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10 A legal approach for trade issues and a diplomatic approach for non-trade and sustainability issues? From the EUSFTA via the Singapore opinion of the court of justice of the EU to the JEFTA

Herman H. Voogtsgeerd

International trade policy in general and free trade agreements (FTAs) more specifically are under increasing pressure in Western countries. Critical notes on free trade used during the current U.S. presidency and by some political parties in Europe are proof of this pressure. Many complain about the lack of democracy during the conclusion of trade agreements (Holmes 2006, p. 815; Ranald 2015, pp. 241–260). In terms of the two-level game approach, referred to in the conceptual framework presented by Gaenssmantel and Wu in [Chapter 1](#) of this book, the win-sets of free trade seem to have shrunk somewhat, due to the perception by some domestic constituencies that they suffer because of free trade. Because of these pressures, the European Commission adapted its trade policy (European Commission 2015) and now includes issues such as human rights, labour and the environment in FTAs under the heading of “sustainability.” The language used in these sustainability chapters is relatively vague and of a more promotional nature than the chapters on trade barriers (TBs) and traditional non-trade barriers (NTBs). The enforcement is also of a different nature. Civil society actors are involved in the treatment of these issues, while TBs and traditional NTBs are dealt with in a more legal approach through dispute settlement or tribunals. The first of such new-style agreements has been between the European Union (EU) and the Republic of Korea in 2011, and this FTA has a Chapter 13 on trade and sustainable development.

Do sustainability issues have more than a symbolic role? Is it only about creating focal points for future diplomatic consultations or is there really a legal approach possible for these issues as well? The negotiations between the EU and Japan towards the Japan–EU Free Trade Agreement (JEFTA), better known in Japan as Japan–European Union Economic Partnership Agreement (JEEPA), concluded in December 2017, will form the central case study of this chapter. In comparison with the earlier deal with Singapore, the EU–Singapore Free Trade Agreement (EUSFTA), considerable changes have been made in the JEFTA sustainability chapter. Both the EU and Japan are supporters of the multilateral trade system of the World Trade Organization

(WTO). Both also want to pay attention to certain regulatory issues on top of their obligations under the WTO; they want to build a normative partnership or a “civilian power relationship” (Bacon et al. 2016). Both parties face constraints at home.

When negotiating FTAs, the EU has the choice between an approach exclusively centred on the common commercial policy (CCP), where the EU is exclusively competent, and a broader one leading to so-called “mixed agreements,” where both the EU and the member states are parties to the treaty. In the second case, the agreement will also have to pass the hurdle which requires ratification by member states or even regional parliaments such as the Walloon parliament during the final stage of the Comprehensive Economic and Trade Agreement (CETA), the agreement between Canada and the EU. I will start with this “vertical” relationship between the EU and the member states and study competency issues concerning the CCP and sustainability issues with a particular focus on the Opinion of the Court of Justice of the EU (CJEU) on the EUSFTA. Afterwards, the “horizontal” relationship between the EU and Japan and their position concerning sustainability issues under the shadow of the WTO rules will be treated. Finally, labour-related issues during JEFTA negotiations will be studied in detail.

The scope of the EU’s CCP after the treaty of Lisbon and competency issues between the EU and the member-states

The CCP after Lisbon (2009)

The EU, and not the member states, is competent concerning the CCP. Member states’ diplomats do have large influence, though, in the special committee of national representatives, mentioned in Art. 207, 3 of the Treaty on the Functioning of the European Union (TFEU), paragraph 3 committee. The new legal situation after the Treaty of Lisbon (2009) has led to a more robust external trade policy of the EU. But is there, indeed, an increasing opportunity to protect Europe’s internal values “beyond the single market”? (Eeckhout 2009). Legal issues concerning competencies are of the highest importance in the EU, as EU competences are based on the principle of conferral. The EU legal order is an autonomous one in which institutions have prerogatives that may be protected by the CJEU. General provisions with respect to all external action of the EU have been introduced in Art. 21 of the Treaty on European Union (TEU), creating a “mission statement” for EU external action. Exporting important values such as democracy, the rule of law, protection of human rights, promotion of international law and economic liberalism is now a major goal of the EU. That this has a consequence for the CCP becomes clear in Art. 205 TFEU, which refers to Art. 21 TEU. The EU is now able to embed its trade policy in a broader, “global” approach. On the other hand, these general objectives such as human rights and the rule of law still have to be qualified as “transversal objectives,” general objectives that influence a number of individual policies.¹ These general objectives are not of a prescriptive but of a promotional character. They are more political in

nature than legal obligations concerning TBs and traditional NTBs, and they are essentially characterized by political discretion of the competent bodies.

Another innovation in the Treaty of Lisbon is the strengthening of the role of the European Parliament (EP) in the CCP. The EP is no longer only involved in the ratification of trade agreements (from “assent” to “consent,” Art. 218(6) TFEU) but now also in setting the framework for implementing the CCP. Powers of the EP and its International Trade Committee have been increased (Art. 207(2) TFEU). This new legal situation definitely is an improvement from the point of view of democratic legitimacy at the EU level. On the other hand, suspension of the application of an international agreement is possible under Art. 218(9) of the TFEU by the Council after a proposal from the Commission or the High Representative of the Union for Foreign Affairs and Security Policy. The European Parliament is not even mentioned in this provision. Such a suspension is deemed to be a “highly political act” (Kaddous and Piçarra 2018, pp. 89–90). This points again to transparency as a major issue, as critical voices on trade policy increasingly request more information on goals, achievements and compromises in trade negotiations.

The European Commission has two ways for dealing with this issue. First, it can separate the issues where the EU is exclusively competent from those where the EU and the member states are both competent. This approach has the advantage of clarity, also for the general public. The problem is that this does not address the widespread concerns about commercial liberalization and related fears, thus leading to agreements that lack a perception of legitimacy. Second, the European Commission may continue with its approach of having large, integrated FTAs as mixed agreements, which require ratification by member states or even regional provincial parliaments. In this situation it may be best to get these parliaments involved earlier on in the negotiating process. This may frustrate transparency, as many actors will be involved. As a reaction to the cumbersome CETA negotiations, the former Australian Minister for Trade, Steven Ciobo, submitted that Australia may prefer to have a more limited trade agreement in the future with the EU, focused especially on the trade in services. In that situation the member states of the EU would not need to ratify that agreement (Heck 2016, p. 6). This choice is therefore put under some constraints. Splitting FTAs in EU-exclusive and other issues may seem attractive for the sake of transparency. It might, however, not please some of the member states that insist on having an investment disputes system in the FTA. Investment disputes and the investor state dispute settlement are issues where the EU is not exclusively competent. Disagreements between the member states on having such a system might therefore spill over to the question of the acceptability of the FTA as a whole.

Whether or not member states have to ratify an agreement between the EU and a third state relates to the question of the proper legal base. The CJEU gave an interesting decision in 2013 on the scope of the CCP after Lisbon in *Daiichi Sankyo*, concerning trade-related intellectual property measures.² Going against the opinion of its Advocate-General, the CJEU reversed its earlier case law on the CCP in which the member states remained principally competent

in issues concerning “trade-related” intellectual property issues. These issues were, however, explicitly included in the scope of the CCP in Art. 207(1) of the TFEU after Lisbon. The Court made two important distinctions. First, there was the one between the EU’s internal market and the CCP. Before Lisbon, the Court was of the view that the CCP was introduced in the Treaty to buttress and facilitate the good operation of the internal market.³ After Lisbon, the two will be treated separately. Second, there was the one between the exclusive competence of the EU and a “mixed” competence between the EU and its member states. If an issue is within the scope of the CCP, the EU is exclusively competent. The CJEU gives a broad definition in order to determine the scope of the CCP: an act concerning a patent is within that scope “if it relates specifically to international trade in that it is essentially intended to promote, facilitate or govern trade and has direct and immediate effects on trade.” This new definition is interesting in that it seems to focus on the terms specific and essential a “specifically” and “essentially” criterion. When the relation with trade is minimal, the legal basis of the CCP may be out of reach. Ankersmit submits that a measure of external harmonization with a limited number of third countries of insignificant importance (in terms of trade) might not be possible on the legal base of Art. 207 TFEU (Ankersmit 2014, p. 208). This argument would introduce a *de minimis* test in the area of the CCP and is in my view highly inefficient, as it would lead to a difficult analysis of quantitative effects on trade.

In the earlier years of the European Community there was a struggle between the Council of Ministers (that is, the member states), who supported a “subjective” approach focused on the content and the aim of the measure in order to determine whether it is under the scope of the CCP, and the European Commission supporting an “objective,” instrumental approach considering whether the measure “in fact” regulates trade relations in spite of the aim. The CJEU now combines both approaches. The scope rule in *Daiichi Sankyo* pays attention to the content, the aim and the effects of the measure, but it relates all three clearly to the topic of international trade. A concrete link with international trade will have to be provided.

More specifically, related to the subject matter in *Daiichi Sankyo*, the “trade-relatedness” in the decision concerned the trade-related intellectual property rights (TRIPs) agreement in general and the issue of patentability in Art. 27 thereof in particular. The Court focuses on the fact that the TRIPs agreement was concluded within the framework of the WTO and therefore in the context of international trade. These instruments are meant to standardize rules at the world level and to facilitate international trade. In *Commission v. Council*, both institutions disagreed on the correct legal base of a directive on the legal protection of services and the suppression of illicit activities.⁴ The Commission pleaded for Art. 207 TFEU and the Court agreed; although the provisions of the directive were almost similar to an internal market directive, the directive on the legal protection of services was specifically meant to extend legal protection beyond the borders of the EU to other non-member countries in Europe in order to promote supply and therefore trade in these services. Moreover, a ban on the export of

illicit services to the EU, with which the EU's global interests can be defended, is in its very nature within the scope of the CCP.

This development may lead to an inclination on the part of the EU institutions to bring as many issues as possible under the CCP in order to be exclusively competent and thereby circumvent ratification by all the individual member states. Sharpston and De Baere warn with reason against these inclinations (Sharpston and de Baere 2011, p. 149); one should not assimilate the whole field of external economic relations to the CCP, as this would be against the principle of conferral. This principle is also responsible for the hybrid approach by the CJEU in matters of CCP, focusing both on the content of the instrument and on aims pursued. That the exclusive competence is important also becomes clear from national constitutional courts. The German constitutional court, for example, decided in a summary proceeding that a provisional application of CETA between the EU and Canada by way of a Council decision is only possible when it concerns areas where the EU is exclusively competent.⁵ Where there are mixed competencies between the EU and its member states, the principle of democracy needs to be safeguarded through a vote by national parliaments. The German court iterates that the EU is not competent in issues such as protection of investments, including investment court systems; portfolio investments; international sea traffic; mutual recognition of professional qualifications and protection of labour. With respect to these topics, CETA can therefore not be provisionally applied. The European Commission now chooses for a separate treaty on investment protection, apart from the FTA. An example is the Investment protection agreement between the EU and Singapore of February 2019, recently approved by the European Parliament. Negotiations with Japan concerning an investment protection agreement are not finished yet.

The Singapore opinion of the CJEU of May 2017

In order to clarify competency issues, the European Commission asked for a binding opinion from the CJEU under Art. 218(11) TFEU on EUSFTA, concluded in October 2014. Now that the Art. 207 includes “the progressive abolition of restrictions on international trade and on foreign direct investment,” the Commission wanted to know whether the EU has exclusive competence to conclude FTAs concerning foreign direct investment (FDI) or only a shared one with the member states.

Sustainability issues were also raised. According to the criteria in *Daiichi Sankyo*, there has to be a “specific” connection between the non-trade issue and trade for the former to fall under the CCP. In the EUSFTA opinion proceedings, the Commission argued that there is a specific connection in that the purpose of the sustainability chapter is to make sure that conditions for trade are not hampered by different levels of protection of labour and the environment. By contrast, the Advocate-General Sharpston was of the opinion that in order to come within the scope of the CCP there is either a need for “a form of trade conditionality” or a need for a commercial policy instrument.⁶ Trade conditionality implies the

use of trade sanctions when the other party does not comply with environmental or labour standards in the FTA. The criterion of a typical commercial policy instrument is understandable; a form of conditionality is more difficult to assess *ex ante*, e.g. before a sanction is imposed.

The opinion of the CJEU from May 16, 2017, of binding character notwithstanding the word “opinion,” is more in line with the Commission’s approach.⁷ Again, it reiterates the seminal change in character of the CCP pre- and post-Lisbon, as it did earlier in *Daiichi Sankyo*. It refers to Art. 3(5) TFEU in which the obligation to contribute to not only free but also fair trade is contained. “New aspects of contemporary international trade” could be read as simply including environmental and social concerns. Then, the CJEU studies the preamble and the text of [Chapter 12](#) of the EUSFTA in order to satisfy the criteria given in *Daiichi Sankyo*. The CJEU seems to attach some importance to Art. 12.16 of the EUSFTA in which it is stated that the dispute settlement procedure of the agreement is *not* applicable to [Chapter 12](#). This leads the Court to the conclusion that [Chapter 12](#) neither concerns the powers of the member states, nor the scope of the other international agreements, such as the conventions of the International Labour Organization (ILO), to which the CJEU refers (paragraph 155). On the other hand, the chapter gives a “specific” link with trade between the EU and Singapore, and this fulfils (part of) the definition given in *Daiichi Sankyo*. This link is also specific because one of the parties to the EUSFTA may terminate or suspend the liberalization of trade between the partners according to the UN Convention of the Law of Treaties.

The needed direct and immediate effects on trade are derived from the commitment of the EU and Singapore in Art. 12.1(3) to not encourage trade by reducing levels of social and environmental protection, from the reduction of the risk of major disparities between the production costs in the EU and Singapore, and finally from the undertaking by the parties to implement or encourage verification schemes concerning illegally harvested timber or illegal fishing. After this step-by-step application of the *Daiichi Sankyo* definition to [Chapter 12](#), the Court clearly makes a distinction between the CCP including requirements of sustainable development on the one hand, and the regulation of social and environmental protection in Singapore and in the member states of the EU. Art. 207(6) of the TFEU states that the exercise of the CCP cannot alter the division of competences between the Union and the member states. Art. 12.1(4) of the EUSFTA clearly states that the agreement between the EU and Singapore is not intended to harmonize the labour or environmental standards of the parties. Therefore, division of competences is not changed and all of the sustainability provisions fall under CCP, which places the agreement thus under exclusive competence of the EU. While the scope of trade-related issues has been broadened after Lisbon, FDI and the investment court system still belong to the competences of the member states. In principle, this should imply that mega-treaties such as CETA and the Japan–EU FTA still qualify as mixed agreements.

The CJEU with this opinion takes a very practical view and takes the seminal change since Lisbon to its logical conclusion. The CCP is different in nature to the internal market and social and environmental policies of the member states. Sustainability issues are just “new issues of contemporary international trade” (paragraph 141). The opinion is very relevant for the main questions this chapter is proposing to answer, especially concerning the distinction between a legal and a diplomatic approach. The CJEU treats problems in the implementation or enforcement of the sustainability chapter as a public international law problem between the two parties and not as an EU law issue. The remark in paragraph 156 is most striking: the bad application or enforcement of the chapter by the other party may lead to an “artificial or unjustified restriction of trade.” This consists of legal language derived from the internal market law of the TFEU, but also from the provisions of the General Agreement on Tariffs and Trade (GATT), and this language may blur the distinction between a diplomatic and a more legal manner to address conflicts. Nevertheless, it is for the competent authorities of the EU (and the other party to the treaty) to make a decision in this respect and the diplomatic manner in my view still prevails.

Further legalization of sustainability issues is therefore possible, but it is doubtful whether political discretion is limited by the language used by the CJEU.⁸ Complaints about an artificial or unjustified restriction of trade in relation with labour and the environment regularly arise as a last resort. A trade deal is not easily suspended. And restrictions of this nature must be large and serious before a real conflict between the trading parties will occur. And even in such a serious stage diplomatic options will be tried first. After commenting on the text of the JEFTA in section 4, I will come back to this important issue.

Implications of the Singapore opinion for the diplomacy versus law debate

Trade has high political relevance these days, not only for the interplay between EU institutions and member states, but more broadly in relation to the popular protests against FTAs. This political resistance has had a strong influence on EU decision makers, meaning that parameters of the logic of constraint have been shifting lately. Although trade Commissioner Malmström argued in July 2016, that, from a purely legal point of view, the EU could be seen as exclusively competent concerning CETA (European Commission 2016a), for political reasons and resistance from the member states the Commission proposed to treat CETA as mixed agreement.

If in the future the EU chooses from the outset pure CCP agreements over mixed ones, the CJEU rulings since Lisbon as discussed above seem to strengthen the choice available for the Commission, in that trade is not necessarily limited to TBs and NTBs, but it can choose to legalize non-trade issues in FTAs, as long as the matter is specifically related to trade. There is no automatic legalization as the language of the CJEU in the Singapore opinion might suggest, but it is subject to political discretion. Suspending the operation of an FTA under Art. 208(9) TFEU is a “highly political act” where the European Parliament is not even directly involved.

Negotiations on sustainability issues between Japan and the EU in the “Shadow of WTO obligations”⁹

Both the EU and Japan are now supporters of the WTO as well as the trend to bilateral and regional FTAs. This becomes clear from the texts of the EU–Japan summits, held annually since 1991 (Morii 2015, p. 422). Negotiations between Japan and the EU for an FTA officially started in March 2013. While Japan preferred to conclude an FTA only (Nakanishi 2014, p. 11), the EU wanted to embed this agreement in a strategic partnership agreement (SPA). Although the focus in the negotiations is clearly on trade issues such as traditional NTBs and public procurement, the EU proposed from the beginning to focus on sustainability issues. Because Japan is a developed country and a member of the OECD, not much friction in this respect was to be expected. In general, Japan is already fully supporting the EU in topics such as human rights, democracy and the rule of law (Hosoya 2012, p. 332). However, more specific regulatory issues are potentially contentious. Under the old EU–Japan Regulatory Reform Dialogue (RRD) of 1994, the Japanese side raised issues against the EU such as nationality requirements for tour and tourist guides in southern EU member states and rules on excessive sick leave in eastern EU member states, as well as complaints about extensive consumer protection rules, taxation, maritime and environmental policy of the EU (Rothacher 2013, pp. 172–173). JEFTA was concluded in December 2017. The SPA between Japan and the EU, with references to some of the fundamental values also mentioned in art. 21 TEU, was concluded in 2018. Talks about regulatory cooperation and negotiations on investment and an investment court system are ongoing (Hilpert 2017, p. 1).

Both the EU and Japan are members of the WTO and a potential free trade agreement may not violate the rules of this international organization. The primary purpose of this organization is trade. There is no consensus within the WTO on the role of non-trade issues such as labour and the environment. Developing countries have a negative opinion on the inclusion of these concerns in the jurisdiction of the Dispute Settlement Body (DSB) of the WTO (Arun 2016). These countries fear restrictions to trade from the developed countries. Still, some non-trade issues are dealt with in the WTO and others are not. Examples of the former are environmental protection and cultural issues (Art. XX(g) and (f) GATT) and also food security within the framework of agriculture.¹⁰ For Japan, the domestic agricultural sector is of the utmost importance and food security is therefore a topic defended by Japan during negotiations with the EU.

Non-trade relations sit uneasily with the WTO rules. In 2003, Simpson and Schoenbaum made a proposal to incorporate non-trade concerns within the WTO. In order to forego criticism of protectionism, non-trade concerns (NTCs) should become better defined and be limited to a positive externality “that contributes to sustainable development” (Simpson and Schoenbaum 2003, p. 10). NTCs should also be quantified, and countries that want to subsidize their agriculture because of an NTC concern should show a causal link between the NTC and a domestic support program (Simpson and Schoenbaum 2003, p. 11). Since 2003

not much progress has been made concerning these issues, as WTO member states still disagree and the Doha Round is stalled. The approach of Simpson and Schoenbaum is interesting in that it explicitly focusses on the incorporation of non-trade concerns within a subfield of the WTO.

The EU and Japan are also users of the WTO dispute settlement procedure. While the EU and the United States have used the procedure extensively, Japan in the beginning lacked experience in handling this dispute settlement procedure. Some “institutional learning” from the side of the Japanese administration (especially by the Ministry of Economy, Trade and Industry, METI, and its predecessor, the Ministry of International Trade and Industry, MITI) has taken place (Yoshimatsu 2009, p. 296). In the use of the improved dispute settlement procedure under the WTO, the Japanese position has been named “aggressive legalism” (Pekkanen 2001), after the successful *Kodak v. Fuji* case between Japan and the United States.¹¹ Japan has hardly ever used this procedure against developing countries. The United States was a prime target. Japan followed closely the EU in its trade disputes with the United States, and the complaints of Japan against the United States were carefully selected cases “under a powerful cover of the EC [European Community]” (Araki 2006, p. 794). Moreover, Araki argues, Japan only started selective, highly targeted and winnable cases.

There has been only one complaint by Japan against the EU, namely *European Communities and its Member States – Tariff Treatment of Certain Information Technology Products* (DS376) from 2011. This is a very specific case where Japan protested against the treatment by the European Communities of information products under the Information Technology Agreement (ITA). It was joined by the United States and Taiwan (“Chinese Taipei”) and the panel decided that the EU had to repeal two of its regulations. On the other hand, eight complaints have been started by Japan against the United States with a clear emphasis on anti-dumping duties levied by the United States. The EU has started six complaints against Japan under the WTO dispute settlement system. One of these, *Taxes on Alcoholic Beverages* (DS8), lasted about three years and was concluded only in 1997 with the publication of the report of the Appellate Body. After 1998 there have been no new complaints by the EU on Japan. That Japan will use the WTO procedure against the EU in non-trade concerns is highly unlikely.

Japan is, however, not always on the same side as the EU. In the *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products* case (DS400 and 401), Japan acted as a third party. Canada and Norway complained that EC Regulation No. 1007/2009 banned the importation and sale of all seal products on the European market. The dispute settlement panel considered that the EU regulation could not be justified by the exception under Art. XX(b) because the EU did not clearly show that the ban was imposed due to the protection of animal life or health. The regime also did not meet the test of the “chapeau” of Art. XX, as there is arbitrary and unjustified discrimination between seal products from Canada and Norway on the one hand, and the same products from the Inuit in Greenland on the other

hand, who profited from an exception in the regulation. The panel qualified the EU seal regime as a technical regulation and applied the Technical Barriers to Trade (TBT) Agreement. The EU did not violate Art. 2(2) of this agreement, as the regime is related to the objective of EU public moral concerns on seal welfare. Canada and Norway appealed this decision.

The Appellate Body (AB), by contrast, considered that the EU regulation did not qualify as a technical regulation because there is no prescription or imposition of any “characteristics” of seal products. The regulation only puts conditions on market access, related to the type and purpose of seal hunt. It found that the EU regulation was necessary to protect public morals within Art. XX(a). The rules, however, failed to satisfy the test of the “chapeau.” In order to pass the test of Art. XX, the measures must not be applied in such a way that it leads to arbitrary or unjustifiable discrimination or leads to a disguised restriction on international trade. The EU regulation made exceptions for the prohibition for seal products from indigenous peoples from Greenland, the Inuit, and for products from hunts for reasons of marine resource management.

It is these exceptions that made that the ban was judged to be against the obligations of the WTO. If you give a special treatment to the Inuit of Greenland, this special treatment cannot be refused to inhabitants of small communities in coastal areas of Canada and Norway. The “chapeau” means, in the words of the AB, that an exception is invoked without abuse or misuse. The EU did not show that the situation in Greenland is different from the one of indigenous populations in Canada and Norway. The relation between the public morals exception in Art. XX GATT and the protection of the Inuit was also not sufficiently established by the EU. It was still possible for commercial hunts to enter the EU market under the exception regarding the protection of the indigenous peoples of Greenland, the Inuit. The applicable administrative provisions in the regulation, in order to benefit from the exception, were burdensome. In the application of the EU measure, therefore, there was an additional discrimination.

In general it is hard to pass this test of the “chapeau” (Desmedt 2001, pp. 473–475). This implies that trade concerns are more easily processed through the dispute settlement route, than non-trade, or more specifically sustainability issues. If a national measure is justified by a legitimate reason of public policy, then it still will not be allowed if there is “arbitrary discrimination” or a “disguised restriction.” The positive point of the *Seal products* case is that public morals is a valid ground to limit importations. The negative point is that this additional guarantee in the chapeau in favour of nondiscriminatory international trade has the effect of a high hurdle concerning the effectuation of the non-trade concern. Note, however, that the terminology in the chapeau is the same as the one used in paragraph 156 of the EUFSTA opinion of the Court of Justice of the EU: arbitrary and unjustified discrimination. While the Court contemplates the idea that violation of environmental or labour issues could lead to such a discrimination, the DSB and the AB focus on the discriminatory treatment of one trade partner *vis-à-vis* another.

According to Boisson de Chazournes, non-trade issues should be analyzed by the DSB on their protection of these issues, not on their effects on trade (Boisson de Chazournes 2016, p. 280). This implies that the DSB should not only look at the effects on trade, but also on the effects on the non-trade issues themselves, and compare both before making a decision. For the moment, however, the realization of many non-trade concerns is contrary to the WTO rules, if there is arbitrary discrimination involved. Any form of conditionality and trade sanctions for not realizing non-trade concerns, targeted against trade partners that are also members of the WTO, may therefore be at variance with WTO rules. This is also an argument to treat some NTCs in a political manner in FTAs and not in a legal manner. Political consultations are not per se against the spirit of the WTO system. On the other hand, unilateral sanctions of one WTO member against the other could violate the WTO rules. This is an additional reason to treat these issues first and for all in a diplomatic manner.

Case study: EU–Japan negotiations, JEFTA and labour-related sustainability issues

Already in their 2000 summit the EU and Japan submitted that the Doha Round should strive both for trade policy and “sustainable development” (Wright 2013, p. 162). Peace, stability and prosperity are dealt with in a general sense, i.e. with no concrete commitments or proposals for legally binding rules (European Commission 2015). In the texts of the yearly Japan–EU Summits and in the speeches of former and current External Trade Commissioners Karel De Gucht and Cecilia Malmström at, respectively, the EU–Japan Business Summit in Tokyo, March 25, 2013, and the Keidanren in Tokyo, May 29, 2015, there is, however, a clear focus on the main topics: non-tariff barriers, public procurement and “deep” regulatory cooperation. Non-trade concerns are not mentioned in these texts and speeches. In the meeting with Keidanren in May 2015, Malmström defined regulatory cooperation as follows: “trying to remove unnecessary technical differences between our systems, on the basis of international standards, in order to boost growth, and to save time, money and energy” (Keidanren 2015). The most interesting words in this definition are “international standards” and “unnecessary.” Who will decide when something is unnecessary? International standards are also often made on the basis of input by business actors. Increased involvement of other civil society actors is important in this respect. This increased involvement has to imply a qualitative step beyond the participation of the small circle of diplomats and bureaucrats that underpinned the annual summits held since 1991.

There is attention for sustainability issues in the JEFTA in a chapter called “Trade and Sustainable Development” (Chapter 16). The language on the commitments in this field is rather vague in comparison with the language in the chapters concerning trade issues. It mentions that the parties “strive” to ensure that their laws provide high levels of labour (and environmental) protection and to continue to improve these levels of protection (Art. 16.2(1)). Encouragement

of trade or FDI will not be done by lowering these levels of protection (Art. 16.2(2)). Effective enforcement is also mentioned and the parties will “not use their laws as a means of arbitrary or unjustifiable discrimination against the other Party” (Art. 16.2(3)). The main mechanism concerning these topics is, however, “exchange of views and information” (Art. 16.3(1); Art. 16.3(3); Art. 16.5(e)) and “cooperation” (Art. 16.12). It is clearly stated that there is no intention to harmonize labour or environmental standards of the parties. Violation of the eight fundamental ILO conventions may not be done for reasons of comparative advantage, but these conventions may also not be used for protectionist purposes (Art. 16.3(6)).

There are provisions concerning the involvement of civil society organizations, also including trade unions. Cooperation with the ILO as an institution is a new element in JEFTA (see Art. 16.17(4)). The last provision concerns the panel of experts parties may refer a dispute to. This panel “should seek information and advice from relevant international organizations.” This language looks promising, but its legal value remains to be seen (Vogt 2015, pp. 857–858).¹² It would really be a qualitative step forward if the reports of the ILO supervisory committees would be used in the evaluation of EU and Japanese labour-related policies. However, there is already an asymmetry here: Japan is a member state, while the ILO reports do not concern the EU as an international organization but only the member states of the ILO, including those of the EU.

Is it possible that the substance of this chapter will be tested in a court-like body or an EU court? Is it about politics or law, or is the sustainability chapter deliberately blurring the line between a legal and a diplomatic road to deal with disputes between the EU and Japan in that political discretion remains pivotal? From the text of the JEFTA it becomes clear that sustainable development is dealt with in a separate specialized committee, different from the committees that oversee the TBs and traditional NTBs. Dispute settlers in the trade chapters need “specialized knowledge or experience of law and international trade.” By contrast, only if the specialized committee on sustainable development is not able to reach a mutually satisfactory outcome, one of the parties may ask for the matter to be dealt with in a panel of experts. This panel “shall interpret the relevant articles of this chapter in accordance with customary rules of interpretation of public international law.” This is a huge step forward in relation to the EUSFTA chapter on sustainability. Law is explicitly mentioned here, but it is public international law and not EU trade law, giving more political discretion to the parties. The legal value of this remains to be seen. The commitments are therefore not only meant to have some kind of indirect legally binding character but most probably will become focal points for subsequent diplomatic consultations.

Although Japan is a developed country like South Korea and Singapore, we might find some specific problems in the sphere of labour-related sustainability issues. The first problem is related to the fact that only six out of eight ILO fundamental conventions have been ratified by Japan. Japan has not yet ratified convention no. 111 on non-discrimination in employment and convention no. 105 on the abolition of forced labour. Discrimination on the labour market

is a sensitive topic in Japan and treated very differently in comparison with EU law. Non-discrimination practices on the basis of nationality, later on sex, and recently also on handicap are extremely important rules within the EU. In Japan there is less experience with concepts such as indirect discrimination (Hanami et al. 2015, p. 150). The CJEU developed rather radical concepts of indirect and substantive discrimination. In Japan there is also an issue with the important freedom of association convention, no. 87. The issue of the right to strike for public servants such as teachers and firefighters is still not completely solved, notwithstanding regular requests and observations of the ILO's Committee of Experts on the Application of Conventions and Recommendations (CEACR) and the Committee on Freedom of Association (CFA) of the ILO (Voogsgeerd 2015). These kinds of sensitivities may be difficult to solve under the heading of JEFTA, even by the panel of experts, as culturally specific issues are involved.

Another major topic is the lack of experience with civil society in Japan. Also, the experience with trade unions is mixed in Japan. There are strong company-based unions, but these depend often on the employer. The national umbrella of trade unions, JTUC-RENGO, is loud in its demands but hardly influential in the current Liberal Democratic Party (LDP) administration of Prime Minister Abe. It was much more linked to the major opposition party, the Democratic Party of Japan (DPJ), which was in government from 2009 until 2012. These stakeholders will be invited to the extensive discussions in the Committee on Trade and Sustainable Development.

In the *Final Report of the Trade Sustainability Impact Assessment of a Free Trade Agreement between the EU and Japan*, issued before the signature of JEFTA, it was recommended that the EU should ensure greater compliance, implementation and monitoring of ILO conventions by Japan (European Commission 2016c, pp. 211–212). Conventions no. 111 on non-discrimination in employment and occupation and no. 105 on specific issues concerning forced labour were specifically mentioned, as these two fundamental ILO Conventions have still not been ratified by Japan. Gender discrimination, another topic of high concern in Japan, was also extensively discussed in this report.

It is interesting to see that the European umbrella of trade unions and JTUC-Rengo made a statement together on the (future) trade deal between the EU and Japan. They requested the immediate ratification by Japan of ILO conventions no. 111 and no. 105. ILO issues such as tripartism and the role of the ILO supervisory bodies in the monitoring of a potential trade agreement feature high in the statement. There was a strong focus on monitoring and compliance of international labour standards. The social partners also wanted to be regularly involved in the trade talks. In the statement, they preferred mainstreaming of labour protection throughout the whole FTA and labour provisions not to be limited to the trade and sustainability chapter.¹³ Socially sustainable public procurement and a ban on the privatization of public services were also asked for.

In its own updates on its website, JTUC-Rengo not only supported the inclusion of labour issues in the agreement but even showed open opposition to any NTB agreements in the FTA that would risk to affect in a negative way internal Japanese

regulations, when these are “rational and necessary for the Japanese society.”¹⁴ This specifically refers to standards concerning vehicle safety, food safety, processed foods, medical equipment and pharmaceuticals. At the same time, JTUC-Rengo expressed the hope that the FTA would bring both employment creation and greater employment security. Quality of life for the working people in a “safe and reliable society” is one of the most important goals for the trade union umbrella organization, along with the issue of compliance with labour standards.

Labour issues are particularly sensitive. The EU is unlikely to relinquish on these issues, as they are an important part of the new EU trade agenda. Within Japan labour is relatively weak; it often needs the support of other labour organizations in the world and other trade unions to strengthen its position *vis-à-vis* the government. Still, the umbrella organization positioned itself very clearly against any concessions on regulations that might imply disadvantages for Japanese workers. In both the EU and Japan, free trade is critically watched by the general public, and safeguarding existing jobs and creating new jobs are extremely important in this context.

Labour-related sustainability issues have become more visible in the public debate. This means that free trade agreements will have to be handled in a more transparent manner. Even between two advanced democratic countries as the EU and Japan, there is no complete agreement on culture, norms and values, and this translates, for example, into diverging views on labour issues and on some of the ILO core conventions. Consensus will not always be easy to find under the JEFTA. If there is more normative agreement among the civil society organizations and movements on both sides, then more civil society involvement in the framework of the FTA negotiations might help in this respect. Because of the sensitivities it is likely that a legal approach in these labour issues will not be chosen, although there is a possibility to invoke a panel of experts using public international law. Involvement of the ILO supervisory committees is also possible, but this route is also often of a promotional and not a conditional character. After the conclusion of JEFTA a joint statement by ETUC and JTUC-Rengo on July 9, 2018, critically assessed the lack of “effective labour enforcement provisions” in the FTA.¹⁵ There is also concern for rising protectionism, globally.

Conclusion

Free trade is recently under pressure, at least in the West. The (perceived) win-sets are changing. There are choices to be made with regard to FTAs. First, a choice concerning the legal basis: exclusive EU competence on the basis of the CCP or a mixed competence between the EU and all its member states. The European Commission chose to treat CETA as a mixed agreement; involvement of the member states of the EU might be the better option for the sake of legitimacy. Some form of (re)politicization of trade policy is useful in the context of growing political/civil society constraints on the public authorities involved in trade negotiations. So in a complex polity as the EU, the choice that

seems easy given the constraints may not be the best choice in the medium to long term. Avoiding the constraints does not address the concerns of the civil society groups behind them. But some of these groups have now a place in the architecture of the JEFTA. This could alleviate the logic of constraints a little.

Second, there is the role of labour-related sustainability issues in an FTA. Inclusion of these issues in the CCP seems to be possible after the opinion of the CJEU in the EUSFTA case of 2017. Some aspects of the opinion have found their way in the text of JEFTA, e.g. that domestic labour laws should not be used “as a means of arbitrary or unjustifiable discrimination” (Art. 16.2(3)) and that a panel of experts in case of a dispute submitted by one of the parties is able to contact the ILO in Geneva and is obliged to interpret the chapter “in accordance with customary rules of interpretation of public international law, including those codified in the Vienna Convention on the Law of Treaties” (Art. 16.18(2,3)). It remains to be seen whether this increased legal character of the language and the reference to international customary law will lead to a form of trade conditionality in that rights under the JEFTA may become suspended. First, there will be discussions among diplomats and civil society actors in case of conflicts. Normative agreement among the civil society actors between the EU and Japan, in particular trade unions, may start processes of arguing that could lead to agreement on at least some of the contested labour-related issues. Put differently, if normative agreement cannot be brought about in a single round of negotiations, then joint campaigns by civil society groups might create arguments that are difficult to refute, especially if they are supported by international bodies like the ILO. In any case, a lot of arguing and institutional learning are needed in the near future. Some convergence on these issues is possible between the EU and Japan (see also Hilpert 2017, p. 3). That is why a diplomatic approach is still to be expected in the area of labour-related sustainability issues and not a legal approach, although the text of JEFTA is making this possible.

Notes

- 1 Case C-268/94 *Portugal v. Council*, [1996] ECLI:EU:C:1996:207, point 34. See for an interesting contribution on these objectives (Neframi, 2014, p. 94).
- 2 Case C-414/11, *Daiichi Sankyo Co. Ltd, Sanofi-Aventis Deutschland GmbH v. DEMO* [2013] ECLI:EU:C:2013:520.
- 3 “Opinion of the Court of 11 November 1975 given pursuant to Article 228 of the EEC Treaty. Avis 1/75,” [1975] ECLI:EU:C:1975:145.
- 4 Case C-137/12, *Commission v. Council* [2013] ECLI:EU:C:2013:675.
- 5 BVerfG, Judgement of the Second Senate of 13 October 2016 – 2BvR 1368/16. http://www.bverfg.de/e/rs20161013_2bvr136816.en.html.
- 6 “Opinion Advocate-General,” [2016] ECLI:EU:C:2016:992, point 491.
- 7 Opinion CJEU, A-2/15, 16 May 2017, [2017] ECLI:EU:C:2017:376.
- 8 Ankersmit defends this view in his blog entry *Opinion 2/15: Adding some spice to the trade & environment debate*, available at <https://europeanlawblog.eu/2017/06/15>.
- 9 The idea of bargaining under the “shadow” of obligations is borrowed from Shaffer (2006).

- 10 Art. 20 of the Uruguay Round Agreement explicitly states that non-trade concerns should be taken into account during the negotiations on agriculture.
- 11 Panel Report on *Japan – Measures affecting Consumer Photographic Film and Paper*, WT/DS44/R of 22 April 1998.
- 12 Vogt is critical on the GSP+ of the EU in that decisions made in this framework do not take into account the reports of the ILO supervisory bodies. In the JEFTA there is now at least the possibility for the panel of experts to take into account the views of the ILO committees concerning the sustainability.
- 13 “ETUC-Rengo Joint Statement on EU-Japan Free Trade Agreement negotiation,” available at https://www.etuc.org/sites/default/files/press-release/files/etuc_rengo_joint_statement_as_of_20151217en.pdf.
- 14 “RENGO calls for job creation and better working conditions through Japan-EU EPA: RENGO & ETUC Joint Action,” available at <http://www.jtuc-rengo.org/updates/index.cgi?mode=view&no=362&dir=2015/05>.
- 15 “ETUC - JTUC-RENGO Joint Statement on EU-Japan EPA negotiations,” available at <http://www.jtuc-rengo.org/updates/index.cgi?mode=view&no=384&dir=2018/07>; see also “Statement on the Signing of the Japan-EU Economic Partnership Agreement (EPA),” available at <http://www.jtuc-rengo.org/updates/index.cgi?mode=view&no=385&dir=2018/07>.

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