm.

General exceptions provision

The Services chapters of the EU-Korea and EU-Vietnam Agreements contain a general exceptions provision modelled on Article XIV of the GATS (without making explicit reference, however).[167] CETA contains an identical general exceptions provision for all sectors of trade in services in its separate chapter on exceptions (also without explicit reference to Article XIV of the GATS).[168] KORUS incorporates Article XIV of the GATS in its separate chapter on exceptions provisions, making reference to trade in services and electronic commerce, with the exception of financial services; this equally applies to the separate chapter on exceptions provisions in the TPP, which, however, only partially incorporates Article XIV of the GATS.[169] The general exceptions provisions of the agreements conclude by stating a series of legal interests for whose protection the parties may take measures, even if these are not in accordance with the obligations of the parties under the respective Services chapters. However, these measures, which are permissible in principle, may not be applied in such way as to discriminate between the parties in an arbitrary or unjustified manner where like provisions prevail, or to restrict trade in services in disguised form.

The legally protectable interests within the meaning of these provisions also include consumer protection. Firstly, measures that are necessary to protect human, animal or plant life or health are permissible.[170] Secondly, measures that are necessary to secure compliance with laws or other regulations that are not inconsistent with the Services chapters, including those relating to “the prevention of deceptive and fraudulent practices or to deal with the effects of a default on contracts” and “the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts” are permissible.[171]

Article XIV of the GATS, which is either implied or expressly referred to in the above trade agreements, is the counterpart of Article XX of the GATT 1994, establishing a general exceptions provision for the purposes of the GATS (see above, market access for goods, 3.2).[172] Therefore, the details set out there apply correspondingly to Article XIV of the GATS. It sets out exceptions justifying that WTO members act inconsistently with their obligations under the GATS, provided that the conditions set out therein are satisfied.[173] As under Article XX of the GATT 1994, these conditions apply on a two-tier

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[167] Article 7.50 EU-Korea; Article 1 (Chapter 8, section 7) EU-Vietnam. Article XIV of the GATS is the counterpart of Article XX of the GATT 1994 on trade in goods; on Article XIV of the GATS see Cottier/Delimatsis/Diebold 2008, pp. 291 ff.

[168] Article 28.3, (2) CETA.

[169] Article 23.1, (2) KORUS; Article 29.1, (2) TPP. The KORUS and TPP chapters on financial services contain their own exceptions provision which, however, has a narrower substantive scope of application than the general exceptions provision, Article 13.10,(4) KORUS and Article 11.11,(4) TPP.

[170] Article 7.50, b) EU-Korea; Article 1, 1 (b) (Chapter 8, section 7) EU-Vietnam; Article 28.3, (2), No. 2 CETA. In KORUS and TPP, this follows from the (partial) incorporation of Article XIV of the GATS.

[171] Article 7.50, e) EU-Korea; Article 1, 1(e) (Chapter 8, section 7) EU-Vietnam; Article 28.3, (2), No. 3 CETA. In KORUS and TPP, this follows from the (partial) incorporation of Article XIV of the GATS. Regarding the prevention of fraudulent and deceptive practices under Article XIV GATS, Cottier/Delimatsis/Diebold2008, pp. 291, 309, state: “Under Article XIV lit c (i) one can reasonably include most national laws and regulations which aim at the protection of consumers from fraud or deceptive practices that service suppliers may use to attract consumers.” However, the literature criticises the fact that Article XIV of the GATS does not contain a provision on consumer protection in a broad sense, Drake/Nicolaidis 2000, pp. 399, 428; Krajewski 2003, p. 160.

[172] Report of the Appellate Body, *US – Gambling* (WT/DS285/AB/R), para. 291.

[173] *Id.*

basis.[174] Firstly, it is necessary to examine whether the measure in question (inconsistent with the GATS) serves the protection of one of the protected interests (finally) mentioned therein; some of the protected interests stated in the standard require that the measures taken to protect or prosecute them are necessary. This applies, for instance, to measures for the protection of human life and health and for compliance with GATS-conforming national laws and regulations intended, for example, to prevent deceptive and fraudulent practices or protect personal rights when processing and transferring personal data. The determination of necessity required to this respect is essentially identical to the necessity test in the context of Article XX of the GATT 1994.[175] If the measure in question satisfies the requirements of this first tier of examination, the next step, as under Article XX of the GATT 1994, is to examine whether the prohibition of abuse of law set out in the introductory paragraph of Article XIV of the GATS has been satisfied.[176] As mentioned above in section 3.2 with regard to Article XX, the interpretation of the general exceptions in the framework of WTO dispute settlement is clearly criticised in some of the academic literature.

3.6 Trade and sustainable development/trade and the environment

The chapters on trade and sustainable development in the EU-Korea, EU-Vietnam and CETA Agreements, respectively, reaffirm the parties' commitment to promote international trade in such a way as to contribute to the objective of sustainable development.[177] They recognise that economic development, social development and environmental protection are mutually reinforcing components of sustainable development.[178]

The emphasis on environmental protection is of particular interest for consumers in this context, as it can firstly contribute to more environmentally conscious or environmentally friendly production of the goods and services demanded and consumed, and secondly preserve and improve the natural living conditions of consumers. CETA, KORUS and TPP contain separate chapters on trade and the environment. However, the commitments contained in these chapters are often rather weak.[179] Consequently, there are statements reflecting doubts as to the effectiveness of such chapters with respect to the improvement of environmental protection and the situation of workers.[180]

High levels of protection for the environment and for workers

The chapters on trade and sustainable development or, respectively, on trade and environment in the EU-Korea, EU-Vietnam, CETA, KORUS and TPP Agreements recognise the parties' right to establish their own levels of environmental and labour protection, and to adopt or modify accordingly its relevant laws and policies.[181] The parties seek to ensure that their relevant laws and policies provide for high levels of protection

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[174] *Id*., para. 292.

[175] *Id*., para. 305 ff.

[176] *Id*., para. 339 (referring to the report of the Appellate Body, *US – Gasoline*, see above, 3.2, Market access for goods)

[177] Article 13.1., (1) EU-Korea, Article 1, (1) (Chapter 15) EU-Vietnam, Article 22.1, (1) CETA.

[178] Article 13.1, (2) EU-Korea; Article 1, (2) (Chapter 15) EU-Vietnam, Article 22.1, (1) CETA.

[179] Cf. for an overview Jinnah/Morgera 2013.

[180] Cf. For example Marx/ Lein/Brando 2016.

[181] Article 13.3 EU-Korea; Article 2, (1) (Chapter 15) EU-Vietnam; Article 24.3 CETA (re: environmental protection); Article 20.1 KORUS (re: environmental protection); Article 20.3, (2) TPP (re: environmental protection).

in these respects.[182] The parties undertake to implement their employment and environmental laws effectively, regardless of the effects on trade or investment.[183] The parties further undertake not to derogate from or waive their labour and environmental regulations in order to encourage mutual trade and investment.[184] This reaffirmation under international law of the national validity, application and effective enforcement of domestic laws of the parties on labour and environmental protection is significant for consumers because it is intended to provide protection from the attempt of the parties to disregard their laws in this regard in order to gain advantages in mutual trade and investment.

Eco-friendly and fair trade

In addition, the parties to the EU-Korea, EU-Vietnam, CETA and TPP agreements undertake to make efforts to facilitate and promote trade in environmental goods and services, as well as foreign direct investment in this respect.[185] They will also promote trade in goods that are marketed through trade schemes such as fair or ethical trade.[186] This is significant for consumers who are interested in purchasing or using goods that are produced and sold with a view to preserving the natural environment and in consideration of the living and working conditions of the people involved in the production and supply chains in question.[187]

Consultation / participation of the private sector / the public

In the EU-Korea Agreement, the parties moreover agreed to inform and consult “non-state actors including the private sector” in a timely and appropriate manner about all measures they develop, introduce and implement for the protection of the environment and labour conditions that affect trade between the parties.[188] The term “non-state actors” also includes consumers and their organisations, which are accordingly entitled to be informed about and consulted on the development, introduction and elaboration of such measures in a timely and appropriate way. A similar, but weakened, obligation is laid down in the EU-Vietnam Agreement, which stipulates that interested persons be given the opportunity, in accordance with the domestic laws, to provide their views on the development, introduction and implementation of such measures.[189] The parties to the CETA undertake to encourage public debate with and among non-state actors as

[182] Article 13.3 EU-Korea; Article 2, (2) (Chapter 15) EU-Vietnam; Article 24.3 CETA (re: environmental protection); Article 20.1 KORUS (re: environmental protection); Article 20.3,(3) TPP (re: environmental protection).

[183] Article 13.7, (1) EU-Korea; Article 10,(3) (Chapter 15) EU-Vietnam; Article 24.5,(3) CETA (re: environmental protection); Article 20.3, (1a) KORUS (re: environmental protection); Article 20.3,(4) TPP (re: environmental protection).

[184] Article 13.7, (2) EU-Korea; Article 10, (2) (Chapter 15) EU-Vietnam; Article 24.5, (2) CETA (re: environmental protection); Article 20.3, (2) KORUS (re: environmental protection); Article 20.3,(6) TPP (re: environmental protection).

[185] Article 13.6, (2) EU-Korea; Article 9, b) (Chapter 15) EU-Vietnam; Article 24.9, (1) CETA; Article 20.18, (2) TPP.

[186] Article 13.6, (2), sentence 2 EU-Korea; Article 9, d) (Chapter 15) EU-Vietnam; Article 22.3, (2), No. 1 CETA.

[187] See Fliess et al. 2007.

[188] Article 13.9 EU-Korea.

[189] Article 12 (Chapter 15) EU-Vietnam.

regards the development and definition of policies that may lead to the adoption of environmental laws,[190] and to give due consideration to submissions from non-state actors on matters related to trade and the environment.[191]

The parties to KORUS and TPP undertake to grant interested persons the right to request the parties' competent authorities to investigate violations of its environmental laws; the competent authorities must give such requests due consideration in accordance with its domestic laws.[192] The parties moreover undertake to receive written submissions from persons of the other party (KORUS) / of its own nationals (TPP) in respect of the implementation of the chapter on environmental protection and to respond thereto in accordance with domestic procedures.[193]

3.7 Institutional provisions

The chapters of the EU-Korea, EU-Vietnam, CETA, KORUS and TPP Agreements dealt with above contain institutional provisions that stipulate the establishment of committees and other bodies that are responsible for monitoring and supervising the implementation of the respective chapters by the parties. Opportunities for involvement of consumer organisations arise mainly in the following areas:

- **Technical barriers to trade**: The EU-Korea Agreement stipulates the appointment of TBT co-ordinators by both parties, whose tasks include the establishment of working groups, which may include or consult with non-governmental experts and stakeholders as mutually agreed by the parties;[194] the latter also include consumers and their organisations. In addition, the coordinators should exchange information on developments in "non-governmental, regional and multilateral fora related to standards, technical regulations and conformity assessment procedures,"[195] such non-governmental fora could in fact also include consumers and their organisations. The EU-Vietnam Agreement provides for the designation of a TBT contact point by both parties, however without participation of the non-governmental stakeholders.[196] Equally, the TBT committee to be established under CETA has no mandate to involve non-governmental stakeholders.[197] The TBT committee under the KORUS Agreement may establish (sub) working groups, which may, upon the consent of the Committee, include or consult with non-governmental stakeholders.[198] The TBT chapter of the TPP provides for the designation of a TBT contact point by each party to the agreement that will consult and, if appropriate, coordinate with interested persons in its territory on relevant matters pertaining to the TBT chapter.[199]

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[190] Article 24.7, (1) CETA.

[191] Article 24.7,(3) CETA.

[192] Article 20.4, (1) KORUS; Article 20.7, (2) TPP.

[193] Article 20.7, 2 (b) KORUS; Article 20.9, (1) TPP.

[194] Article 4.10, 2 (d) EU-Korea.

[195] Article 4.10, 2 (e) EU-Korea.

[196] Article 13 (Chapter 6) EU-Vietnam.

[197] Article 4.7 CETA.

[198] Article 9.8,5 (a) KORUS.

[199] Article 8.12, 3 (c) TPP.

- **Trade and sustainable development / trade and environment**: The EU-Korea, EU-Vietnam and CETA Agreements stipulate that each party is to appoint a national advisory group that is to support the implementation of the chapter on trade and sustainable development in an advisory capacity.[200] The national advisory groups are to include “independent relevant civil society organisations,”[201] this also includes consumer organisations. The representatives of the national advisory groups of each party meet at least once a year in a civil society forum to conduct a dialogue encompassing sustainable development aspects of trade relations between the parties.[202] The civil society forum can draw up policy statements and present them to the parties.[203] Under the EU-Vietnam Agreement, the forum may only present a report on its meeting.[204] The KORUS Agreement provides for the establishment of an environmental affairs council, which is obliged to promote public participation in its work, including by engaging in a dialogue with the public on environmental issues (of interest to the public),[205] whereby the term “public participation” also includes participation by consumers and their organisations. Each session of the council is to include a meeting with the public to discuss matters related to the implementation of the chapter on trade and the environment.[206] Moreover, the council is to seek appropriate opportunities for the public to participate in the development and implementation of cooperative environmental activities.[207] The TPP obliges the parties to make use of existing or establish new consultative mechanisms, for example national advisory committees, to seek views on matters related to the implementation of the chapter on trade and the environment.[208]

3.8 Summary

Similarities and differences

The above study shows that the analysed chapters of the trade agreements in question are very similar in terms of consumer-related provisions, regardless of differences in detail. Significant differences exist only when it comes to electronic commerce as well as trade and sustainable development / trade and environment. The reasons for the broad concurrence on one hand and the differences on the other hand are identical: the WTO Agreements. The chapters of the trade agreements that draw upon existing WTO agreements, such as the chapters on TBT and SPS measures, the regulation of financial services for prudential reasons and the general exceptions for trade in goods and services display a very considerable common denominator. These chapters make reference to the corresponding WTO agreements or incorporate them (in whole or in part) or reaffirm the rights and obligations set out therein. The effect is that

[200] Article 13.12,(4) EU-Korea; Article 15,(4) (Chapter 15) EU-Vietnam; Article 22.5, (1) CETA.

[201] Article 13.12,(5) EU-Korea; Article 15,(4) (Chapter 15) EU-Vietnam (this standard, however, makes no reference to “civil society”); Article 22.5, (2) CETA.

[202] Article 13.13, (1) EU-Korea; Article 15,(5) (Chapter 15) EU-Vietnam (This standard provides for the forum to meet once a year, and refers only to a joint forum instead of a civil society forum); Article 22.5 CETA.

[203] Article 13.13,(3) EU-Korea; Article 22.4,(4), No. 2 CETA.

[204] Article 15,(5) (Chapter 15) EU-Vietnam.

[205] Article 20.6,(3) KORUS.

[206] Article 20.6, (2) KORUS.

[207] Article 20.6,(4) KORUS.

[208] Article 20.8, (2) TPP.

the WTO agreements create a kind of “minimum harmonisation” of the respective chapters and the consumer-related provisions they contain. As the dispute settlement practice within the WTO progresses, this harmonisation effect is likely to increase. By contrast, there is considerably less concurrence in the two spheres that currently cannot draw upon WTO agreements or WTO regulations, namely electronic commerce[209] and trade and sustainable development / trade and environment. Consequently, there is no such “minimum harmonisation” effect and, therefore, quite significant divergence in these spheres, also affecting the consumer-related provisions stipulated therein.

Protection of human life and health

Most chapters make reference to the protection of life and human health. This protected interest can be found in the chapters on TBT and SPS measures as well as the general exceptions provisions for trade in goods and services. However, the effect of this protected interest is reflected in different ways: when it comes to TBT and SPS measures, the protection of life and health is *one* legitimate goal (TBT measures) or *the* legitimate goal (SPS measures), the pursuit of which justifies taking specific TBT or SPS measures. In the general exceptions provisions for trade in goods and services, however, the protection of human life and health is an interest that justifies contraventions of other obligations set out in the chapters on trade in goods and services. However, the possibility to resort to such justification is not unlimited, but is contingent on compliance with certain requirements. As described above, the interpretation of this provision in the framework of WTO dispute settlement is controversial: some authors criticise that it places too high demands on the justification of trade-restricting measures of WTO members.

Prevention of deceptive or fraudulent commercial practices

The prevention of deceptive or fraudulent commercial practices is a consumer-related provision that is to be found, firstly, in the general exceptions clauses for trade in goods (where it is limited to deceptive commercial practices) and trade in services and, secondly, in the sphere of electronic commerce. As regards the general exceptions provisions, the statements made above on the protection of life and health apply: in order to be able to prevent deceptive or fraudulent commercial practices and ensure compliance with the relevant laws and regulations, it is admissible to contravene other obligations set out in the chapter on trade in goods and services, provided that the justification limits are respected. In the sphere of electronic commerce, however, there are more similarities to the TBT and SPS chapters: The prevention of deceptive and fraudulent commercial practices constitutes a legitimate public interest the pursuit of which justifies taking certain measures. In this respect, however, a considerable difference between the trade agreements considered becomes apparent: The trade agreements concluded with EU participation provide for engagement in a dialogue in which information and experiences are to be exchanged. The agreements concluded with participation of the United States are more direct in this regard. TPP in fact stipulates an obligation incumbent on the parties to adopt laws on consumer protection that prohibit deceptive and fraudulent commercial practices.

[209] As described above in the “Electronic commerce” section of chapter III 3.5 above, however, negotiations are currently being conducted in the WTO about regulations for electronic commerce.

Labelling

Specific provisions on the marking and labelling of goods are contained only in two trade agreements, namely the EU-Korea and EU-Vietnam agreements. These provisions include, among others, the principle that mandatory marking or labelling requirements may only stipulate such information that is relevant or important to consumers; however, a minimum of relevant or important information is not explicitly defined. The parties thus retain some latitude of discretion as to which information is necessary from the viewpoint of their consumer policy to adequately inform consumers about the respective goods.

Protection of personal information

Provisions for the protection of personal information can be found in the spheres of financial services and electronic commerce. Regarding financial services, the parties are obliged to ensure that personal information is adequately protected / that the existing legal regulations for the protection of personal information are respected in the context of (cross-border) data transmission by financial service suppliers. This obligation is, however, only stipulated in the trade agreements concluded with participation of the EU. When it comes to electronic commerce, the parties to CETA and TPP are obliged to protect the personal information of users engaged in electronic commerce by means of legal measures taking account of international data protection standards; however, EU data protection standards in some cases exceed international data protection standards.

Regulation in the public interest

In the field of trade in services there is a need to regulate the provision of services in the public interest; consumer protection is generally recognised as a public interest that justifies taking regulatory measures. This “right to regulate” is more or less clearly recognised in all trade agreements; this also applies to the GATS. However, in order to avoid regulation going beyond the original objective, the trade agreements stipulate principles of good regulatory practice, some of which are already set out in the GATS. Services associated with the exercise of sovereign power are excluded in all trade agreements. The criteria for determining whether the provision of a service is associated with the exercise of sovereign power are, however, not clear and leave some latitude for different interpretations; this also applies to the GATS.

Regulation of financial services for prudential reasons

A special form of regulation can be found in the sphere of financial services (understood as insurance, banking and other financial services). Here, regulatory measures may be taken for prudential reasons which are – broadly speaking – intended to safeguard the safety, soundness, integrity and financial responsibility of financial services suppliers or financial institutions, whether it be to protect customers – in other words, consumers – from risks or to protect the financial system as such from systemic risks.

Participation of the public / civil society

A final consumer-related provision that can be found is the participation of the public / the civil society in the implementation of certain regulations. Such opportunities for participation are granted above all in the TBT chapters and the chapters on trade and sustainable development / environment; in detail, however, they display some considerable differences.

The TBT chapters set out two different forms of public participation. Firstly, interested persons from the other party to the agreement are to be given the opportunity to participate in consultations on the development of TBT measures; the applicable terms may be no less favourable than those applicable to own nationals. This form of participation is reflected in all trade agreements discussed here. Secondly, the TBT bodies to be established under the TBT chapters are to consult with or involve in their work non-governmental stakeholders; this form of participation is not stipulated in all trade agreements considered here.

The chapters on trade and sustainable development / environment also provide for different forms of public participation, although not all trade agreements always contain all of these forms of participation. This includes: (a) information and consultation on environmental measures; (b) consideration to submissions from the private sector on matters related to trade and the environment; and (c) the right to request the competent authorities to investigate suspected negative impacts on the environment. In institutional terms, the above-mentioned chapters stipulate the establishment of national advisory groups that can meet with those of the other party to engage in an exchange on trade and sustainable development / trade and the environment and to present their views in this regard to the parties.

IV. RECOMMENDATIONS

This section contains recommendations for elaborating the content of trade agreements. They mainly refer to the above-analysed chapters of trade agreements that have particular significance for consumer interests such as those recognised in the UN Guidelines. However, these recommendations should not be considered to constitute an exhaustive list of all consumer-relevant aspects of trade agreements.

Trade agreements contain a number of consumer-related provisions in various subject areas. The manner in which these consumer-related provisions have been elaborated should be improved and/or standardised in some regards. Such improvements and/or standardisations are conceivable in various spheres, as described below – without claiming to being exhaustive.

1. GENERAL AND OVERARCHING PROVISIONS

- **Provisions of trade agreements' objectives:** The provision stating the objective of a trade agreement should not be limited to stating the establishment of a free trade area in accordance with the requirements of the WTO rules. Trade agreements should rather make clear statements regarding various objectives; consumer protection should be one of the specifically mentioned objectives in this respect.
- **Consumer protection as a legitimate objective of regulation:** Besides including consumer protection in the objectives of a trade agreement, consumer protection should be mentioned in an introductory provision of the agreement that applies to all chapters of the agreement as a legitimate objective of regulation (in addition to other public interests) for the pursuit of which the parties to the agreement may maintain and adopt regulatory measures.

- **General exceptions clause**: Based on the general exceptions clauses of CETA and TPP, general exceptions clauses should in each case apply to the *entire* trade in goods and services, and should not be restricted to sub-sectors or individual sectors of trade in goods and services. This approach would make it possible to ensure that specific cross-sectoral exemptions for the protection of particularly important legal interests – such as the protection of human life and health as well as protection from deceptive and fraudulent commercial practices – are applicable to the entire sphere of trade in goods and services. In addition, the public interest of "prevention of deceptive and fraudulent practices" laid down in the general exceptions clauses, should be supplemented by an additional and at the same time more comprehensive public interest of "consumer protection." Furthermore, the general exceptions clause should include a provision that stipulates that measures of the parties conforming to international consumer protection agreements, to which they are parties, are deemed to constitute necessary measures within the meaning of the general exceptions clause.
- **Trade and the environment:** Given that consumers are interested in environmentally friendly products and services as well as in preserving and improving their environmental conditions, trade agreements should grant persons, including consumer organisations, the right to make written submissions to the environmental authorities of the signatories, which must be considered by them. Such submissions should also be permitted to point out violations of regulations relevant to the environment and demand their investigation. A dialogue between governmental and non-governmental stakeholders, including consumer organisations, should be made mandatory in the sphere of environmental policy. The participation of consumer organisations in national advisory groups, the establishment of which is stipulated in the chapters on trade and sustainable development or trade and the environment, should be specifically mentioned in the relevant provisions.
- **Chapter on trade and consumer protection:** It should also be considered whether trade agreements could include a chapter on trade and consumer protection based on the model of the current chapters on trade and environment / trade and sustainable development. It could, for example, lay down an obligation of the parties to ensure a high level of protection in terms of consumer policies where consumer interests are affected by international trade. Such chapter could also include provisions for engagement in a dialogue with consumer organisations on relevant issues. Provisions regarding a complaint mechanism on consumer issues as well as on other consumer-relevant issues could also be included in this chapter.

2. RULES ON TECHNICAL BARRIERS TO TRADE AND LABELLING

- **Marking / labelling**: In the chapter on technical barriers to trade, trade agreements should regulate the minimum of information relevant to consumers that should be stipulated by the mandatory marking and labelling requirements existing in the national law of a party to the agreement. This should by all means include information on the origin, production method and ingredients of a product; further minimum information could be defined on the basis of the appropriate requirements of the UN Guidelines on Consumer Protection.

- **Right to be heard / participation in the development of TBT measures**: The right to be heard / participation of consumer organisations in the development of TBT measures should be made mandatory and should not depend on whether or not the national law of a party permits such consultation / participation.

3. PRVISIONS ON SERVICES AND ELECTRONIC COMMERCE

- **“Public” services**: The criteria set out in the trade agreements for services provided in the exercise of governmental authority (frequently referred to as “public” services) should be formulated more clearly, given that these criteria determine whether services are excluded from the scope of the chapters on services.
- **Regulation of financial services**: The provisions for financial services set out in the trade agreements that permit regulation of such services for prudential reasons are broad enough to cover the consumer interests worthy of protection in the sphere of financial services, and should therefore be maintained in this form.
- **Electronic commerce**: Consumer protection should be laid down as a legitimate regulatory objective. In this respect, the parties should be obliged to maintain or adopt legal measures. As electronic commerce frequently involves cross-border transactions, an obligation of the parties to cooperate should be established for consumer protection.
- **Data protection in electronic commerce and in financial services**: The protection of personal information when engaging in electronic commerce and in using financial services should be established as a legitimate regulatory objective, just as the obligation of the parties to maintain or adopt appropriate legal provisions for the protection of personal information. Where reference is made to international data protection standards, the wording should be dynamic so as to take adequate account of future legal developments at this level. In addition, it should be clarified which international data protection standards are relevant. Likewise, it is important to clarify that the international data protection standards are only minimum standards.

It would be worth considering the development of model standards for the above-mentioned aspects, which could serve as a basis for trade policy discussions.

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