

# Rights, Values and Trade

*Is an Agreement between the EU and the  
US Still Possible?*

*Lucia Serena Rossi, Federico Casolari  
Editors*

**LAWTTIP Working Papers**  
2018/2



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This Working Paper collects the abstracts of the contributions to the  
II LAWTTIP Joint Conference 'Rights, Values and Trade:  
Is an Agreement between the EU and the US Still Possible?'  
(Bologna, 12 and 13 April 2018).

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## Abbreviations

ACP	African, Caribbean and Pacific (States)
BITs	Bilateral Investment Treaties
CCP	Common Commercial Policy
CETA	Comprehensive and Economic Trade Agreement
CFSP	Common Foreign and Security Policy
ECJ	Court of Justice of the European Union
EEA	European Economic Area
EMA	Environmental Multilateral Agreement
EPO	European Patent Organisation
EU	European Union
FTAs	Free Trade Agreements
GATT	General Agreement on Tariffs and Trade
GIs	Geographical Indications
ICSID	International Centre for Settlement of Investment Disputes
IP(R)	Intellectual Property (Rights)
ISDS	Investor-State Dispute settlement
KOREU FTA	EU-South Korea Free Trade Agreement
NAFTA	North American Free Trade Agreement
NGOs	Non-governmental organizations
OECD	Organisation for Economic Co-operation and Development
PPM	Production Process Methods
PTAs	Preferential Trade Agreements
SMEs	Small and Medium Enterprises
SPS	Sanitary and Phytosanitary Measures
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TPP	Trans-Pacific Partnership
TRIPs	Agreement on Trade-Related Aspects of Intellectual Property Rights
TSD	Trade and Sustainable Development
TTIP	Transatlantic Trade and Investment Partnership
UK	United Kingdom
US	United States of America
WTO	World Trade Organization



## Introductory remarks

*Federico Casolari*

The idea of the II LAWTTIP Joint Conference is to reflect on the interplay between the EU trade cooperation and the EU fundamental rights and values as expression of the EU constitutional identity. The main question of the Conference concerns the relations between the EU and the US, but in keeping with the practice that is emerging in this area, it is also intended to deal with other third countries.

Starting from the entry into force of the Lisbon Treaty, human rights protection has become fully enshrined in primary law not only with reference to the internal perspective but also, as is made clear by Article 21 TEU, with reference to the external dimension. As stressed within the European Commission strategic document *EU Trade for All*, human rights protection has become integrated part of the EU trade policy. This, however, has brought to light interesting challenges when it comes to establishing a coherence and proper interplay between trade interests and fundamental rights. This is owed, on the one hand, to the different levels of human-rights protection recognized by the contracting parties and, on the other, to a different understanding of the values that may come to bear on trade cooperation, thereby giving rise to clashes among the actors involved.

Against this general background, the first section of the Conference should set the scene and introduce the general legal framework that becomes relevant when discussing the protection of fundamental rights in trade cooperation. Thus, the main tools and mechanisms to be put in place have been taken into account by considering also the potential conflicts between national interests and understandings of fundamental rights and the trade agreements concluded by the Union. The second section has been devoted to sectoral issues by underlining the interplay between trade cooperation and specific categories of rights. The final session tried to consider, according to a *de lege ferenda* perspective, the future of the EU trade policy with specific regard to the protection of fundamental rights.

## I SESSION

### **Setting the scene: international, supranational and national tools to safeguard EU fundamental rights and values in trade cooperation**

*Chair: Lucia Serena Rossi*

## Is the EU a 'value-led' international actor?

*Paul James Cardwell*

*Abstract by Susanna Villani*

The EU Global Strategy issued in 2016 contains a number of references to the values included in the Treaties thereby enshrining the attempt to confront with the perception that the EU is an international actor not only in the field of trade but also in that of values. Although trade is not at the core of the 2016 global strategy, it is mentioned many times and, very curiously, also the term 'values' is mentioned as many times as the term 'trade'. So, it is possible to find a link between these two dimensions and it is thus interesting to evaluate the interconnections and the potential contradictions between the values the EU seeks to promote and the trade policy.

EU values differently apply when they operate at internal or at external level as well as in different fields (e.g. trade, migration, development). The way the EU affirms and applies the values embodied in the Lisbon Treaty reflects the kind of actor the EU intends to be and the modalities it carries out business in practice. In terms of values, it is obvious that at the basis of the EU construction as well as of the EU as global actor there are those essential values enshrined in Article 2 TEU that are human dignity, freedom, equality, democracy, rule of law and respect of human rights. Furthermore, these values, as constitutional elements of the EU, also structure the external dimension of the EU. However, their nature and in particular how they interact with other countries' values in the field of the Common Commercial Policy (CCP) are interesting points to be focused on.

First of all, it is appropriate to ponder what these values are and how they operate, because the EU cannot act against the values it is based on and that seeks to promote. Moreover, it appears interesting to understand what kind of actor the EU is and whether it differs and behaves in an autonomous way from Member States. In this regard, the classical theories elaborated in the 70s' have been eclipsed by the awareness that the EU, notwithstanding Member States continue to cooperate at interstate level in specific fields, the EU is a separate entity, especially in trade. Still, there are a lot of open questions, such as the variance of EU values and their susceptibility to change. The list in Article 2 TEU does not tell us a lot about their evolving nature, nor does it tell us how they interact with the national values espoused by the single Member States: on the one hand, there are some shared core values but, on the other, there are also some values that may be interpreted in different ways (a case in point being that of democracy). Therefore, the nature of these values and the advisability of carrying them over from the national to the European level is not a fixed point.

Secondly, it is worthwhile exploring how these values operate at the internal and external levels and where their meeting point is. At the internal level, the EU represents in the first place an integration project aimed at taking down borders, and this is already a value per se. But some issues are specific to the EU's external dimension, wherein EU values therefore necessarily apply in a different way, as happens with issues relating to the movement of people and the fight against terrorism. As for trade, an expanded liberalisation

is expected to come, and particularly interesting in this connection are the evolving institutional aspects that characterise EU activities (as can be appreciated, for example, from the increasing calls for the European Parliament to be involved in TTIP negotiations). But, on the other hand, a lot of criticism has been aimed at the application of the values embodied in the Treaties in relation to the changing nature of the EU. The enlargement process and the different perspectives on the future of the EU urge a deep discussion on how to guarantee a fair balance between different values (e.g., social and economic values).

Turning to the external sphere and the distinction between trade and other policies, it is appropriate to premise that, according to the Treaties, the Common Foreign and Security Policy (CFSP) is the main way the Union engages with the world in those issues that are not defined as economic. Useful ways these values are expressed within the scope of the CFSP are expressed in the declarations the EU institutions have released relating to third countries. The most common values expressed in these declarations bear a strong relation to democracy and human rights. Even though the weight they carry is in fact just diplomatic and political, it is interesting to note that their content and wording change remarkably depending on who their addressees are, resulting in different value-based approaches. Illustrative in this regard, for example, is the EU's severe condemnation of the death penalty in Iran and the US, in contrast to its silence vis-à-vis China and Saudi Arabia, which have never been openly contested for this practice. Such a changeable perspective is also applied to trade, as evidenced by the different uses the EU made of its values in the TTIP, the CETA, the EU-Japan Agreement, and its agreements with developing countries. Values are therefore not invoked in a consistent way, but rather follow a double-standard approach.

In conclusion, to talk about values is to note the contradictions that emerge from their application. The question therefore comes up: can EU action be said to be guided by specific values? Yes, it can—but it can also be observed to be highly differentiated, not only in the mismatch between word and deed, the rhetoric of action and what is actually done, but also in the distinction between the external and internal dimensions. It is thus not easy to map out a coherent framework for the application of the EU's values. Against this background, the TTIP is a fascinating case because it illustrates the EU's potential in the external field of trade, while at the same time highlighting the main challenges for EU values at the internal level. In the European Commission's 2015 paper "Trade for All", an attempt is made to bring the EU's trade policy into closer alignment with its values, but the risk is that these values should be forsaken in favour of Treaty obligations. In the coming years, the EU will have to continue to probe its values and show whether or not it is a coherent actor as a promoter of values even at the external level.

## The future of regulatory cooperation

*Thomas Cottier*

*Abstract by Riccardo Righelli*

Over the last decades, international trade has shifted its focus from free trade regulation – that means to reduce and eliminate tariffs – to highly complex regulatory fields. The ultimate goal of free trade agreements has not changed: to facilitate international trade. What has deeply been modified is the mean selected to achieve that target: by moving away from a model based on reduction of tariffs, the second and third generations of free trade agreements have promoted a highly complex regulatory approach, whose objective is to eliminate the obstacles to trade by law uniformity. In this respect, free trade agreements are aimed not at deregulating but at re-regulating, harmonising, and eliminating trade barriers other than tariffs.

This new trend has led to a close intersection with a great many issues in domestic affairs—intellectual property rights, services, food standards—now attracted to a more international law-oriented sphere. The main challenge that also confronts values probably lies in the issue of Production Process Methods (PPM) and the difference among products according to human-rights protection standards. Therefore, politically, these standards are highly sensitive to concerns of sovereignty and self-determination. At the same time, removing such barriers is essential to cross-border trade, and in particular to SMEs, which do not operate in vertically integrated value chains and private standards. From these simple clues alone we can appreciate the importance of the issue and its links to current events, such as the US request that NAFTA be renegotiated or President Trump’s proclaimed intention to “repatriate jobs”. On the other side of the coin, it’s easy to spotlight the existence of important technical sectors where global harmonisation has been fully implemented, such as aviation and telecommunications. It would, after all, be uneconomical to act in a different way in these fields: the familiar metaphor of the adapter is here apropos.

The EU experience in harmonisation goes back to its process of regulatory cooperation and approximation of laws, though this process has, in truth, proved to be toilsome and time-consuming, as well as biased. In the Union’s relationship with third countries, most of the FTAs that have been concluded, including the CETA, essentially rely on WTO nontariff rules and principles (non-discrimination, equal opportunity, and transparency). By contrast, the TTIP—which remains a very important project—is the most important effort in addressing de-regulatory convergence issues, as it covers 30% of world trade and 50% of world GDP. Therefore, if the EU and the US will not firm up such an agreement, that will be done by other players, such as China, which is already taking an interest, and in light of other values.

The proposals submitted by the EU are far-reaching in this respect, and none more so than the one on regulatory cooperation. Still, there are many issues on which the EU and the US have very different regulatory traditions and approaches: the US relies on product liability rules, while the Europeans look to the precautionary principle and strict liability; the US pushes for the deregulation, while Europeans tend to delegate standard-setting to private organisations; and, above all, while the enforcement of the law in the US is by legal

tradition entrusted to a centralised system, the EU legal-enforcement system is decentralised (it was no accident, in this regard, that the VW “Dieselgate” emissions scandal was prosecuted in the US and not in any of the European countries). Thus, the US could reasonably harbour doubts that common standards will not be properly implemented in Europe.

Behind these considerations, the shift in trade policy towards regulatory affairs and trade regulation actually raises some fundamental issues in terms of public law and policy: How much division of labour do we want? What is the role of lawmakers and civil society in addressing “behind-the-border issues”? Current US policy seeks to reduce the international division of labour and global value chains, but in this way limiting competition and affecting consumers as well as the allocation of domestic jobs. In order to meet current challenges, it therefore proves necessary to rethink our current notion of sovereignty, which is essentially reduced to self-determination and independence from external control, but maybe it is essential to revisit this notion in light of the considerations offered by Bodin and Hobbes, with their emphasis on domestic peace, order, stability, and welfare of the body politic.

Another element to be introduced is the doctrine of the multilevel governance also in the field of trade. Public affairs are dealt with at very different levels of government, and this raises the question of which of these levels, in keeping with a fair decision-making process, should be entrusted with fostering a public good. In the field of trade, this is a problem because the issue, in its current formulation, is still at the stage of tariff reduction and has not been properly adapted to the field of regulatory affairs. This is also why in the Wallonia Parliament has been able to block the adoption of the CETA agreement, because the process is backloaded: the democratic bodies in the EU address trade policy at the very end of the process, when the agreement is already ready for signing. What needs to be done is therefore to make sure that democratic and inclusive inputs can be given at the outset of the process. To this end, the EU could learn from the US Trade Act as amended in 2015. Indeed, while in the EU trade is a prerogative of the executive power, that is, the European Commission, in the US trade policy is constitutionally a prerogative of Congress, which in this area has delegated powers to the President. Moreover, the US Trade Act includes several references to values and principles to be taken into account when negotiating new agreements and trading with third countries. In all these issues, the US Trade Act could inspire the adoption of a EU Trade Act that would essentially embody the essential values that trade policy should achieve beyond those mentioned in the specific FTAs, while providing for a major involvement of the European Parliament and the national parliaments. The EU should use this time, while the TTIP is on hold, to design a stronger democratic process through which to address these issues effectively.

## Constitutional monitoring of mixed FTAs by MSs' courts

*Cécile Rapoport*

*Abstract by Susanna Villani*

The French Constitutional Council as well as other national Constitutional Courts are currently monitoring mixed agreements and, in particular, the CETA. There have already been two preliminary cases that set the necessary preconditions for the CETA agreement to be signed by Germany and Canada: one resulted in a favourable ruling by the German Federal Constitutional Court (*Bundesverfassungsgericht*), and the other, still pending since October 2016, is on the docket of the Federal Court of Canada. The French Constitutional Council – that is the national court entitled to evaluate the conformity of the laws and the international agreements with the French Constitution – has been the first ever court ruling a final decision on the substantive content of the CETA agreement and its compatibility with the national Constitution.

The case n° 2017-749 on which the French Constitutional Court ruled on 31 July 2017 is interesting both from a constitutional and an EU law perspective because it raises the question of the tasks of the constitutional judges and the EU judges when confronting with mixed agreements.

The French Constitution envisages three possible legal bases for reviewing laws and agreements: Article 61 concerns a priori review of laws; Article 61-1 C provides for a posteriori review of laws, and Article 54 relates to a priori review of international agreements which need to be authorised for ratification. In particular, the latter sets that “if the Constitutional Council, on a referral from the President of the Republic, from the Prime Minister, from the President of one or the other Houses, or from sixty Members of the National Assembly or sixty Senators, has held that an international undertaking contains a clause contrary to the Constitution, authorization to ratify or approve the international undertaking involved may be given only after amending the Constitution”. Two comments on this provision. First, the provision is designed to make it possible the ratification of international agreements by France may intervene before having amended the Constitution – in which regard it recalls what is provided for in Article 218(11) TFEU – in practice the outcomes are usually different. At EU level, a negative Opinion by the ECJ leads to the modification of the agreement or to the end of the conclusion process, in France it is not rare to see the government initiating a constitutional amendment in order to be able to ratify an international agreement. Second, unlike the procedure in Articles 61 and 61-1, which are regularly used, the procedure envisaged in Article 54 is rarely resorted to. What are the constitutional norms under which an international agreement is to be reviewed? The Constitutional Council reviews the compatibility of the international agreements with all sources of law that form the so-called *bloc de constitutionnalité* (these are the current French Constitution, the 1958 Constitution, the Preamble to the Constitution of the Fourth Republic, the 1789 Declaration of the Rights of Man and the Citizen, and the Environment Charter of 2005).

In February 2017, the CETA agreement was referred to the Constitutional Council by 110 members of the French Parliament from both Assemblies, and it took five months for the Council to issue an opinion. This was because the Council had to wait for the ECJ to deliver its Opinion 2/15. The applicants addressed a number of grievances on CETA, arguing in particular that the treaty's provisional application could undermine French law-making and rule-making capacity and national sovereignty. In addition, it was contested that Section F of Chapter 8, on ISDS, was incompatible with Article 88(1) of the Constitution and several other constitutional rights and freedoms, such as the principles of independence, impartiality, and equality. Finally, the applicants complained that there is no provision mentioning the constitutional precautionary principle laid down in Article 5 of the Environment Charter.

The Constitutional Council rejected all the claims, holding that CETA does not contain any unconstitutional clauses. It is interesting to note that the Council confined itself to quoting the language of CETA without further interpreting the provisions contained in it so as to avert improper interpretations of EU law.

From this judgement it is possible to learn two different lessons on the procedure of monitoring of mixed agreements by national constitutional courts.

First of all, the specific nature of mixed agreements impacts on the monitoring method. At least from a national point of view, mixed agreements are hybrid source of law because they respond both to the principle of primacy of EU law and to the constitutional framework. There is, indeed, an obligation on French laws to respect EU law and on the French institutions to transpose EU directives disregarding what constitutional provisions may be challenged as long as rules and principles inherent to the constitutional identity of France are safe. That doctrine also holds good for mixed agreements, even if these also count as international agreements from a constitutional point of view. This means that they may also trigger the method used by the Constitutional Council when monitoring national arrangements in the French Republic in the framework of Article 54 of the Constitution, and this method consists in determining whether the provisions at issue contain clauses that are unconstitutional and contrary to French principles and values.

The Constitutional Council decided to combine both these methods by referring to Opinion 2/15 of ECJ and thus taking into account the division of competences between the EU and its Member States. Therefore, the nature and presumably the extent of its control depends on the nature of the EU competence: concerning the provisions falling within shared or retained competences, the Constitutional Council shall apply the method attached to the traditional monitoring of international undertakings, while as for those provisions falling within EU exclusive competences, it should only check that they do not undermine the rules or principles inherent to the constitutional identity of France. Interestingly, this means that the Constitutional Council considers itself competent to monitor also provisions falling within EU exclusive competences. At first glance, the Constitutional Council's room for manoeuvre depends on the nature of the competences; the CETA case, however, shows that the French Constitutional Court is in a position where it cannot do much more than stick to the literal interpretation of EU mixed agreements.

The second lesson that can be derived from the case at hand is thus that the Constitutional judges have a narrow margin of manoeuvre. On the one hand, according to the preventive procedure envisaged in Article 54 of the Constitution, the Constitutional



Council cannot rely on the potential effects of the agreements in evaluating the compatibility with the French Constitution; on the other hand, its tasks cannot compete with the monopoly of the ECJ in interpreting EU law. Therefore, the Constitutional Council cannot do more than quote the agreement and interpret its own constitutional standards.

In conclusion, to monitor the provisions falling either within shared or exclusive competences might not be so different in terms of effective margin of manoeuvre granted to the Constitutional Council. Actually, such a conclusion should not be so surprising because, when dealing with EU secondary law and international agreements, the Constitutional Council faces the developments of the EU integration process. Therefore, there should not be reason why it should exercise a closer scrutiny in monitoring mixed agreements than in monitoring other kind of EU acts. The situation is different when the Constitutional Council deals with the revision of EU treaties because for those France acts as a sovereign State and not as a Member State.

## II SESSION

### **Sectoral Challenges to the effective protection of EU fundamental rights and values: IPs, State aids, subsidies and health services**

*Chair: Pietro Manzini*

## Intellectual property rights: The EU FTAs Agenda and TTIP

*Laurent Manderieux*

*Abstract by Riccardo Righelli*

The TTIP chapter on International Property Rights (IPR) does not seem to be the most complicated one in the transatlantic negotiation: both the EU and the US promote common standards in IPR. The EU standard agenda in negotiating FTAs focuses on a strong protection and enforcement of IP rights similar to that of the US, and it promotes the inclusion of specific IP chapters in FTAs. The EU also has a specific agenda on the protection of geographical indications, but its scheme clashes with the US agenda. The most important FTAs for intellectual property are about twenty and include those concluded with Asian countries such as Korea and Singapore, which can be looked to as models for negotiating the TTIP.

As already anticipated, the EU and the US are cosmetically in agreement for high IPR standards: the IPR Agenda is indeed largely business-driven in both areas. This notwithstanding, the depth and development of IPR protection in the EU and in the US is different for two reasons.

In the first place, it is evident a deep difference in terms of political organisation in the process of creation and reinforcement of these rights. While the EU is the sole actor in negotiating the TTIP with the US, it is not the sole actor in promoting and regulating IPR in its own area. In the second place, there is a deep difference in when it comes to competences: the EU has a shared competence on IP rights and has no competences in other fields covered by other subject areas, such as patents, with the European Patent Organization (EPO) comprising numerous “heavyweight” non-EU countries such as Switzerland, Norway, and Turkey. Therefore, the EU internally has a weak mandate in negotiating FTAs in the field of IP, and this reflects the weak mandate the US has internally in making IP law in general. On the other side, the US is a single actor even though, in its own area, the federal government still shares a few competences with the single states. Therefore, while the US has a complete integrated policy on IP, the EU has a partial integrated policy. In particular, the EU has a full integration policy on trademarks and designs, a partial harmonisation for copyright, and no harmonisation for the granting of patents.

The specific EU agenda shows important differences from that of the US also with regard to some technical issues, that are patents; enforcement; grace period; geographical indications; pharmaceuticals; genetic resources and traditional knowledge. As for patents, it is universally acknowledged that the EPO quality standards in patent granting are far higher and tighter than those of the US. The latter is interested in indirectly lowering the value of patents and therefore, even though they share the same objective, the EU has a more rigid approach for better quality. As for patent enforcement, a sharp division remains particularly between the European pre-grant resolution procedure and the American litigation-oriented one, which entails costs that not all European actors would be able to sustain, thereby

reducing jurisdictional protection. So, too, there is the highly controversial issue of the grace period, which is already in wide use in the US, while the EU refuses to apply this system, even if some EU stakeholders are requesting changes covering the last two decades. With regard to copyright, the US and the EU have diverging methods for granting protection: the EU advocates a larger protection in the US corresponding to the larger protection granted to US Right Holders in the EU. As regards pharmaceuticals, the key players in the industry are the EU and the US, along with Switzerland, Japan, and other actors. The EU, in particular, is being lobbied by non-business actors to insist on a greater space for generics in the US, and especially for EU generics in that market. In the matter of genetic resources, there is total disagreement between the US and the EU, the former objecting to any reference to this question in trade agreements covering patents, while the latter is open to international discussions on this topic, albeit to a limited extent. Last but not least, the most critical point, as is well known, is that of geographical indications (GIs). In the TTIP, the EU tries to expand the list of its GIs currently protected in the US, but with modest results that consist in a list of GIs protected in countries that refuse GI protection as a matter of principle. Indeed, caught between the pressure exerted by Member States like Italy and France, on the one hand, and strong US opposition, on the other, the EU has not been able to successfully negotiate what, in the most optimistic expectations, should have led to an outcome in keeping with international treaties and suited to cooperating and interfacing with third countries.

Are these unsurmountable problems? It would appear so. But in fact, the points of agreement are more numerous than the points of contention, and therefore these divisions can be sorted out. For the IP chapter, the EU could map out the points where consensus has largely been achieved and the issues that are yet to be resolved, in a proposal structured under eight headings as follows: common objectives, compliance with international treaties, preambular narrative, agreed principles for high standards, geographical indications, copyright and related rights, cooperation with third countries on IP, and trade secrets. In conclusion, while in international negotiations with third parties the US and the EU have a good deal of common ground, it has to be conceded that the divergencies between them over the governance of substantive IPRs make harmonization in TTIP a cumbersome technical agenda. That said, the work done until 2015 on the IP rights chapter has had and will have an impact on other FTAs currently being negotiated with third countries, regardless of whether TTIP will be signed.

## State aid control and subsidies regulation in the EU FTAs (and a bit of Brexit...)

Andrea Biondi

Abstract by Nicola Bergamaschi

In the UK, the application of a new model for regulating subsidies has emerged as one of the most contentious issues in the aftermath of the 2016 referendum on Brexit. Indeed, state aid control has always been perceived as a twofold fetter, acting on the one hand as a pesky obstacle to liberalisation, a bureaucratic constraint, and on the other as a limit on the pursuit of a fair social policy.

State aid control and subsidy regulation often tend to pose a conundrum from an EU and international law perspective: on the one hand, subsidies and state-aid measures are desirable and necessary instruments for promoting certain kinds of common goods and accomplishing legitimate policy objectives that the market cannot achieve alone; on the other hand, they can distort free trade and significantly alter competition in the market. The question is therefore how to strike a fair balance.

At EU level, the state aid control system makes for a nearly perfect balance. On one scale of this balance, state aid control has changed so much over the years by progressively ensuring equality between Member States as well as within the marketplace itself. As the ECJ has stated in *Commission v. Spain* (Case C-184/11), the EU state aid control system is an expression of the “EU essential task of ensuring that competition in the internal market is not distorted,” and it is also a tool of economic efficiency.

As for the need to deal with externalities, EU law operates in a very sophisticated way. The Treaty includes a long list of derogations for the compatibility assessment, which is essentially entrusted to the supranational referee, that is, the European Commission. In deciding about the compatibility of an aid, it is, indeed, requested to consider both the proportionality of the measure in relation to its objectives and a series of externalities from the so called “common interest”, which is really about taking into account labour standards, environmental protection and innovation. More recently, the adoption of the General Block Exemptions Regulation has introduced a revolution in the EU legal framework by allowing the system to move from an *ex ante* control to an *ex post* control whereby certain kind of predefined public expenditures are not forbidden. There is to say that, looking at recent case law of the ECJ (*Corsica Ferries* and *Paint Graphos*), there has been a shift from an objective notion of State aid to a little bit more flexible definition, in particular with regard to the application and definition of the market operator principle that also comprises social, economic and environmental sensitive investments.

At the international level, the overall system of subsidy controls can be divided into three different subsystems: (i) the parallel aid system (similar to the European one), which includes the EEA and, albeit with some differences, the agreements with candidates or potential candidates for European accession; (ii) the WTO Agreement on Subsidies and

Countervailing Measures (SCM Agreement); and, finally, (iii) the new generation of EU trade agreements with Korea, Singapore, and Vietnam (as well as the CETA).

On the one side of international trade regulation, looking at the WTO model of subsidies control, besides a limited application, there is no reference and no real solution to the problem of how to introduce certain kind of externalities and public policies. However, looking at this new generation of agreements, three interesting points emerge. First of all, all the regulations of subsidies are included in the same chapters of competition, all under the same umbrella. Secondly, the notion of subsidies is much wider, including the unlimited State guarantees and rescue aid, which are defined *per se* as unlawful subsidies, and it also extends to services, or rather, to some very specific services. And finally, generally speaking, the notion of unlawful subsidies applies when competition is affected by the measure.

On the other side of the scale, in all these agreements it is clearly stressed that subsidy control will not hamper the ability of contracting parties to pursue public policies and fulfil welfare-related obligations. Moreover, Article 107(2) and (3) TFEU, on the compatibility of aid, is carried over verbatim into both the Vietnam and Singapore FTAs, which also exclude any form of control on subsidies when these are granted as compensation for meeting public-service obligations (see Article 12(7) of the EU-Singapore Agreement) or when their effects on trade are limited.

The control model for FTAs is thus essentially based on economic efficiency and fair competition, but it is interesting to note that all these agreements adopt the terminology of EU law. For instance, they use the concept of compensation for public-service obligations, recalling the *Altmark* test, and they also contain very specific criteria, such as transparency, primarily set at EU level. Therefore, some questions are bound to rise: what criteria should be used to determine the compatibility of a subsidy? Who should decide and according to what procedure? It would be essential, in this regard, that even these agreements should ensure transparency as a core value of European law.

Moving on to Brexit, it was mentioned at the outset that state aid control meets with resistance in the UK, where both the government and the leader of the opposition, Jeremy Corbyn, view it as hindering the ability to pursue public policies. On the EU side, by contrast, as the Council and the Commission have both underscored, there is strong support for the idea that state aid control is essential even with regard to FTAs. In this vein, the Commission calls for a robust state aid provision to be included in the future EU-UK agreement so as to ensure a level playing field with Member States. This means that it will be necessary to have a new and robust model providing for a form of *ex ante* control, a joint committee for the application of these rules, a dispute settlement mechanism, and, finally, remedies of some kind. In this vision, a potential new model could include an independent state authority, also entrusted with guaranteeing regional solidarity and transparency, and a permanent joint committee entrusted with managing future disputes. However, doubts arise about the makeup of such a dispute settlement body and its relation to the ECJ, as well as about the sanctions and remedies that can be assigned. With all these open questions, one is reminded, in conclusion, of a quote by T. S. Eliot: "What we call the beginning is often the end. And to make an end is to make a beginning. The end is where we start from."

## **FTAs and healthcare services: Combining market access rules and reservations on public services**

*Giacomo Di Federico*

*Abstract by Susanna Villani*

Although healthcare has a multifaceted nature with a great potential for trade, it is believed that the regulation of health services as well as the access to primary and secondary healthcare is first and foremost a matter of values more than of regulation. This affects the range of available legal options in the framework of FTAs by sometimes giving rise to objections to the liberalisation of health services. There is a growing and continuous interweaving between trade and values as expression of one's identity. Commercial agreements therefore are always informed by a sort of spirituality.

In TTIP and CETA, the main provisions affecting health and social services can be found in specific chapters dealing with very different topics (i.e. investment protection, cross-border training services, public procurement and recognition of qualifications). What stands out as most interesting and peculiar among these is cross-border training services, this for a number of reasons, including the issue it raises of the division of competences between the Union and its Member States. Having regard to GATTs, many refer to the cross-border provision of services as "mode one," where producers and consumers do not need the service in person. Consumption abroad, by contrast, would correspond to "mode two," where the customer has to move to the producer's location in order to consume the service, as in tourism.

A number of NGOs and consumer and patients' organizations have been vocally opposed to the TTIP and CETA negotiation process as contrary to their own understandings of public services and healthcare. Even if the criticisms may be legitimate, it is worth noting that they sometimes reveal not only a sort of hypocrisy but also a deep ignorance of current affairs, particularly as concerns the normative convergence in healthcare services within the EU. Considering the significant advances in healthcare, there should not be a concrete risk of breach of EU values and national identities.

Taking a step back, Article 6 TFEU says that the protection and improvement of human health falls within supporting competences, and hence that EU action cannot supersede the Member States' responsibilities. Moreover, the management and organization of healthcare systems belong to the latter under Article 168(7) TFEU, and under Article 21(3) TFEU any decision to harmonise social security and social protection requires unanimity within the Council. In light of this, the regulation of healthcare services cannot be deemed an exclusive competence of the EU, and so whenever an international agreement also covers these subject matters, it should be mixed. What are the real risks posed by FTAs and, in particular, by the CETA agreement?

In the first place, the EU and Canada support a negative-list approach, which means that unless reservation is explicitly taken up, trade and services are liberalised. And, in the second place, the scope of trade and services is carved out from services supplied in the

exercise of governmental authority. Reservations concerning the cross-border trading services introduced in CETA, Annex 1, are subject to standstill as well as ratchet effects unless expressly mentioned otherwise. The goods and services included in Annex 2, by contrast, are only subject to standstill effects.

As for cross-border healthcare services, these are defined in Chapter 9 of CETA (“Cross-Border Trade in Services”) as (a) the movement of a service from the territory of one of the contracting parties to the territory of another one, or (b) the supply of a service in the territory of a party to the service consumers of the other party. But this definition does not include the provision of a service in the territory of a party by a person of another party. The agreement covers in particular measures affecting the production, distribution, marketing, sale, and delivery of services. The supply of services in the exercise of governmental authority is expressly excluded from the scope of the agreement. Reservations were introduced by the EU, and Member State were also allowed to introduce individual reservations. On the EU side, there is a general reservation concerning, *inter alia*, specific sectors that include publicly and privately funded health services (Annex 1), while in Annex 2 the EU clearly reserves the right to restrict market access to investment in services considered to be public utilities at national or local level. National complementary reservations instead are unsurprisingly quite limited (Austria, for example, introduced a reservation for ambulance services, Germany for hospitals, Belgium for ambulance and residential services, and Hungary for ambulance, hospital, and residential services).

It is worth looking at the current stage in EU integration because the level of legal and economic permeability of the national healthcare systems depends not only on the specific reservations formulated by Member States but also on the position adopted by the Union in relation to aspects which have been de facto harmonised. First, the criteria used in CETA can be seen to be completely coherent with the ECJ’s case law on the applicability of internal market rules on competition. At the same time, the concept of a service of general interest is increasingly being restricted within the EU legal order: in regard to Article 56 TFEU, on restrictions on the freedom to provide and receive services within Union, the Court has singled out some funding criteria that need to be satisfied in determining whether a service may be deemed public: these are universality, continuity, the public interest requirement, and regulation and supervision by public authorities. Directive 2001/83/EC concerns responsibility of Member States and the procedures envisaged for guaranteeing both financial stability and the harmonisation of the conditions under which Member States cannot refuse authorisation and reimbursement for the treatment received abroad. This has been possible because national health ministers have accepted that the Member States’ healthcare systems share common values, namely, universality, equality, access to healthcare, and solidarity. This partial harmonisation has resulted in Member States reorganizing their healthcare systems in significant ways, in spite of their apparent diversity. Therefore, it is only in very limited cases that Member States may invoke their special responsibility in this field. In the end, healthcare systems are to a large extent conditioned by internal market rules and, as the ECJ underscored in 1998, healthcare services are “services” within the meaning of Article 56 TFEU. In this regard, two cases can be pointed out—*Watts* and *Elchinov*—that are quite revealing of the extent to which Member States have lost their prerogatives in this sector.



In light of these considerations, it is possible to respond to the criticisms raised against FTAs in the matter of access to medical treatments. Indeed, the conclusion of agreements of this kind holds great potential for major collaboration in a way that need not undercut EU values. Indeed, the process of dismantling the traditionally robust national healthcare systems has been underway for some time, and the management of public resources has now become a must that cannot be limited to crisis situations.

## III SESSION

### **Sectoral Challenges to the effective protection of EU fundamental rights and values: Environmental protection, labour standards, investments' protection, food law and data protection**

*Chair: Attila Tanzi*

## **The inclusion of the ‘right to regulate’ of the host State in the EU post-Lisbon international trade agreements. An answer to the quest for the legitimacy of international investment law through a ‘rule of law’ based on the safeguard of non-investment concerns**

*Pia Acconci*

*Abstract by Riccardo Righelli*

As well known, over the last years many host States that have benefited from foreign investments have claimed for a more balanced approach between the equal treatment clauses, created in order to promote the predictability of domestic law, and legitimate expectations of the public opinions. Looking at case-law, it is evident a clash between investors and host States with regard to water concessions, the management of waste sites, the prohibition of harmful substances and the protection of archaeological and religious sites. No doubt, these clashes fuelled in part by a perceived lack of transparency in some proceedings, like arbitration, that ignore the impact of protests rooted in public opinion. This suggests the need to bring in the voice of a variety of actors (private and public alike) who can be considered representative of local communities, and whose actions, though they unfold within the sphere of public law, can influence the evolution of international investment law. The expectations of investors should therefore be balanced against the host state’s legitimate expectations regarding the stability of its social, environmental, and economic situation.

From relevant trends in recent years, it is apparent that in some trade agreements concluded after the entry into force of the Lisbon Treaty, there is a different semantic approach to the clauses on fair and equitable treatment standards. Now, in certain treaties signed by the EU it is possible to find a sort of basis legitimising the host State’s ‘right to regulate’ and the incorporation of specific clauses linked to public interests considered to be legitimate. Examples can be found in the EU-Singapore FTA and the EU-Vietnam trade agreement, as well as in the preamble to the TPP. The reference these agreements make to public interests—understood as legitimate public objectives, such as protecting public health, the environment, public morality, and cultural diversity, as well as social and consumer protection—is usually considered an open-ended list. This kind of definition of a fair and equitable standard aims to establish a “rule of law” based on a balance of interests between a foreign investor and a host state in accordance with general principles, such as due process, good faith, judicial review, and transparency.

As for arbitration, there have been some relevant developments as demonstrated by the *Chemtura v. Canada* case wherein the tribunal concluded for the legitimacy of the Canadian regulation because it had been “a valid exercise of the respondent’s police powers”, and more notably by the *Philipp Morris v. Uruguay* case. In these cases, the arbitral tribunal recognised that, although the language of the investment treaties was more investor-oriented, the host State could still exercise its policy powers for the protection of public interests, such as public health.

The results of this investigation on investment treaty practice and arbitral case-law demonstrate that this field is still marked by a deep inconsistency. At the same time, not only is there a growing recognition of the importance of certain public interests, but investment treaty practice is also moving toward greater transparency and openness in arbitral proceedings, and we are also seeing that the nature of arbitration based on investment treaties is shifting from a private-law to a public-law dimension. A case in point, in this latter connection, is the emergent practice of introducing specific provisions on the right to regulate with a view to protecting certain interests that can be considered public. In comparison to the past, this new trend places greater emphasis on the concept of legitimate public interests that are deemed public precisely because they reflect the needs, interests, and concerns of the local population, consumers, NGOs, and stakeholders, and public opinion in general. International investment law is therefore shaping up as the outcome of the interplay between a variety of actors, interests, expectations, and legal sources.

Against this background, a multinational approach would be desirable under which to balance the different interests and concerns at stake. Specifically, this approach would entail (i) revising the legal and policy frameworks together, (ii) coordinating international treaty obligations by harmonizing the relevance of public interests as treaty exceptions, (iii) promoting a balanced implementation of clauses on the fair and equitable treatment standard and on the right to regulate, (iv) preventing normative conflicts in arbitral proceedings, and (v) settling cases by streamlining lengthy arbitration proceedings when public interests are at stake. Thus, to adopt such a multilateral approach would in a sense be to revive the spirit of the ICSID Convention of 1966, and this would serve as a tool for the EU to comply with those provisions in the Treaties, particularly Article 21(2)(h) TEU, that commits the EU to promote multilateral cooperation. To this end, however, if such a multilateral approach is to succeed, it needs to be built by engaging the states—consulting with them on the adoption of model clauses and model interpretive guidelines for averting normative conflicts involving recurrent issues—or else by drawing on the work of networks of various researchers and stakeholders.

## **Robust, comprehensive and binding'? A critical analysis of the substantive environmental provision in the chapters on trade and sustainable development of EU FTAs**

*Sophia Paulini*

*Abstract by Nicola Bergamaschi*

International trade cuts across all environmental issues, from global warming to deforestation and biodiversity loss. At the same time, it places ever-increasing demands on natural resources, but it also makes the use of such resources more efficient. This means that if conflicts are managed well and synergies are turned to advantage, trade can bring prosperity and improve quality of life, but if trade is not done well, it can have a destructive effect on the environment.

For a long time, the international trade regime has been little concerned with environmental issues, which at the time when the GATT was signed, in 1947, were considered a matter of domestic policy. Furthermore, environmental concerns took a backseat when viewed against the potential obstacle to trade that would be posed by the environmental measures needed to address them. This is evidenced by the introduction of Article XX in the GATT agreement and by the conclusions of the 1972 UN Conference on the Human Environment. In fact, on this occasion the GATT secretariat prepared a study on the implications that environmental protection policies would carry for international trade and reflected in the study was the worry that such policies would amount to a new form of protectionism. Therefore, the first concern was not how to integrate these two interests but how to limit the extent to which environmental protection would interfere in trade liberalisation. Since then, the trend has been toward greater integration, as can be appreciated from the looser interpretation that has been given to Article XX of the GATT and the Doha Declaration. Thus, improvements in this regard have been made with the conclusion of FTAs that now address environmental concerns and contain commitments that go beyond the achievements of the WTO system.

The EU integrate environmental concerns in its FTAs in various ways. Following the 2016 EU Global Strategy, the Union has been acting to integrate sustainable development interests in trade relations, and its efforts are based on the inclusion in its FTAs of an ad hoc chapter on trade and sustainable development (the so-called TSD chapter). Such an operation was for the first time made in the EU-South Korea FTA (KOREU) which came to be a sort of model and prototype for subsequent negotiations. But it is important to note that these efforts are not discretionary, since the EU is constitutionally required to so act under Article 205 TFEU read in conjunction with Article 21 TEU. The structure of TSD chapters is very similar in the FTAs subsequently concluded by the EU: it consists of declarative and substantive provisions, while introducing also an institutional structure comprising contact points between the parties and specialized committees but excluding dispute settlement mechanisms.

If we turn now to the environmental provisions contained in the EU-Vietnam FTA, CETA, and the EU-Japan economic partnership agreement, it can be observed that many ambitious statements have been made about these chapters. For example, the EU delegation to Vietnam has defined the TSD chapter contained in the agreement in question as a “robust, comprehensive and binding” chapter. As for CETA, the European Commission takes the view that never has a trade agreement included stronger commitments to environmental protection and sustainable development.

In order to judge the extent to which these commitments are truly binding and enforceable, it will be useful to locate them within the spectrum of commitments—binding and nonbinding—conceptualized by the UN Environment Programme and the International Institute for Sustainable Development, serving as a benchmark by which to assess the environmental performance of the single FTAs.

Turning to the substance of the specific environmental provisions contained in the three FTAs in question, it is worth exploring those which govern the legal relation between FTAs and environmental multilateral agreements (EMAs). The first approach is quite soft, for it is confined to reiterating commitments—such as sharing information and experiences—that the parties have already made on the basis of another agreement. This means that they are not binding, merely serving as political declarations. Furthermore, both include some exception clauses by explicitly referring to what is already provided for in Article XX of the GATT.

The second kind of substantive environmental provision contained in the FTAs pertains to domestic environmental law. Provisions of this kind are made up of two different elements. The first of these lies in a prohibition barring a party from waiving or derogating from its environmental laws or offering to do so. In this respect, a difference can be pointed out between the Japan and Vietnam FTAs, on the one hand, and CETA, on the other: what matters in the two FTAs is their effect on trade and investment; what instead matters in CETA is its intent to encourage trade in the parties’ territory. The second element lies in a prohibition barring a party from neglecting to effectively enforce its environmental laws, or, more to the point, prohibiting any sustained inaction where a commitment has been made to frame policies and enact measures in support of an agreed objective, as well as any recurrent practice of making such policies and measures nonspecific. It is important to note that the primary intent of these prohibitions is to prevent one party from gaining an unfair competitive advantage over the other, as well as to prevent competitive distortions between the parties: environmental considerations are secondary, and environmental benefits are therefore understood to come as side effects.

A third type of provision, almost identical in each of the three FTAs, consists in the obligation to ensure high environmental protection standards in the parties’ domestic law and policies. Even if the core objective of this kind of provision is very positive for the environment, their language is such that they fall into the category of nonbinding commitments.

In conclusion, the number of provisions amounting to actually binding commitments is very limited. Moreover, provisions that do contain binding commitments tend not to have environmental protection as their primary objective. The European Commission, having engaged in a dialogue with Member States and civil society organizations, has concluded that the implementation of TSD chapters ought to be stepped up and improved. To this end,

it has already come up with a plan which includes working with international organizations, but if this plan is to bring the benefits it is intended to, the Commission should further strengthen the substantive environmental provisions already contained in these chapters.

## Compliance mechanisms in EU FTAs. Challenges and hindrances for labour standards in TTIP

*Pawel Frankowski*

*Abstract by Susanna Villani*

Literature on the EU and international labour standards is still limited and focuses mainly on the comparison between the soft and hard approach adopted respectively by the EU and the US. Against this background, it is thus necessary to investigate three different issues.

First, why is the EU so weak in promoting labour standards? The European Commission promotes labour standards in FTAs/PTAs by applying the logic of deeper integration. Therefore, to have better market integration, it is necessary to enhance labour standards abroad just to convince Member States that it is important to have this right in this sector at EU level. Second, since every political action is for someone and is designed for some purpose, labour standards in FTAs/PTAs are important for internal political processes in the EU and the US. Indeed, there is a strategic constellation of private and public actors that is leading to the covert integration of core state powers, thereby transforming labour provisions in a smoke screen for economy. In this way, private companies and industries promote lower labour standards in order to increase exports, as in the case of Korea or the US. And third, finally, what kind of compliance mechanisms are possible for TTIP? The European Commission is seeking to maximize its institutional power over the Member States and its ability to regulate this area, and this is why labour standards are included in FTAs.

Against this background, there are three relevant weaknesses to be taken into account: first, the EU presenting itself as a normative power while pursuing economic goals; second, the tendency to focus on a limited set of EU goals and strategies; and third, the lack of political competition and, in comparison to the US, of a serious public debate over labour standards, or at least none that can be seen between the major EU institutional bodies and the Member States. In the end, there are some conflicts that FTAs try to solve—conflicts linked to the idea of the market or to market ideas as tools with which to transform existing institutions—where the actors involved are interested in achieving specific results and in limiting the scope of the conflict itself. Last but not least, FTAs are a source of political legitimacy, as can be appreciated by considering that the EU is promoting these kinds of agreements so that EU citizens may see them in a positive light. In this game between regulation and deregulation, the market represents the answer, but it is necessary to understand the political roles the European Commission and the US play in the specific area of labour standards.

As for the EU, this regulatory game comes quite easily, the European Commission being a technocratic, competence-seeking, and policy-seeking institution, while the US side is more complicated. At any rate, there is a potential conflict over compliance and what it is possible to do with that. The inclusion of labour standards is indeed supported by representatives of civil society, NGOs, and interest groups and the European Parliament, whether or not they are perceived as a threat by the European Commission, which uses labour standards to limit conflicts over FTAs and support regulation and deregulation. Thus the EU side is (a) market-



driven, as concerns the prospect of automation, autonomous transportation, and an ageing population; (b) geopolitically driven, seeking to be in the forefront in the region and to promote good standards; and (c) politically driven, by the need to expand the powers of the European Commission. In the US, labour standards may limit conflicts over FTAs and support compliance mechanisms, but in a different way. The US is equally driven by (a) the market, when it comes to pushing exports and cheap energy; (b) geopolitical reasons, in its effort to maintain a leading role globally; and (c) political motives, given the federal government's interest in expanding its power over the states and trade unions.

What kind of compliance mechanisms are important for FTAs? In the first place, given any constraint or restriction, the government will try to find a way around it, but when an agreement is in place, and so when the interests at stake are complementary, compliance will be an unnecessary mechanism. Here we have the general problem of noncompliance, and what the parties can and should do to make agreements less problematic. At the moment, the more likely scenario is that a compliance mechanism will be included in FTAs, but at EU level the unstable economic situation translates into a bargaining power of third countries (as in the case of Korea and Singapore), and consequently into a reduced effectiveness of compliance mechanisms. However, of compliance mechanism in FTAs turn out to have major pitfalls, it is more likely that the European Commission should decide to bring other actors into trade policy. It is, however, interesting that neither the EU nor third countries are willing to implement trade and sustainable development (TSD) chapters. Indeed, for the former the issue is irrelevant, and stricter standards are not necessarily a good thing. On the other side, the US is quite keen on implementing TSD chapters because the issue is important to it, and stricter standards and regulation are seen by it as a good way to keep monopolies in check and foster prosperity in particular States.

Turning to a case study in the automotive industry, the cost of labour for BMW and Mercedes plants in the US is one-third the European average wage in that industry. One in every four BMWs sold today comes from the X series, manufactured only in the US, and US-built cars are therefore cheaper. European manufacturers have moved their plants to southern US states (US BMW in Spartanburg, SC; Mercedes in Vance, SC; Volkswagen in Chattanooga, TN), taking advantage of cheap labour and generous tax breaks offered by governors desperately looking for investors. Volkswagen Chattanooga is the only VW plant in the world without employee representation, and in December 2017 the National Labor Relations Board reversed a previous decision on micro-unions, thus making for a strong argument against TTIP.

In conclusion, labour standards in FTAs are a smokescreen for internal processes, and compliance mechanisms in FTAs are the result of deliberate action. Moreover, beginning in 2008 with KOREU FTA, the European Parliament and the European Commission have outlined a different role for labour in their overall vision of the European economy, thereby applying labour standards in a less stringent way in TTIP than in other FTAs with developing countries.

## Food trade in the TTIP: The role of GIs and regulatory cooperation

*Francesco Cazzini*

*Abstract by Riccardo Righelli*

Two interesting topics can be identified when it comes to food trade. The first, more traditional one is that of geographical indications (GIs), where we are witnessing a long-running battle between the EU and the common law countries. The second one is that of international regulatory cooperation, where the question comes up of the extent to which the EU and the US can discuss technical measures.

As concerns the first question, it has to be recalled that the European position has been informed by an awareness of its own current situation in the markets: its lack of competitiveness in the market for basic agricultural foodstuffs, offset by a dominant position in the market for premium products highly valued by consumers. It should be pointed out, by way of premise, that GIs lie at the intersection of three different areas of international law, these being trade, intellectual property, and agricultural policy. Indeed, although they originate in relatively small areas and are produced by small companies, they are destined for global consumption. Hence, in these sectors, small EU farms can hold their own against the competition, in such a way as to bring their product to large portions of the market. Of course, this peculiar situation has led to strong lobbying and has deeply informed the EU view on geographical indications as a matter of (partial) public interest, thereby not leaving the matter entirely in the hands of private parties. In the WTO framework, the first international treaty that properly mentions GIs is the TRIPs agreement, though it is difficult to find in it any general accepted and independent definition of GIs, which are simply listed as one among six IP rights. In this regard, there is a sharp opposition between the US—and even the other common law countries, such as Canada or Australia—and the EU. Indeed, the former prefers to see the question from a simple trademark-regime standpoint and as a common intellectual-property problem. The latter, by contrast, has embraced a *sui generis* approach because EU Member States perceive GIs more as a public asset that cannot be transferred or controlled by any single individual.

US opposition began a long time ago in the wine sector, that was solved with an EC-US agreement and the United States' establishment of a specific system based on a wine-designated area. US opposition subsequently grew stronger with the creation of the Consortium for Common Food Names for protecting cheesemakers. More recent clashes, in TTIP negotiations, have concerned matters of a more practical sort, like the perceived threat to common or generic names: some US producers often claim that some EU GI terms are used so widely that consumers view them as designating a whole category encompassing all goods and services of a given kind. To counteract that charge, producers in the EU have created a politically strong Consortium for Common Food Names that seeks to preserve the right to use common food names.

From a EU perspective, the problem is whether it is willing to pay to preserve this asset in the GI field. Previous agreements proved successful because the EU offered additional export markets for third-country products as a bargaining chip. Today, and in particular with

reference to the US, this solution appears less feasible, especially because the gains of this compromise will only benefit producers in some Member States (like Spain and Italy), while northern countries are expected to bear the costs of opening their markets.

We can turn now to GIs in FTAs entered into by the US and the EU in the Asian-Pacific region. The initial approach the EU took in negotiating GI protection was based on specific agreements, whereas in a more recent development, the EU has shifted to the tactic of seeking to protect GIs in the IP-rights chapters included in FTAs. However, the content of negotiations over GIs depends on the third negotiating party and on historical traditions in agriculture and trade. This notwithstanding, the situation seems to have become more difficult as both the EU and the US tend to “export” their point of view in the agreements they sign with third countries, thus bringing about deep normative contrasts, while threatening legal coherence in the domestic laws of third countries, thereby undermining the prospect of equal and fair market access.

On the bilateral level, the EU and the US have been able to achieve modest successes in advancing their approach to the protection of GIs. At the end of the day, however, the competition between the EU and the US in framing rules governing GIs carries two related consequences. For one thing, as mentioned, the competition is threatening the legal coherence of the trading partners’ national laws, and, for another, it is also hindering the establishment of a single system of protection for GIs, to the point where such a system is clearly now quite impossible. Moreover, the absence of a common strategy may be limiting equal market access as one of the TRIPs objectives. Therefore, rather than focusing on themselves and creating overlapping and conflicting agreements, the EU and the US would do well to step back and turn their efforts to achieving a coherent compromise for a multilateral agreement. The small victory the EU has achieved in protecting GIs is not necessarily reason to celebrate. The aim of any international organisation should be to forge common and basic principles, and the attempt to impose GI rules by means of FTAs therefore undermines WTO principles, and in particular the most-favoured-nation and non-discrimination principles.

Regulatory cooperation is a phenomenon that is attracting greater and greater attention, and it should be interesting to see how the idea can extend to the GI field, since the principles of mutual recognition and equivalence apply here as well. The main opportunity for regulatory cooperation in TTIP lies in the fact that if TTIP succeeds in getting the EU and the US to cooperate fruitfully on GI protection, the effect would be to set a de facto global standard. Regulatory cooperation in FTAs may give rise to conflicts with other WTO principles, but in the past such conflicts have been addressed at a deeper level by the courts. Standards based on WTO principles are covered in both TPP and SPS agreements, but neither of these agreements contains an equivalent to Article XXIV GATT that would exempt the relevant WTO principles from regulatory cooperation in the context of FTAs. Moreover, while both of these agreements contain obligations to apply international standards, the question is, can these obligations limit the use of specific standards, and how do they apply to countries that are not parties to these agreements?

Be that as it may, regulatory cooperation on GIs could still represent an important solution, making it possible to achieve a match between local preferences and regulatory policies, while also providing a tool with which to evaluate alternative policy options and

select optimal approaches. In TTIP, in particular, regulatory cooperation should include cooperation not only in taking down trade barriers but also in learning to design the best policy by looking at the impacts of different policies.

## **‘Personal data is not bananas’. Data protection across the Atlantic: TTIP, Privacy Shield and beyond**

*Luisa Marin*

*Abstract by Nicola Bergamaschi*

Data protection in Europe is a very sensitive issue, not only because it is a fundamental right but also because, with the Lisbon Treaty, it has become a core policy of the EU through the Treaty’s inclusion of Article 16 TFEU. Recently, even the ECJ has contributed to the constitutionalisation of data privacy rights, with judgments like *Google Spain* and *Digital Rights Ireland*. The latter, annulling the data retention directive, has had important implications externally as well, with the *Schrems* judgment, which has challenged the safe harbour principles for data transfer between EU and US. More recently, the constitutionalisation of data privacy rights at EU level has gone further, considering that the ECJ, with its opinion on the EU-Canada Passenger Name Record agreement, has had occasion to develop the process begun in 2014 with the so-called “privacy spring of the ECJ.”

On the other hand, as is well known, the transatlantic divide that keeps the US and the EU apart on the question of privacy is huge. In fact, while both are concerned to protect privacy, the conceptual differences between their understandings of privacy, as well as between their privacy practices and enforcement, are quite significant. Briefly stated, in the US privacy is protected as a threat to property, enforcement is based on a civil law (rather than a criminal law) mechanism, and the approach to regulating data processing is not general but sectoral—exactly the opposite of what is the case in the EU under the General Data Protection Regulation. So, too, in the US data privacy is protected as an expression of liberty, whereas in Europe it is embedded into an idea of human dignity. In this regard, the legal divergences are considerable as concerns (a) the scope of privacy protection, (b) the methods of protection, and (c) who is entitled to the protection of privacy.

At the same time, international trade is not really concerned with privacy. In the GATT, for instance, privacy rights fall under a general exemption, and the WTO’s own website clarifies that “the WTO has had nothing whatever to do with Internet privacy.” Even so, trade cannot disregard data protection because, as has been stressed by the former vice president of the Commission, “data protection is not red tape or a tariff. It is a fundamental right and as such it is not negotiable.” This quote helps us understand the specificity of the data protection issue in relation to preferential trade agreements. On the one hand, data privacy is a fundamental right and, from the perspective of international trade, data privacy law can represent an obstacle because trade needs a free flow of data in order to thrive. On the other hand, although it is true, quoting Spiros Simitis, that “personal data are not bananas,” they are commodities of a very special kind, and as such (as goods) they can be put to valuable use by private parties and public authorities alike. Thus, personal data have to be regulated.

Against this background, it is therefore interesting to evaluate whether it is possible to square the circle around data protection, privacy, and trade, and what place data-protection clauses might have within the TTIP. For legal, political, and pragmatic reasons data-protection clauses are excluded from the TTIP. Indeed, since the debate around the TTIP and the debate around data are very much polarized and sensitive, it is necessary to separate trade and data protection in order not to jeopardize the ability of these sensitive legal instruments to be successfully negotiated. Hence, if data protection has to remain in the TTIP, it will be dealt with under the ordinary regime comprising the GDPR and the privacy shield, has replaced the safe harbour scheme. After Schrems, the recent judgments on privacy shields set some critical issues the Commission tries to tackle in a more positive way, while the Article 29 Working Group points out many aspects for improvement. Despite that, and even though the current US administration has frozen many of the commitments made under Obama, the privacy shield can be considered a step forward and a way to keep the US-EU dialogue open and to raise standards of protection by playing a kind of carrot and stick game.

Another relevant issue in what concerns EU relations not only with the US but also with other third countries, is that of the extraterritorial effects of the GDPR. Particularly sensitive is Article 3 of the regulation, as it defines the EU's role in establishing the golden standard for the rest of the world in this field. This is what political scientists mean when they talk about the "Brussels effect" or "Brussels' privacy power Europe," which is not immune from critical aspects that need to be taken into account and studied. Of special interest, in particular, are the implications which the framework of European data protection law carries beyond EU borders. An interesting example is the application of GDPR to data-processing activities involved in offering goods and services to data subjects in the EU, irrespective of whether or not a payment is required.

In this respect, as some scholars have argued, the EU should rethink its rules for regulating data flow with third countries, in such a way as to address the whole range of enforceability and legitimacy problems. In order to tackle these problems, the EU should draw inspiration from private international law and its conflict-of-law rules, thereby linking these situations to jurisdictions and enforcement mechanisms. Another option would be to create a global privacy regime: this would make it possible to take a strong stance against tech multinationals, but it could also entail huge economic costs for economically weaker countries.

The problem is that under Article 3(5) TEU, the EU in its relations with the world is committed to promoting its values, eradicate poverty, and protect human rights. The way forward is therefore to take this provision seriously even in the field of data transfer between the EU and third countries, but to do so in a way that will not result in a unilateral imposition of formal standards but rather promotes flexibility and a search for ad hoc solutions in a context marked by legal pluralism and differentiation. Such differentiating multilateralism is the approach the EU should take in dealing with the extraterritorial consequences of its data protection laws, this by holding up some core values including the fundamental rights protected by the EU Charter and the ECJ.

## IV SESSION

### **The future of EU trade cooperation: taking EU fundamental rights and values seriously?**

*Chair: Nanette Neuwahl*

## Transparency as a tool for fundamental rights' protection: The EU as a global standards setter

*Maria Laura Marceddu*

*Abstract by Riccardo Righelli*

The constitutional foundations of transparency may be found in the EU treaties, which have placed a strong emphasis on this concept. Without explicitly mentioning the principle of transparency, Article 2 TEU lists the values underpinning the EU. The principle is in the first place embodied in Article 11 TEU, which—inter alia—requires the EU institutions to maintain an open, transparent, and regular dialogue with citizens and representative associations and to give them “the opportunity to make known and publicly exchange their views in all areas of Union action”; moreover, paragraph 3 set forth an explicit duty of the European Commission to “carry out broad consultations with parties concerned,” thereby making the practical side of transparency clear. Complementing these provisions is Article 15 TFEU, with its strong commitment to openness and access to documents for promoting good governance and ensuring a stronger participation of civil society, reinforcing what is outlined in Article 11 TEU. In this way—merging the idea of ensuring the conditions for an informed, engaged public and of public consultation with the idea of giving open access to EU documents—the EU legal order seeks to support transparency as a prominent legal tool. Transparency thus figures as a key component and prerequisite when it comes to enhancing the European Union’s democratic legitimacy as decision-making power vis-à-vis its citizens. Individuals are put in a position where they can not only be informed about what is actually happening but can also influence the EU institutions’ decision-making process and subject it to scrutiny. In this way, the multilevel approach that characterises the EU finds a clear application.

Bearing this institutional setup in mind, it is therefore necessary to explore whether and how it is applied in practice, and in particular how it is brought to bear on the EU’s external relations in the domain of investment policy and the Brexit negotiations.

As for investment policy, it bears pointing out that before the Lisbon Treaty came into effect, competences in this field were predominately exercised by the EU Member States, but after the current treaties took effect the EU gained exclusive competence in the investment field. Under Article 207 TFEU, investment policy now falls within the scope of the common commercial policy, and in light of this competence the EU has started negotiating its own investment agreements or including this subject matter within the single FTAs concluded with third countries in order to gradually replace the external BITs previously concluded by the Member States.

As concerns the application of transparency at treaty-making level, it is worth stressing that the novelties introduced by the EU are dramatic, considering that international-investment negotiations have long been conducted by diplomatic or government representatives behind closed doors, without any public participation.

Among the most interesting novelties the EU institutions have introduced, there are some of special relevance. First, all EU negotiation proposals may be consulted online (the



only notable exception being the EU-Japan economic partnership agreement, which only certain chapters of which have been made available online). In addition, the Commission also releases explanatory factsheets that are intended to provide for clear and neutral explanations of extremely complex issues, such as ISDS, thereby placing nonspecialists, too, in the position of understating of what the published documents are about and what they say. The boldest novelty introduced by the Commission in its commitment to transparency lies in its public consultations, launched in 2014, in strict compliance with Article 11 TEU: with the TTIP negotiations, the European public has for the first time been invited to offer its own opinions on the treaty-making procedure. Nor is that a one-time experience, for in 2016 a public consultation was launched on the establishment of a Multilateral Investment Court. The last point worth highlighting concerns the Council's negotiation mandates to the Commission, in that these are now declassified and available online. These are important documents because they contain the instructions under which the Commission may conduct negotiations with third countries, and so they reveal the policy positions taken by Member States: maybe this is why that declassification has met a fair amount of resistance from the Member States.

Turning now to the Brexit negotiations, it is first of all worth mentioning that under the governing provision (Article 50 TEU), the EU and the UK are to conduct their negotiations in a transparent manner. However, the two sides are each implementing this requirement in its own way: while the EU has taken a maximalist approach by making available all the documents at its disposal, the British government has taken a discriminating stance on transparency. In the words of Theresa May, the United Kingdom will not provide a "running commentary on every twist" of Brexit negotiations. The rationale behind this different approach is based on an appreciation that the two actors have different needs, but this casts some doubt on the way legitimacy is understood in these negotiations, especially as concerns the line of conduct adopted by the UK. As for unity, while in the EU transparency may strengthen the relationship between the Union and civil society, the same cannot be said of the UK, where greater transparency risks bringing about the opposite effect of public mistrust. The UK has recently revised its stance somewhat, suggesting that it is willing to be more transparent in this phase, but still there are some critical issues in the matter of transparency.

To conclude, it is too early at the moment to definitely state that the EU has become a global standard setter on transparency, with an ability to give force to its model even outside its own borders. However, it is worth noting in this regard that the EU has been successful in gradually driving some of its more reluctant partners to set a high bar for transparency or to raise their own standards, as in the case of Japan and Canada. Only time will tell if this partly disappointing "no" will become a "not yet."

# **The implications of the EU Charter of Fundamental Rights for the relationship between trade and traditional human rights: An application to the TTIP and Brexit**

*Gerard Conway*

*Abstract by Nicola Bergamaschi*

Nowadays, free trade is regarded as something axiomatically valued, but historically trade has been much more localised and regionalised. Free trade was a key political debate in Europe during the 19th century, especially in the UK, when it played an important role in relations between the European states and their colonies and acted to reinforce the colonial powers. The idea of an EU customs union and of free trade in Europe was systematically introduced in late 19th and early 20th centuries, with particular regard to France and Germany. Global free trade as a norm and an international trade system has, however, had a relatively recent development, in particular after World War II.

The EU has therefore been at the forefront of a comprehensive and systematic notion of free trade and competition law. As is well known, the principle of freedom of movement and the principle of undistorted competition have become the two pillars of the internal market, which is the core framework of the EU. From the UK point of view, the internal market was the main feature of the Union and therefore the main reason for joining the integration project, while other matters were considered of low importance and less attractive. That is the reason for the many opt-out choices the UK made even in the Lisbon Treaty in relation to other aspects of the integration process, thereby limiting the development of a more federal EU structure.

Against this background, it is worth mentioning that fundamental rights and free trade are not often viewed and discussed as directly linked—which raises some interesting and philosophical points for reflection. One of the interesting things about ECJ case law on the relation between the internal market and fundamental rights is that the Court has not really and systematically established a kind of normative preference for the latter over the internal market. Rather, the Court has more than once sought to apply internal market issues in fundamental terms, as in *Viking* and *Laval*, where it subordinated the right to strike to the free movement principle, deemed more important than the social-economic right. What this suggests is that fundamental rights within the EU are to be understood not as equal to national constitutional values but as finding their proper place within the framework of the internal market, which is treated as itself having a fundamental structure.

This assessment of the interplay between the internal market and fundamental rights is also apparent in the Brexit process, where the European Commission is especially insistent on the special status to be accorded to free movement and to the limited scope of the exemptions to access to the internal market. Such rhetorical insistence on the integrity of the internal market could be seen to some extent as a negotiating tactic of the Commission in the face of the flexibility allowed under other EU trade agreements, but it is actually something more nuanced than an “all or nothing” position. It really reflects the notion of the

fundamental structure of the internal market, which should not be fundamentally modified. The EU has been extremely successful in renewing the debate on investors and national economies and on state aid rules, which figure among the sticking points of negotiations with UK.

Looking at the documents released by the European Commission on the TTIP, also in this case it can be observed a certain tendency of the EU to export its norms and standards within the TTIP negotiating process. In one point of the final report filed after the 15<sup>th</sup> round of negotiation in October 2016, the Commission straightforwardly stated that the only way to reach to an agreement would be to harmonize US standards consistently with EU law, thereby basically excluding more space for negotiation in that particular regard. The EU is therefore engaged in a process that is normal at international level, but the reality is that a compromise has to be found. Another point of the report provides for the possibility of an involvement of US experts in the development of EU trade standards, which reflects the practical dynamic of EU interaction-and-influencing process in the field of trade. It will be interesting to see to what extent each party is successful in influencing the other and exporting its own rules.

In conclusion, in both the TTIP and the Brexit process, the EU is coming in with a very strong ideological commitment to its own internal market, but the reality—as already reflected in other agreements with third countries—is that there will be a compromise.

## Human rights in future EU agreements: Lessons from past experience

*Marion Geffrault*

*Abstract by Susanna Villani*

As much as human rights may not be the primary concern of the FTAs concluded by the EU, the latter is doing its best to ensure that they go hand in hand with free trade. It is thus of utmost importance to discuss how in its agreements the EU is trying to strike a balance between promoting and protecting its fundamental values, in this case human rights, and its less “idealist” interests, namely economic and trade-related ones.

The origin of the human rights clauses, now a symbol and characteristic of EU’s identity as embodied in Article 21 TEU, can be traced back to the 1990s, when the EU started tying its relations with third countries to the demand that they meet some political conditions, including the protection of the fundamental rights set in the most relevant international instruments. The human rights clause has been later defined as “essential element” of these agreements thereby becoming grounds for suspending or terminating a treaty under Article 67 of the 1969 Vienna Convention in the event that the partner state should commit or tolerate serious human rights abuses. Such suspension or termination clauses can be generally found in global agreements, but it is surprising that it does not appear in sectoral agreements even though they deal with human rights issues, as in the case of readmission agreements. Besides this, the human right clause is characterized by a number of other shortcomings that deserve to be underlined. To begin with, it has been often criticized as a way for the EU to interfere in the domestic affairs of foreign countries and to apply a neo-colonialist paradigm in its relations with ACPs and other former colonies in Africa. At the same time, there is no clear or agreed method or set of criteria on which basis to implement these agreements. Then, too, its wording is unstable and its scope varies from one agreement to the next. This can be appreciated in particular in the EU-Canada Strategic Partnership Agreement, in which even more severe requirements deprive the human rights clause of any chance to ever be applied, which contributes to undermining the credibility and legitimacy of this clause.

In light of this background, there has been a tentative enhancement of the human rights clause by means of the so-called “double-agreement system” introduced in 2010 with South Korea and inspired by the Cotonou/EPA system. The purpose of this system is to use the only real leverage the EU has on some third-country partners, namely, trade, so that they will be encouraged to take action on human rights. The most developed version of this scheme is contained in the framework agreements dealing with the political aspects of bilateral relations: these agreements include a breach clause under which the EU may take specific measures to suspend the agreement. By extending the scope of the human rights clause to other sectoral agreements linked to the framework agreement, the EU has thus negotiated comprehensive and ambitious FTAs, as in the case of the agreements concluded with Asian countries, i.e., Indonesia, Vietnam, Singapore, Thailand, and Japan. This notwithstanding, such a system cannot represent the remedy to the other remaining weaknesses of the clause, such as the fact that some political agreements do not include a

breach clause and that others explicitly provide that the human right clause may not be invoked as grounds for for suspending or terminating other agreements between the parties (see, for example, Article 52 of the recent agreement with Australia and New Zealand). This means that the only way an FTA can be affected by the human rights clause is by introducing a breach clause directly in the treaty in question, but then—considering how reluctant the EU’s trade partners are to tie trade to human rights considerations, and this goes for Canada and New Zealand as well—one should expect that it won’t be so easy to accomplish such a task.

Against this background, alternatives to the inclusion of a human rights clause could be not only a stronger and deeper political dialogue, but also the setting of autonomous instruments, like the one that could be termed as “pre-conclusion conditionality”. The Union has used it for accession to the EU itself by demanding that candidate countries comply with human rights protection before joining the EU. More recently, in the EU-Japan FTA negotiations, a document was drawn up containing nontariff barriers to be removed before the agreement could be concluded. Using these examples as a blueprint, the EU could bring that approach and conditionality to bear on human rights as well by making the conclusion of an FTA subject to the partner state’s satisfaction of a few requirements, as by demanding that partner states enforce human rights provisions more strictly or that they ratify specific international instruments.

In conclusion, the EU appears to be torn between its intention to be perceived as a pragmatic and realist international player, on the one hand, and as more than just a trading power, on the other, with its attachment to its principles and identity.

## The state of the art and the future of the EU-US trade relations

*Judicaël Etienne*

*Abstract by Nicola Bergamaschi*

The European Parliament is handling a number of legislative files concerning trade, human rights protection and anti-dumping measures in order to take major steps in the discussions on EU international trade negotiations.

As for the latest developments in EU-US relations, there is a clear contrast to be observed between the most ambitious bilateral trade agenda ever attempted—begun in 2013 with a Council directive and carried forward in 2014 with the publication of the TTIP negotiating mandate—, and the most trade offensive that the EU ever faced, five years later. Despite that tension, it is worth mentioning the joint statement that followed the 81st Transatlantic Legislators' Dialogue, in which representatives from the EU and the US met to address issues of common interest, including trade. In a very short paragraph in this statement, the parties upheld their “belief in a rules-based, open, and non-discriminatory multilateral trading system,” and they “also agreed to intensify [their] efforts to work together to address trade barriers imposed by other countries, particularly China”. A common vision so inspired could provide the new common ground on which basis to resume negotiations. It has to be noted, in this respect, that there are currently no FTAs between the EU and US or any preferential trade relations, and EU-US trade relations are therefore based on the WTO rules. But there are several ongoing disputes, further aggravated by the announcements the US president made in March 2018, introducing new tariffs on the import of steel and aluminium even from the EU, albeit with a temporary exemption.

The EU reaction to the US decision has been centred in three different strands. The first of these envisages the possibility to launch WTO consultations. The second consists in a set of rebalancing measures consisting in the releasing a list of US products to be targeted in agreement with the EU stakeholders. Thirdly, on the 26 of March, the Commission has launched all the safeguard procedures on diverted imports to the EU.

There are two potential prisms through which it is possible to assess the US measures. The first is the national security exception, under Article XXI GATT, the second is the framework of safeguards. The question is complicated by the fact that US assert that these measures are relying on domestic law, rather than on international law. In fact, precisely in this vein, in response to China's WTO dispute complaint alleging illegal safeguards by the US, the latter pointed out that the tariffs were issued not within the WTO framework but on the basis of Section 232 of the Trade Expansion Act. In any case, the claimed exception is an abuse of Article XXI GATT, whose scope of application is very limited. Therefore, at the moment it is not convenient for the EU to take action on the basis of that provision: it would instead be more appropriate to wait for the dispute settlement body to rule on whether or not the US is in compliance with the WTO recommendations.

It is possible to move within the framework of safeguards, so long as this is done in keeping with certain basic principles and procedural requirements. And indeed this is precisely the kind of response the Commission has put into place by invoking some

instruments already provided by EU law, such as Regulation (EU) 2015/478, on the adoption of rebalancing measures, and Regulation (EU) 654/2014, on trade enforcement regulation.

The US president's announcements have left the door open for a possible exemption for the EU, so talks have been initiated by working on questions of heritage and shared interests, which questions will also be on the agenda at the Global Forum on Steel Excess Capacity, set up under the aegis of the G20 and now hosted by the OECD. From the EU side, as the ECJ has held in Cases C-660/13 (Swiss MoU) and C-73/14 (ITLOS), the European Commission is empowered to conduct discussions with the US under Article 17(1) TEU. Whatever the outcome will be, it is necessary to find a proper the legal basis and to follow appropriate decision-making procedures in conformity with the WTO in implementing any possible solution these talks may lead to.

In recent months a number of improvements and changes to EU trade policy have been made, and some questions are therefore bound to come up even in relation to the procedural steps for resuming TTIP negotiations with the US. In particular, Article 218 TFEU sets out the procedure for negotiating and concluding an international agreement but does not envisage the possibility of resuming negotiations that have seized up: it is thus not evident whether any such resumption needs a formal step by the Council or a Commission proposal. Finally, another open question concerns the negotiation directives: should they be reformulated and broadened? In this respect, it seems that negotiations could continue under the same mandate without any reformulation. Clearly, all these issues will depend on the political choices made by the EU institutions.





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## Jean Monnet Network L<sup>A</sup>wTTIP

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