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The 2010 WTO Transparency Mechanism for Preferential Trade Arrangements: As Good as it Currently Realistically Gets

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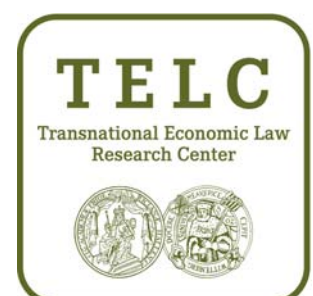
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Introduction

Although the obligation to grant most-favoured-nation (MFN) treatment as prominently enshrined in Art. I:1 of the GATT 1994 and numerous other multilateral agreements of the WTO legal order is generally regarded as “one of the cornerstones of the world trading system” (WTO, 2002: para. 297; see also, e.g., WTO, 2004a: para. 101; *Van den Bossche*, 2008: 322 *et seq.*) or – albeit already more narrowly – perceived as “the golden rule of western trade relations” (*Santos/Fabrias/Cunha*, 2005: 647), it is equally well-known that in practice this legal principle is exercising increasingly less significant steering effects. In this regard, MFN treatment comes closer to constituting the exception, rather than the rule (WTO, 2004b: para. 60; *Tietje*, 2009: 175). Thereby, the fact that currently a considerable portion of world trade by WTO members is not governed by their MFN treatment obligation can

largely be attributed to two recognized and ever-more-important deviations from this type of non-discrimination commitment: on the one side the possibility to conclude agreements aimed at regional economic integration – so-called regional trade agreements (RTAs) – and on the other side the granting of preferential treatment to developing countries, the so-called preferential trade arrangements (PTAs).

Both classes of exceptions have more recently been addressed by the WTO in the course of the slowly progressing, but still ongoing “Doha Development Round”; and indeed, the steering mechanisms agreed upon in this connection are worth noticing already in light of the fact that they are among the very few “Doha” achievements reached so far. Already on 14 December 2006, the General Council adopted and implemented – in accordance with paragraph 47 of the Doha Ministerial Declaration (WTO, 2001) on a provisional basis – the “Transparency Mechanism for Regional Trade Agreements” (WTO, 2006a).

By the same date, the Council furthermore decided to invite the Committee on Trade and Development (CTD) “to consider transparency for preferential arrangements under paragraph 2 of the Enabling Clause (other than RTAs), and to report back within six months for appropriate action” (WTO, 2006b). This ambitious deadline was missed, like numerous others in the course of the “Doha Round”. However, on 4 October 2010 the CTD concluded its consideration of this issue and reached an agreement on a “Transparency Mechanism for Preferential Trade Arrangements” (WTO, 2010a). Having been subsequently forwarded to the General Council, the instrument was finally adopted at the Council meeting on 14 December 2010 (WTO, 2010b).

This contribution is intended to provide an evaluation of this new procedural guiding scheme aimed at enhancing the transparency of regulatory instruments adopted by WTO members in order to provide for non-reciprocal preferential treatment to developing countries and least-developed countries (LDCs). In this connection, it will be

argued that the 2010 Transparency Mechanism for Preferential Trade Arrangements (2010 TM for PTAs) can be regarded as a useful and thus laudable tool for coping with the procedural challenges arising from the evaluation of PTAs by WTO members.

The Background: Special and Differential Treatment for Developing Countries

In order to understand the functions of the 2010 TM for PTAs and the regulatory environment it is intended to cover, it first needs to be recalled that this instrument, as well as the regulations falling under its material scope of application, are – with regard to their position in the broader framework of the WTO legal order and its main legal principles – manifestations of the concept of special and differential treatment for developing countries.

The former GATT 1947 originally did not include any specific provisions on adapted rights and obligations of developing countries. However, it did not take long for the perception to gain

prominence in international trade discourses that also subjecting these Contracting Parties to the principle of non-discrimination on an equal footing with their developed counterparts does not adequately take into account the special needs and challenges of their economic development. Consequently, in the same way as previously done in the course of the Havana Charter negotiations, many developing countries soon started to call for amendments to the GATT 1947 aimed at introducing a “development dimension” into this legal regime in order to advance their integration into the international trading system and to foster their economic growth (see thereto, e.g., *Nottage*, 2009: 484 *et seq.*; *Kessie*, 2007: 15 *et seq.*; *Hoekman/Kostecki*, 2009: 535 *et seq.*; *Santos/Fabrias/Cunha*, 2005: 639 *et seq.*).

While these demands in the 1950s initially only resulted in the adoption of modifications to Art. XVIII GATT 1947 (for details see *Jessen*, 2006: 237 *et seq.*; *Jessen*, 2010: 582 *et seq.*), the process quickly gained momentum for a variety of reasons and led in 1965 to the addition of a new Part IV to the

GATT 1947 (*Trebilcock/Howse*, 2005: 474 *et seq.*; *Jessen*, 2006: 275 *et seq.*), bearing the title “Trade and Development” and – admittedly on the basis of rather vague and compromising language – generally anchoring the notion that developing countries are entitled to special and differential treatment into this multilateral legal framework governing world trade. Today this concept undoubtedly belongs to the central structural principles of the WTO legal order; it is “part of the WTO’s legal ‘acquis’” (WTO, 2004b: para. 89) and, from a broader perspective, regarded as “the most basic principle of the international law of development” for example by no less an organization than the European Union (WTO, 2004a: para. 14). Already the preamble of the Agreement Establishing the WTO enshrines the member’s recognition that “there is need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development”. This is far from an empty statement. A more recent note by the WTO Secretariat

identifies no less than 148 special and differential treatment provisions contained in the WTO agreements (WTO, 2010c: paras. 2 *et seq.*). In light of these findings, it is hardly surprising that this guiding concept is also envisioned to play a rather prominent role in the current “Doha Development Round” (see, e.g., WTO, 2001: para. 50).

In addition to these numerous provisions and the implementation thereof, the notion of special and differential treatment of developing countries finds already for some time one of its most visible as well as practically important expressions in the concept of a Generalized System of Preferences (GSP). Following intensive and controversial discussions, the idea of granting developing countries generalized, non-reciprocal and non-discriminatory trade preferences on a voluntary basis aimed at increasing their exports and thus promoting their economic growth first took shape under the aegis of UNCTAD in the late 1960s (see there-to, e.g., *Santos/Fabrias/Cunha*, 2005: 643 *et seq.*). The compatibility of this type of preferential treatment with

GATT 1947 was initially ensured for a period of ten years on the basis of the so-called “GSP Waiver Decision”, adopted by the Contracting Parties in June 1971 (*Turksen*, 2009: 930 *et seq.*; *Bartels*, 2003: 511 *et seq.*; *Jessen*, 2006: 328 *et seq.*). This was only subsequently established on a permanent basis in the form of the 1979 decision titled “Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries” but more widely known under the name “Enabling Clause” (GATT, 1979; see also *Jessen*, 2006: 331 *et seq.*). The Enabling Clause, which in accordance with paragraph 1 (b) (iv) of the introductory text to GATT 1994 has later become an integral part of the WTO legal order and not only serves as the normative basis for GSP, is currently still considered to be “the most concrete, comprehensive and important application” of the principle of special and differential treatment of developing countries (WTO, 2004a: para. 14) and thus “arguably the central pillar of S&DT [special and differential treatment] in WTO law” (*Nottage*, 2009: 486).

Although from an economic perspective as well as with regard to its application and design in the practice of individual developed countries far from uncontroversial (WTO, 2004b: paras. 90 *et seq.*; Dunoff, 2009; Shaffer/Apea, 2005: 991 *et seq.*; Hoekman/Kostecki, 2009: 555 *et seq.*; Jessen, 2006: 340 *et seq.*), with the latter aspects already having given rise to a dispute settlement proceeding brought by India against the EU (WTO, 2004a; see thereto also, e.g., Harrison, 2005; Irish, 2007; Jessen, 2006: 551 *et seq.*), GSP remains overall and for the foreseeable future a central component of the global economic development strategy. With the first of these schemes having been implemented as early as in the beginning of the 1970s, as of today virtually all developed countries and the EU have adopted – and over time repeatedly modified – legislative instruments granting special trade preferences to developing countries by way of a GSP system (see, e.g., Grossman/Sykes, 2007; Turksen, 2009; Bartels, 2007; Jessen, 2006: 578 *et seq.*; Jessen, 2010: 585 *et seq.*). In order to ensure a basic level of transparency concerning these various individual

preference schemes and to satisfy the wish for further information potentially arising in this connection, already the Enabling Clause itself stipulates in its paragraph 4 a general obligation for the WTO member granting the preferential treatment to notify – since its creation in February 1995 to the CTD – the introduction, modification or withdrawal of the respective mechanism. As an established practice (see, e.g., more recently WTO, 2012; WTO, 2011a), the details are now also addressed in the 2010 TM for PTAs here at issue.

Finally, with a view to the scope of application of this new steering instrument it should also be recalled that despite its prominent position, the concept of GSP is in the realm of the WTO legal order and its members far from the only kind of instrument providing for non-reciprocal trade preferences in the development context. Other respective approaches include the option given to developing country WTO members to grant preferential tariff treatment to products of LDCs on the basis of a waiver which has more recently been extended until 30

June 2019 (WTO, 2009a) or the application of autonomous preferential treatment by developed WTO members to products from individual countries. One such example is the waiver adopted on 7 May 2008 in connection with the respective trade policy approach of the EU towards Moldova (WTO, 2008a).

The Role Model: 2006 Transparency Mechanism for Regional Trade Agreements

The role model – and this by far not only with regard to its denotation – for the 2010 TM for PTAs is without doubt the 2006 Transparency Mechanism for Regional Trade Agreements (2006 TM for RTAs). Thereby, both instruments are in a complementary relationship, each of them focusing on one of the two major exceptions to the MFN treatment obligations as mentioned above.

Contrary to the 2010 TM for PTAs, its slightly older counterpart is not occupied with the respective procedural aspects and challenges resulting from the

unilateral granting of non-reciprocal trade preferences in the development context. Rather, as already implied by its title, the 2006 TM for RTAs applies to the various types of economic cooperation in the form of mutually agreed and applied elimination of barriers to trade and other economic factors on a reciprocal basis at the sub-multilateral level between a limited number of states and/or supranational organizations on the basis of international agreements (on the definition, purposes and different types of “regional” economic integration agreements *Nowrot, 2009: 116 et seq.*).

If the schemes for providing preferential treatment to developing countries are viewed as posing a challenge to the viability of the WTO’s multilateral legal framework governing international trade relations, this finding applies most certainly no less to the phenomenon of regional – including increasingly also “cross-regional” – economic integration. Although in principle far from being a recent feature of the international economic system, the proliferation of regional trade agreements since the beginning of the 1990s and

in particular in the course of the previous decade is unprecedented. While during the whole period from 1948 to 1994 only slightly more than one hundred respective agreements and subsequent accessions thereto had been notified to the Contracting Parties of GATT 1947 (WTO, 1999: para. 2.3), as of 15 January 2012 – according to the respective information provided on the WTO website – the number has risen to 511 notifications, 319 of which concern RTAs currently in force.

It hardly needs to be mentioned that, from an economic perspective, the issues of, *inter alia*, whether the “trade-creating effects” resulting from regional economic integration outweigh the “trade-diverting effects” connected with it (Viner, 1950: 41 *et seq.*; Krishna, 2009: 12 *et seq.*) as well as whether recourse by WTO members to respective trade agreements should be regarded as a “building block” or rather as a “stumbling block” to multilateral trade liberalization (Bhagwati, 1991: 77) are already for quite some time intensively and controversially discussed, yet without any conclusive finding in sight.

This ambivalence is also mirrored in the respective provisions of the WTO legal order as well as in particular their application in practice. Although Art. XXIV GATT 1994, the Understanding on its Interpretation, Art. V and *Vbis* GATS, as well as the Enabling Clause stipulate in part quite detailed prerequisites on the conformity of RTAs with WTO law, the exact meaning of many of these requirements is still disputed. It is in light of the rather inconclusive practice for a variety of reasons far from certain that the WTO is currently in position to effectively monitor the legality of individual RTAs either by way of deliberations in the Committee on Regional Trade Agreements (CRTA) and the CTD, or through the WTO dispute settlement procedure (see thereto, e.g., Matsushita/Schoenbaum/Mavroidis, 2006: 547 *et seq.*; Mavroidis, 2010; Gantz, 2009; Mitchell/Lockhart, 2009; Nowrot, 2009: 129 *et seq.*). Against this background, it is hardly surprising that this complex and increasingly pressing issue also found its way on the agenda of the “Doha Development Round” (WTO, 2001: para. 29 “We also agree to negotiations aimed at clarifying and improving dis-

ciplines and procedures under the existing WTO provisions applying to regional trade agreements.”).

With the contents of the substantive provisions as of today still awaiting respective clarifications, the negotiations have at least insofar been successful as the WTO members were able to agree on the adoption of the 2006 TM for RTAs. Based on the notification and reporting requirements stipulated in Art. XXIV:7, the paragraphs 7 to 11 of the Understanding on the Interpretation of this Article, Art. V:7 and Art. V*bis* lit. b GATS as well as paragraph 4 lit. a of the Enabling Clause, the instrument calls for an early announcement of negotiations on regional trade agreements and timely information on newly signed treaties of this kind (WTO, 2006a: paras. 1 *et seq.*). Furthermore, at the heart of its notable regulatory content lies the establishment of a detailed procedural framework for the consideration by the WTO members of notified respective trade agreements in the CRTA or – in case of agreements notified under the Enabling Clause – in the CTD respectively (WTO, 2006a: paras. 6 *et seq.*),

which includes a factual presentation to be prepared by the WTO Secretariat (WTO, 2006a: para. 7 lit. b). For example as of 1 November 2010, already a total of sixty-seven RTAs had been considered by the WTO members under the 2006 TM for RTAs (WTO, 2010d: para. 5). This positive trend continued in 2011 (see, e.g., WTO, 2011b: paras. 6 *et seq.*).

Although it might be too early for anything close to a definitive judgment on the impact and effectiveness of this procedural instrument, the current review of the 2006 TM for RTAs, as formally agreed upon by the WTO Negotiating Group on Rules on 13 December 2010 and launched in February 2011 with a view to making this provisionally implemented steering mechanism permanent (see thereto, e.g., WTO, 2010e: para. 5; WTO, 2011c; WTO, 2011d; WTO, 2011e), might – with all due caution – serve as an indication that the 2006 TM for RTAs has in the course of its nearly six years of operational practice gained at least a basic level of acceptance among WTO members.

2010 Transparency Mechanism: History and Content

The fact that the General Council's invitation to the CTD to create a Transparency Mechanism for PTAs occurred on 14 December 2006 alongside the adoption of the respective mechanism for RTAs (WTO, 2006b) immediately brought momentum into the negotiations of the former with both Brazil and India agreeing to work with the members of the CTD to establish a first so-called non-paper as a starting point for the envisioned transparency mechanism (WTO, 2007a: para. 43 et seq; WTO, 2007b: para. 21). Soon afterwards both were joined by first the United States of America (WTO, 2008b: para. 33) and subsequently China (WTO, 2008c: para. 43) – leading to the co-sponsorship for the transparency mechanism covering three of the largest beneficiaries as well as the provider of one of the largest GSP schemes. However, the original deadline of six months could not be kept – as many afterwards. Despite these early efforts, the negotiations would last for over three and a half years.

Throughout these negotiations, a defining factor had always been the aim of achieving a high degree of transparency while at the same time avoiding a heavy burden on the reporting State. The first basis for discussion had been the aforementioned non-paper put forward by Brazil and India. This non-paper focused on GSP programs. While aiming at a parallelism to the 2006 TM for RTAs, it was articulated – albeit only in a brief reference – that the procedures should be similar but not identical (WTO, 2007c: para. 27), evoking criticism for not addressing the particular differences that were envisaged (WTO, 2007c: para. 32). Additionally, the non-paper was in parts unclear about the future role of the Secretariat in the transparency mechanism, causing WTO members to stress that the Secretariat's function should be limited to facilitating the exchange of information, not including interpretational or analytical work in regard to PTAs (WTO, 2007c: para. 32).

On the basis of the non-paper, a draft had been created by all four co-sponsors to further the debate in Octo-

ber 2008 (WTO, 2008d: para. 38). This draft addressed the issues voiced at previous meetings, however left concerns in regard to the burden on the notifying WTO members specifically voiced by the European Union, which were previously raised against the non-paper (WTO, 2008b: para. 34). In order to ensure that no unduly burdensome efforts must be undertaken to comply with the notification requirements, a mock factual presentation was suggested (WTO, 2008d: para. 44). However, the preparation of this presentation – based on the US GSP program – was delayed until October 2009 (WTO, 2009b: para. 30). While causing some concern – for instance regarding both the structure and the content – the presentation was supposed to be a supplement to the second draft text issued in December 2009 (WTO, 2010f: para. 46). In this draft, coverage was extended to encompass both preferential treatment to LDCs and any other non-reciprocal preferential arrangements in addition to PTAs under the Enabling Clause (WTO, 2010f: para. 47). In order to overcome the concerns regarding the earlier draft version, changes were specifically im-

plemented to minimize the burden on developing countries – including an extension of deadlines and the incorporation of more flexible language. In addition, both the quantity and the quality of the data were improved due to the suggestions of the Integrated Database Section of the Secretariat (WTO, 2010f: para. 47), which again caused doubts on the side of the European Union in fear of excessive annual obligations being both demanding and impractical (WTO, 2010f: para. 49). This criticism was joined by the Dominican Republic, which specifically addressed the fact that the obligations under the envisioned transparency mechanism for PTAs would now exceed the respective obligations in connection with RTAs. Furthermore, the deadlines were stricter than those regarding RTAs. Also, the Dominican Republic feared that certain obligations would fall outside the mandate of the WTO (WTO, 2010g: para. 16).

Those issues were addressed in another revised draft of June 2010 (WTO, 2010h: para. 29). The majority of the procedural and substantive changes in the text were aimed at minimizing the

burden on notifying WTO members, e.g. by clearly distinguishing between a new and a renewed PTA, requiring a full notification only in the case of the former. Beneficiary countries now had been giving the opportunity to view the draft factual presentation prepared by the Secretariat and it was assured that the scope of the envisioned transparency mechanism was limited to the mandate of the WTO.

In its next meeting in October 2010, the CTD was discussing what was to become the last revision of the draft. Even though it contained only minor changes, one major issue still under discussion until the last moment was the nature of application of the TM for PTAs. While a permanent application was under discussion, emphasis was put to the synchronism with the 2006 TM for RTAs. Especially the European Union stressed that its acceptance of the final version had become possible due to the compromise of all co-sponsors stating for the records that “[the respective delegation] recalls that during the negotiations on the TM for PTAs, it was considered that a decision on its permanent application would

take into account the status of the TM for RTAs” (WTO, 2010i: para. 64). Therefore, according to its final paragraph 26, the 2010 TM for PTAs will apply on a provisional basis until the WTO member’s approval of permanent application, a state that will depend on the fate of the 2006 TM for RTAs currently under review.

In its final version, adopted on 14 December 2010, the TM for PTAs contains 26 paragraphs divided into six chapters, namely Coverage, Notification, Procedures to Enhance Transparency, Subsequent Notification and Reporting, Other Provisions, and Reappraisal of the Mechanism.

Bearing in mind its purpose as contributing towards transparency beyond the realm of RTAs, the 2010 TM for PTAs addresses those exceptions of the MFN-clause not covered by the 2006 Transparency Mechanism, specifically those that are not reciprocal. Therefore, it firstly purports to the instruments enumerated in para. 2 of the Enabling Clause, with the exception of para. 2(c), which encompasses RTAs

and is hence already covered by the 2006 TM for RTAs. Most significantly, para. 2(a) of the Enabling Clause covers preferential treatment under a GSP scheme. In addition, the Enabling Clause also deals with Regional and Global Arrangements amongst developing countries (para. 2 (b)) and special treatment accorded to LDCs (para. 2 (c)). Whereas the Enabling Clause only embraces measures in favor of least-developed countries in the context of any general or specific measure, the 2010 TM for PTAs explicitly expands to all preferential trade accorded to products of least-developed countries (para. 1(b) 2010 TM for PTAs). Lastly, in order to be all-encompassing, the 2010 TM for PTAs includes a catch-all provision in its para. 1(c) explicitly covering any other non reciprocal preferential treatment authorized under the WTO Agreement. Overall, while the primary focus of the 2010 TM for PTAs still lies on treatment accorded under a GSP scheme, as was first envisaged, the mechanism had been enhanced to cover all forms of preferential treatment beyond RTAs.

The covered instruments shall be notified by the WTO member granting the preferences as soon as possible, at the latest three months after the entry into force of the PTA, after which the CTD shall make its considerations in the following 12 months. It is supported in this function by the Secretariat by including the submitted data in a factual presentation as well as a guide envisaged to assist in finding specific information. The Secretariat, while to a certain degree allowed to use information beyond the data submitted by the notifying WTO member, is explicitly ordered to refrain from any judgment on any matter.

The data to be submitted includes a full listing of preferential duties under the PTA, a full tariff listing of the notifying member's MFN duty rates applied on the year of the implementation as well as the preceding one, product-specific preferential rules of origin, import data for the most recent three years preceding the notification, as well as other useful information such as technical guidebooks for the utilization of the PTA.

Changes to an existing PTA on the other hand only demand information regarding the legal and factual changes to the regime. This is one of many compromises taken to appease those WTO members afraid of creating a burden on the reporting countries. Most importantly, the 2010 TM for PTAs does not require members' data that has already been submitted, even allowing mere references to relevant publicly available internet websites containing the pertinent information, thereby avoiding being overly burdensome on those WTO members that have various schemes in place. Furthermore, the 2010 TM for PTAs stresses that it should not create any further obligations towards WTO members, including that the factual presentation shall not be used as a basis for dispute settlement. Lastly, in order to minimize the burden on notifying members, developing countries, which often face more tenuous constraints in gathering and submitting the required data due to limited resources, are addressed by specific provisions, in line with the special and differential treatment, encompassing both special deadlines as well as technical support by other

WTO members as well as the Secretariat. In addition to eliminating obstacles for notification, para. 23 of the 2010 TM for PTAs creates an incentive as far as it allows other Members to bring information on PTAs to the attention of the CTD that it deems ought to have been submitted.

Finally, in its Annexes, the 2010 TM for PTAs sets out the relevant data to be submitted as well as setting out the layout for the Guide to PTAs and the Factual Abstracts, creating a uniform format for all data, thereby enhancing comparability. In July 2011, this practice has been expanded to the Notification Format by the CTD (WTO, 2011f). The collected data is currently partly available in a specific database on PTAs launched on 14 March 2012, which is in large parts modeled after the database already used for RTAs (available under <http://ptadb.wto.org>).

Comparison to the 2006 TM for RTAs

The first versions of the draft envisaged many points of synchronism between the two mechanisms, which has been

kept until the final version to a large degree. However, some differences can be identified. First of all, the 2010 Transparency Mechanism by its nature demands a different scope of application and data to be submitted. Similarly, due to the non-reciprocal nature of PTAs, only the member granting the preferential treatment is required to notify the WTO. This circumstance also explains the absence of an early announcement of a PTA which is included in the 2006 TM for RTAs. Second of all, due to the experience with the 2006 TM and the establishment of the Integrated Database, the provisions setting out in which manner to submit data are more detailed. Similarly, the role of the Secretariat has been expanded while still being purely administrative, now encompassing the preparation of the guide in addition to the factual presentation. Moreover, while the 2006 TM for RTAs already included language stating that no further obligations shall be created, its counterpart for PTAs expands upon this part, addressing members' reservations towards creating burdensome requirements for submitting data. Interestingly, while the 2006 TM for RTAs is lacking on

clear deadlines, demanding that as a rule, submission of data for a new Regional Trade Agreement will occur no later than directly following its ratification and that changes to an existing regime shall be reported as soon as possible, the 2010 TM for PTAs includes specified time frames, at the same time expanding upon its counterpart. This includes the first notification, which is to be submitted at the latest three months after the entry into force of the PTA as well as changes to existing regimes which are to be notified until 30 June of the next immediate calendar year. The practice of introducing deadlines which are explicitly defined but expand upon the TM for RTAs reveals another compromise between WTO members. In general, the 2010 TM for PTAs thereby continues on the path its counterpart has opened, becoming on the hand more precise, but also including more explicit exceptions as a general compromise for members fearing not to be able to fulfill stricter obligations.

Conclusion

Overall, it thus can be stated, that the 2010 TM for PTAs constitutes another pillar for implementing transparency in international trade relationships (see generally thereto, e.g., *Zoellner*, 2006). Undoubtedly many well-known challenges remain regarding the evaluation of the legality of PTAs, since – just as its counterpart of 2006 – the 2010 TM for PTAs requires the CTD to merely consider, rather than to comprehensively examine the notified PTAs, thereby avoiding any judgment on its conformity with the legal order established by the WTO (*Mavroidis*, 2010: 1149). In light of these findings, it becomes obvious that the 2010 TM for PTAs does not amount to a kind of all-encompassing miracle solution to the manifold legal issues arising from PTAs.

Nevertheless, it is equally certain that this new steering instrument constitutes a significant step forward as it promotes the availability of data allowing for the evaluation of existing and new PTAs on an informed basis. And indeed, bearing in mind that the prospect of WTO members reaching the

necessary consensus on significant modifications of the substantive law framework on RTAs as well as PTAs itself is for many reasons currently quite unlikely, any solution beyond addressing the procedural aspects now achieved by the 2010 TM for PTAs can hardly be reasonably expected any time soon (see also, specifically with regard to RTAs *Shadikhodjaev*, 2011; *Crawford/Lim*, 2011). Against this background the result of the nearly four year long negotiation processes in the form of the Transparency Mechanism for Preferential Trade Arrangements can truly be considered to be as good as it currently realistically gets.

References

- Bartels*, Lorand, The WTO Legality of the EU's GSP+ Arrangement, *Journal of International Economic Law* 10 (2007), 869-886.
- Bartels*, Lorand, The WTO Enabling Clause and Positive Conditionality in the European Community's GSP Program, *Journal of International Economic Law* 6 (2003), 507-532.
- Bhagwati*, Jagdish, *The World Trading System at Risk*, Princeton 1991.
- Van den Bossche*, Peter, *The Law and Policy of the World Trade Organization*, 2nd ed., Cambridge 2008.
- Crawford*, Jo-Ann/*Lim*, C.L., *Cast Light and Evil Will Go Away: The Transparency*

- Mechanism for Regulating Trade Agreements Three Years After, *Journal of World Trade* 45 (2011), 375-400.
- Dunoff*, Jeffrey L., Dysfunction, Diversion, and the Debate over Preferences – (How) do Preferential Trade Policies Work?, in: Thomas, Chantal/Trachtman, Joel P. (eds.), *Developing Countries in the WTO Legal System*, Oxford/New York 2009, 45-73.
- Gantz*, David A., Regional Trade Agreements, in: Bethlehem, Daniel/McRae, Donald/Neufeld, Rodney/Van Damme, Isabelle (eds.), *Oxford Handbook of International Trade Law*, Oxford/New York 2009, 237-265.
- GATT 1979: Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries, Decision of 28 November 1979, GATT Doc. L/4903.
- Grossman*, Gene M./*Sykes*, Alan O., A Preference for Development: The Law and Economics of GSP, in: Berman, George, A./Mavroidis, Petros C. (eds.), *WTO Law and Developing Countries*, Cambridge 2007, 255-282.
- Harrison*, James, Incentives for Development: The EC's Generalized System of Preferences, India's WTO Challenge and Reform, *Common Market Law Review* 42 (2005), 1663-1689.
- Hoekman*, Bernard M./*Kostecki*, Michel M., *The Political Economy of the World Trading System*, 3rd ed., Oxford/New York 2009.
- Irish*, Maureen, GSP Tariffs and Conditionality: A Comment on *EC – Preferences*, *Journal of World Trade* 41 (2007), 683-698.
- Jessen*, Henning, WTO und Entwicklung, in: Hilf, Meinhard/Oeter, Stefan (eds.), *WTO-Recht*, 2nd ed., Baden-Baden 2010, 575-595.
- Jessen*, Henning, *WTO-Recht und „Entwicklungsländer“ – „Special and Differential Treatment for Developing Countries“ im multidimensionalen Wandel des Wirtschaftsvölkerrechts*, Berlin 2006.
- Kessie*, Edwini, The Legal Status of Special and Differential Treatment Provisions under the WTO Agreements, in: Berman, George, A./Mavroidis, Petros C. (eds.), *WTO Law and Developing Countries*, Cambridge 2007, 12-35.
- Krishna*, Pravin, The Economics of PTAs, in: Lester, Simon/Mercurio, Bryan (eds.), *Bilateral and Regional Trade Agreements*, Cambridge 2009, 11-27.
- Matsushita*, Mitsuol/*Schoenbaum*, Thomas J./*Mavroidis*, Petros C., *The World Trade Organization – Law, Practice, and Policy*, 2nd ed., Oxford/New York 2006.
- Mavroidis*, Petros C., WTO and PTAs: A Preference for Multilateralism?, *Journal of World Trade* 44 (2010), 1145-1154.
- Mitchell*, Andrew D./*Lockhart*, Nicolas J.S., Legal Requirements for PTAs under the WTO, in: Lester, Simon/Mercurio, Bryan (eds.), *Bilateral and Regional Trade Agreements*, Cambridge 2009, 81-113.
- Nottage*, Hunter, Trade and Development, in: Bethlehem, Daniel/McRae, Donald/Neufeld, Rodney/Van Damme, Isabelle (eds.), *Oxford Handbook of International Trade Law*, Oxford/New York 2009, 481-504.
- Nowrot*, Karsten, Steuerungssubjekte und -mechanismen im Internationalen Wirtschaftsrecht (einschließlich regionale Wirtschaftsintegration), in: Tietje, Christian (ed.), *Internationales Wirtschaftsrecht*, Berlin 2009, 61-144.
- Santos*, Norma Breda dos/*Fabrias*, Rogério/*Cunha*, Raphael, Generalized System of Preferences in General Agree-

- ment on Tariffs and Trade/World Trade Organization: History and Current Issues, *Journal of World Trade* 39 (2005), 637-670.
- Shadikhodjaev*, Sherzod, Checking RTA Compatibility with Global Trade Rules: WTO Litigation Practice and Implications from the Transparency Mechanism for RTAs, *Journal of World Trade* 45 (2011), 529-551.
- Shaffer*, Gregory/Apea, Yvonne, Institutional Choices in the Generalized System of Preferences Case: Who Decides the Conditions for Trade Preferences? The Law and Politics of Rights, *Journal of World Trade* 39 (2005), 977-1008.
- Tietje*, Christian, WTO und Recht des Welt-handels, in: Tietje, Christian (ed.), *Internationales Wirtschaftsrecht*, Berlin 2009, 145-214.
- Trebilcock*, Michael J./Howse, Robert, *The Regulation of International Trade*, 3rd ed., London/New York 2005.
- Turksen*, Umut, The WTO Law and the EC's GSP+ Arrangement, *Journal of World Trade* 43 (2009), 927-968.
- Viner*, Jacob, *The Customs Union Issue*, New York/London 1950.
- WTO, 2012: Committee on Trade and Development, Generalized System of Preferences, Notification by the United States, Addendum, WT/COMTD/N/1/Add.8 of 4 July 2012.
- WTO, 2011a: Committee on Trade and Development, Generalized System of Preferences, Notification by Switzerland, WT/COMTD/N/7/Add.4 of 8 November 2011.
- WTO, 2011b: Report (2011) of the Committee on Regional Trade Agreements to the General Council, WT/REG/21 of 21 November 2011.
- WTO, 2011c: Negotiating Group on Rules, Negotiating Regional Trade Agreements: Transparency Mechanism for Regional Trade Agreements, Report by the Chairman, TN/RL/W/252 of 21 April 2011.
- WTO, 2011d: Negotiating Group on Rules, Regional Trade Agreements, Communication from Ecuador, TN/RL/W/249 of 24 January 2011.
- WTO, 2011e: Negotiating Group on Rules, Review of the RTAs Transparency Mechanism under Paragraph 23: Proposal for the Consideration of all RTAs in a Single WTO Committee, Submission by the United States, TN/RL/W/248 of 24 January 2011.
- WTO, 2011f: Committee on Trade and Development, Notification Format for Preferential Trade Arrangements adopted by the Committee on Trade and Development on 5 July 2011, WT/COMTD/73 of 7 July 2011.
- WTO, 2010a: Committee on Trade and Development, Transparency Mechanism for Preferential Trade Arrangements, WT/COMTD/71 of 11 October 2010.
- WTO, 2010b: Transparency Mechanism for Preferential Trade Arrangements, Decision of 14 December 2010, WT/L/806 of 16 December 2010.
- WTO, 2010c: Committee on Trade and Development, Special and Differential Treatment Provisions in WTO Agreements and Decisions, Note by the Secretariat, TN/CTD/W/33 of 8 June 2010.
- WTO, 2010d: Draft Report (2010) of the Committee on Regional Trade Agreements to the General Council, WT/REG/W/57 of 8 November 2010.
- WTO, 2010e: Implementation of the Transparency Mechanism for Regional Trade Agreements on a Permanent Basis, Communication from China, India and Pakistan, WT/GC/W/621 of 23 April 2010.

- WTO, 2010f: Committee on Trade and Development, Seventy-Seventh Session, Note on the Meeting of 8 December 2009, WT/COMTD/M/77 of 2 February 2010.
- WTO, 2010g: Committee on Trade and Development, Seventy-Eight Session, Note on the Meeting of 18 March 2010, WT/COMTD/M/78 of 21 April 2010.
- WTO, 2010h: Committee on Trade and Development, Seventy-Ninth Session, Note on the Meeting of 28 June 2010, WT/COMTD/M/79 of 3 September 2010.
- WTO, 2010i: Committee on Trade and Development, Eightieth Session, Note on the Meeting of 4 October 2010, WT/COMTD/M/80 of 21 December 2010.
- WTO, 2009a: Preferential Tariff Treatment for Least-Developed Countries, Decision on Extension of Waiver, adopted on 27 May 2009, WT/L/759 of 29 May 2009.
- WTO, 2009b: Committee on Trade and Development, Seventy-Sixth Session, Note on the Meeting of 12 October and 3 November 2009, WT/COMTD/M/76 of 3 December 2009.
- WTO, 2008a: General Council, European Communities – Application of Autonomous Preferential Treatment to Moldova, Decision of 7 May 2008, WT/L/722 of 15 May 2008.
- WTO, 2008b: Committee on Trade and Development, Sixty-Eight Session, Note on the Meeting of 4 March 2008, WT/COMTD/M/68 of 11 April 2008.
- WTO, 2008c: Committee on Trade and Development, Sixty-Ninth Session, Note on the Meeting of 5 May 2008, WT/COMTD/M/69 of 17 June 2008.
- WTO, 2008d: Committee on Trade and Development, Seventy-First Session, Note on the Meeting of 16 October 2008, WT/COMTD/M/71 of 20 November 2008.
- WTO, 2007a: Committee on Trade and Development, Sixty-Second Session, Note on the Meeting of 6 March 2007, WT/COMTD/M/62 of 4 May 2007.
- WTO, 2007b: Committee on Trade and Development, Sixty-Fourth Session, Note on the Meeting of 10 July 2007, WT/COMTD/M/64 of 2 August 2007.
- WTO, 2007c: Committee on Trade and Development, Sixty-Fifth Session, Note on the Meeting of 8 October 2007, WT/COMTD/M/65 of 23 November 2007.
- WTO, 2006a: General Council, Transparency Mechanism for Regional Trade Agreements, Decision of 14 December 2006, WT/L/671 of 18 December 2006.
- WTO, 2006b: General Council, Transparency for Preferential Trade Arrangements, Decision of 14 December 2006, WT/L/672 of 18 December 2006.
- WTO, 2004a: *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, Appellate Body Report of 7 April 2004, WT/DS246/AB/R.
- WTO, 2004b: *The Future of the WTO*, Report by the Consultative Board to the Director-General Supachai Panitchpakdi, by *Peter Sutherland et al.*, Geneva 2004.
- WTO, 2002: *United States – Section 211 Omnibus Appropriations Act of 1998*, Appellate Body Report of 2 January 2002, WT/DS176/AB/R.
- WTO, 2001: Ministerial Conference, Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/1 of 20 November 2001.

WTO, 1999: *Turkey – Restrictions in Imports of Textile and Clothing Products*, Panel Report of 31 May 1999, WT/DS34/R.

Zoellner, Carl-Sebastian, *Transparency: An Analysis of an Evolving Fundamental Principle in International Economic Law*, *Michigan Journal of International Law* 27 (2006), 579-628.

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