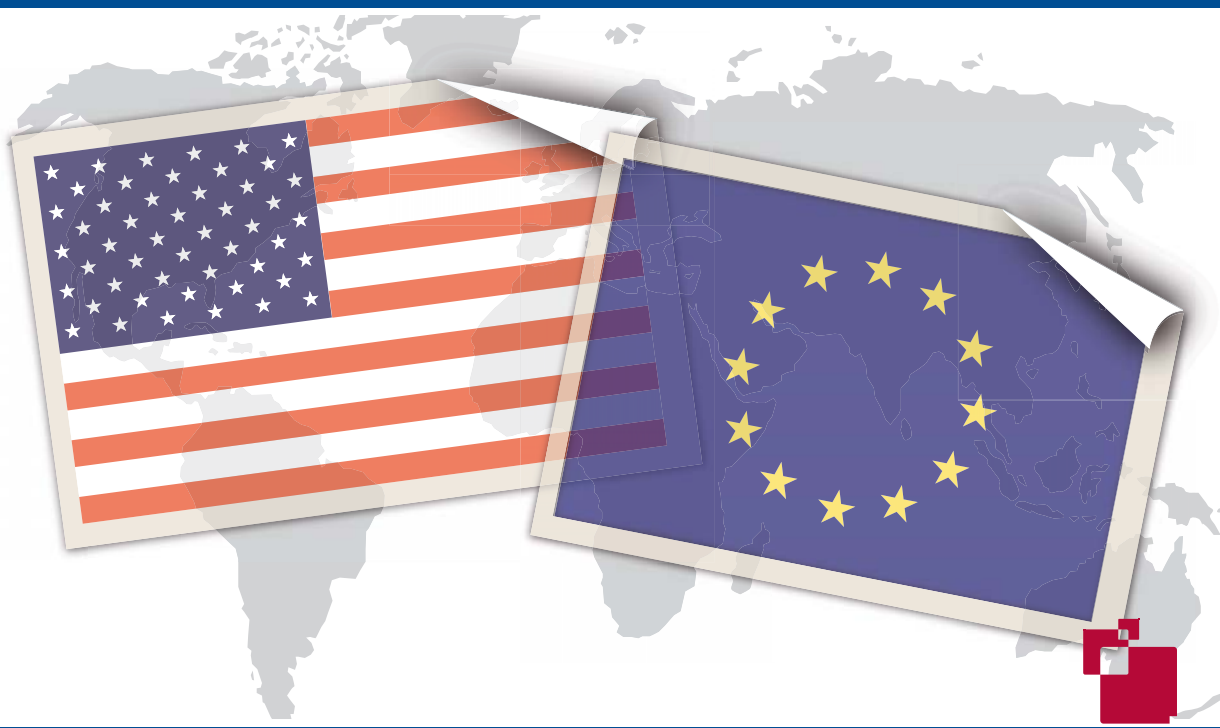
Beyond the WTO?
An anatomy of EU and US preferential trade agreements

BY HENRIK HORN, PETROS C. MAVROIDIS AND ANDRÉ SAPIR



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BRUEGEL
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About the authors

Henrik Horn is a Senior Research Fellow at the Research Institute of Industrial Economics (IFN), Stockholm, a Non-resident Senior Fellow at Bruegel and former Professor of International Economics at the Institute for International Economic Studies, Stockholm University. He is chief reporter (with Petros C. Mavroidis) for the American Law Institute's project 'Principles of trade law: the World Trade Organisation' and a Research Fellow at the CEPR (Centre for Economic Policy Research, London). His research interests mostly lie at the intersection of economics and law.

Petros C. Mavroidis is Edwin B. Parker Professor at Columbia Law School, NY, Professor of Law at the University of Neuchâtel, and Research Fellow at CEPR. He is chief co-reporter for the American Law Institute's project 'Principles of trade law: the World Trade Organisation'. As with Henrik Horn, his research interests mostly lie at the intersection of economics and law.

André Sapir is Professor of Economics at the Université Libre de Bruxelles and Senior Fellow at Bruegel. He is also a Research Fellow at CEPR and a member of the European Commission's Group of Economic Policy Analysis. He was Economic Adviser to European Commission President Romano Prodi from 2001 to 2004. His main fields of expertise are economic integration and international economics.

Foreword

For years now, observers have noted the steady increase in the number of regional trade agreements, and there has been no shortage of controversies about them. Some have claimed that in a world where achieving agreement in multilateral trade negotiations is increasingly slow and cumbersome, 'competitive liberalisation' is the way forward. Others have argued instead that the 'spaghetti bowl' of regional arrangements renders the whole trading system unnecessarily complex and opaque. But few have made a genuine effort to assess whether preferential trade agreements (PTAs) actually matter, and why.

Horn, Mavroidis and Sapir have made that (admittedly laborious) effort. They have methodically assessed the provisions of the PTAs entered into by the EU and the US to determine whether they add anything to the already existing multilateral commitments. Unsurprisingly, the facts they uncover make previous prejudice-based evaluations obsolete and tell us much about the true costs and benefits of regionalism.

Their main and most disturbing finding is that the European PTAs are marred by considerable legal inflation. They ambitiously cover a wide range of topics, going much beyond the multilateral commitments entered into by the partners within the framework of the World Trade Organisation, but they are mostly unenforceable – if not entirely devoid of substance. The Union, in other words, seems to be using trade agreements to promote its views on how countries of the world should be run, and it is able to enlist its trade partners to do this, albeit in a noncommittal or semi-committal way. Trade policy therefore provides a vehicle for declaratory diplomacy. The US, by contrast, includes few additional provisions in their PTAs but makes sure that whatever clause it adds, be it on labour or the environment, serves its perceived interests and is actually enforceable. It plays a rather narrowly defined trade game, and sticks to it.

The question is why the EU behaves in this strange way. There can be several, non-mutually exclusive explanations for this. One is simply that the EU proselytises and uses trade policy to that end for lack of any other suitable instrument. It wants to

promote, say, macroeconomic stability and human rights and does it through trade policy because it lacks the political power to do it through foreign policy. Legal inflation would in this case be the by-product of Europe's political weakness. A second explanation is that Europe is seeking to persuade its partners to adopt its policy culture. The idea here is not that the EU uses trade policy purely as an instrument, but rather that it sees durable benefit in the generalisation of policy regimes inspired by its own and is willing to invest for the long term. PTAs would then have the character of an investment in the development worldwide of a European regulatory and policy culture. The third explanation is that, like bills in the US Congress, trade agreements play the role of shopping lists and each and every nation, political group or sub-bureaucracy finds it appropriate to coattail on the agreement an item from its preferred agenda.

The authors do not choose between these explanations – this was not their aim and they stick to their solidly established findings. But they do raise important questions about the purpose and the clarity of Europe's trade policy.

Jean Pisani-Ferry, Director, Bruegel
Brussels, January 2009

Executive summary

Since the WTO was founded in 1995, its members have notified to it more than 250 new preferential trade agreements (PTAs), the number of arrangements active in 2008 being about 200. A large part of these notifications involves agreements where the European Community (EC) or the United States (US) is a partner.

The primary purpose of this study is to analyse the precise content of the EC and US preferential trade agreements, dividing the areas covered by these agreements into:

- 'WTO plus' (WTO+): commitments building on those already agreed to at the multilateral level, eg a further reduction in tariffs.
- 'WTO extra' (WTO-X): commitments dealing with issues going beyond the current WTO mandate altogether, eg on labour standards.

The study covers all the provisions in all 14 EC and 14 US agreements with WTO partners signed by the parties and, generally, notified to the WTO as of October 2008. It examines to what extent these provisions are legally enforceable. It then compares and contrasts the EC and US approaches to PTAs and draws conclusions.

Main findings and conclusions:

- The EC and the US have chosen markedly different strategies for including provisions in their PTAs that go beyond the WTO agreements: the 14 EC agreements contain almost four times as many instances of WTO-X provisions as the 14 US agreements but the EC agreements evidence a very significant amount of 'legal inflation', ie they contain – for whatever reason – many obligations that are not legally enforceable.
- Legally enforceable WTO-X provisions contained in the EC and US PTAs are in fact quite few. Provisions that can be viewed as ground-breaking compared to existing WTO agreements are even fewer: environment and labour standards for the US agreements, and competition policy for the EC agreements. The major part of the enforceable provisions deal with areas related to existing WTO agreements, such

as investment, capital movement and intellectual property.

- However, the legally enforceable WTO-X provisions in the ground-breaking areas clearly all deal with regulatory issues. This suggests that the EC and US agreements effectively serve as a means for the two hubs to export their own regulatory approaches to their PTA partners.

1. Introduction

There is growing concern about preferential trade agreements (PTAs) and the role they should play within the multilateral trading system. This concern stems both from their increasing number and their ever-broader scope.

During the period 1948-1994, the General Agreement on Tariffs and Trade (GATT) received 124 notifications of PTAs, of which about 50 were active at the creation of the World Trade Organisation (WTO) in 1995. Since then, more than 250 new arrangements have been notified to the WTO, and the number of arrangements active in 2008 was about 200. A large part of this expansion involves agreements where the European Community (EC)[1] or the United States (US) is a partner. As a result, the EC and the US have become the two main 'hubs' in the pattern of PTAs, with the 'spokes' represented by agreements with the various partner countries.

Modern PTAs exhibit features that earlier PTAs did not possess. In particular, PTAs formed before 1995 concerned only trade in goods and took the form of (mostly) free-trade areas (FTAs) or (more rarely) customs unions (CUs), involving mainly tariff liberalisation. Since the creation of the WTO and the extension of multilateral trade agreements to trade in services and trade-related aspects of intellectual property rights, new PTAs also tend to cover these two subjects, which revolve chiefly around regulatory issues. Besides, there are claims that the new preferential agreements signed by the EC or the US go even further in the coverage of regulatory issues, by including provisions in areas that are not currently covered by the WTO agreements at all, such as investment protection, competition policy, labour standards and protection of the environment.

This claim has potential systemic implications because, although they jointly account for no more than 40 percent of world GDP (at PPP) and world trade, the EC and the US are sometimes viewed as the 'regulators of the world'. It is estimated

1. We will generally use the term European Community (EC), which is the legally correct expression in the WTO context. However, we will also sometime use the term European Union (EU) where appropriate.

indeed that, together, they account for around 80 percent of the rules that regulate the functioning of world markets[2].

The relatively broad scope of PTAs involving the EC and the US is reflected in the policy debate, and to a lesser extent in the academic literature. Economic scholars have been arguing for some time about the relationship between PTAs and the multilateral trading system, with a clear division into two camps. On one hand, there are those who argue that PTAs, especially those of the 'new generation', constitute a dangerous threat to the system[3]. On the other, there are those who feel that such concern is overstated, and that there are potential solutions to reconcile the two, providing the political will exists[4].

There is now also an institutional acknowledgement that PTAs should be regarded as a serious concern for the multilateral trading system. Thus, in opening the conference entitled 'Multilateralising Regionalism', held in Geneva in September 2007, WTO Director-General Pascal Lamy reflected 'that it would be fair to say that proliferation [of PTAs] is breeding concern – concern about incoherence, confusion, exponential increase of costs for business, unpredictability and even unfairness in trade relations'. Yet no concrete action has been taken so far by the policy community to address this multifaceted concern.

This paper serves as a building block in this discussion. We believe that, before embarking upon a discussion as to whether (new) PTAs should be viewed with concern, one needs to examine the facts in greater detail than is typically done in the debate. Our primary purpose, therefore, is to analyse the precise content of the EC and US preferential trade agreements. In order to do this, we divide the subjects covered by these agreements into two categories: 'WTO plus' (WTO+), and 'WTO extra' (WTO-X). The first category corresponds to those provisions of PTAs which come under the current mandate of the WTO, where the parties undertake bilateral commitments going beyond those they have accepted at the multilateral level. An example would be a reduction in tariffs. By contrast, the WTO-X category comprises those PTA provisions that deal with issues lying outside the current WTO mandate. An example would be a commitment on labour standards.

At the outset it should be emphasised, however, that our aim is not to answer the

2. See Sapir (2007).
3. See, in particular, Bhagwati (2008).
4. See, for instance, Baldwin (2006).

question why WTO members – and in particular the EC and the US – include WTO-X obligations in their PTAs. At one end of the spectrum, one might suppose that PTAs serve as a kind of preparation for setting tomorrow's multilateral agenda. According to this argument, assuming consistency in the subject-matter across PTAs, it will be easier to interconnect them and multilateralise them in the future, or at least use their subject-matter as a basis for negotiating tomorrow's WTO rules[5]. But one could also argue that the very existence of WTO-X provisions is evidence that the preferential partners do not wish to include certain items in the WTO, and that is why they consistently maintain them in their PTAs.

The study covers all the 14 EC and 14 US agreements with WTO partners signed by the parties and, generally, notified to the WTO as of October 2008. In order to fully map these agreements, we proceed in three steps.

The first step consists of listing all the policy areas contained in the 28 agreements. For each of the 52 areas identified, we then record whether each agreement specifies obligations.

As a second step, we determine whether each obligation contained in the agreements is *legally enforceable*. We describe more precisely below why we believe that this is an important feature and how we evaluate whether a provision is enforceable or not. Let us simply say for the moment that the general idea is that texts that specify clear legal obligations are more likely to be implemented than highly less hard-edged ones.

As the final step, we establish whether obligations that are legally binding actually contain some 'depth', that is, whether these obligations are likely to matter in practice. Our ambition here is not to delve into any substantive examination of this issue, but simply to ensure that the identified obligations are not (completely) trivial[6].

In order to shed light on the validity of the claim that the EC and US agreements go

5. This view can be found, for instance, in Baldwin (2006).
6. Our work bears some resemblance to the study by Bourgeois *et al.* (2007), which characterises the form, content and implementation of certain provisions contained in 27 PTAs. Nevertheless, the two differ in several respects. First, we cover all EC and US PTAs with WTO members, whereas Bourgeois *et al.* covers only one EC PTA, 10 US PTAs and 16 other PTAs. Second, we cover all the provisions contained in EC and US PTAs, whereas Bourgeois *et al.* focuses on five types of provisions: social and labour standards, environmental policies, government procurement, five specific non-tariff barriers, and competition and state aid policies. Finally, and most importantly, the purpose of the Bourgeois et al. study is totally different from ours, reflecting the fact that it was contracted out by the European Commission. The goal of Bourgeois *et al.* was primarily to advise the Commission on negotiating strategy based on the experience of key trading parties in a few areas.

substantially beyond the WTO agreements, we divide the (52) identified policy areas into two groups as already indicated. The first, labelled WTO+, contains 14 areas, whereas the second, labelled WTO-X contains 38 areas.

Applying the WTO+/ WTO-X distinction to the EC and the US sets of agreements, our main findings are as follows.

First, we observe that while both sets cover both WTO+ and WTO-X types of provisions, the 14 EC agreements contain almost four times as many instances of WTO-X provisions as the 14 US agreements do. This would suggest that EC PTAs extend much more frequently beyond the WTO agreements than US PTAs.

However, second, the picture changes dramatically once the nature of the obligations is taken into account. The EC agreements evidence a very significant amount of 'legal inflation', in particular in the parts dealing with development policy. US agreements actually prove to contain more legally enforceable WTO-X provisions than the EC agreements. Hence the latter contain many obligations that have no legal standing.

Third, we also find that both the EC and the US PTAs contain a significant number of legally enforceable, substantive undertakings in WTO+ areas. Fewer obligations contained in EC agreements tend to be enforceable than those of US agreements, but the difference is not as pronounced as for the WTO-X areas.

Finally, we find that there is a difference in the nature of the legally enforceable obligations contained in EC and US agreements, with the latter putting more emphasis on regulatory areas.

We draw three conclusions from these findings.

First, although the EC and US preferential trade agreements do go significantly beyond the WTO agreements, the number of legally enforceable WTO-X provisions contained in the EC and US PTAs is in fact quite small. Provisions that can be regarded as really breaking new ground compared to existing WTO agreements are few and far between: environment and labour standards for the US agreements, and competition policy for the EC agreements. The other enforceable WTO-X provisions found in EC and US PTAs concern domains that more or less relate to existing WTO agreements, such as investment, capital movement and intellectual property.

Second, the new, legally enforceable WTO-X provisions clearly all deal with regulatory

issues. This suggests that the EC and US agreements effectively serve as a means for the two hubs to export their own regulatory approaches to their PTA partners. This study does not permit us to draw conclusions about the costs and benefits of this situation for the hubs and the spokes, but our impression is that it primarily serves the interests of the two 'regulators of the world'. This impression is based on the fact that the legally enforceable WTO-X provisions included in EC and US agreements have all been the subject of earlier, but failed, attempts by the EU and/or the US to incorporate them into WTO rules, against the wishes of developing countries. To the extent that our conclusion is correct, it supports the above-mentioned view that PTAs are breeding concern about unfairness in trade relations.

Third, the EC and the US have chosen markedly different strategies for including provisions in their PTAs that go beyond the WTO agreements. In particular, EC agreements display a fair deal of 'legal inflation', a phenomenon almost totally absent in US agreements. This study does not permit us to draw precise conclusions about this asymmetry of behaviour between the EU and the US, but the fact that much of the 'legal inflation' occurs in development-related provisions, which are unique to the EC agreements, suggests that the EU has a greater need than the US to portray its PTAs as not driven purely by commercial interests. Our feeling is that this may reflect a lack of consensus on the part of EU member states about the ultimate purpose of PTAs.

The plan of the remainder of this study is as follows. Section 2 deals with methodological issues related to the agreements being studied, the classification of policies into either WTO+ or WTO-X areas, and the definition of 'legally enforceable' obligations. Section 3 presents our initial findings concerning the coverage, the legal enforceability, and the 'depth' of obligations for WTO+ areas. Section 4 contains similar findings for WTO-X areas. These two sections prepare the ground for Section 5, which contains our main analyses. Section 6 briefly summarises the results.

2. Methodological issues

The purpose of this section is to describe the set of PTAs under study, to set out how we classify the coverage of these agreements, and how we evaluate whether a covered policy contains legally enforceable obligations.

2.1 PTAs and the WTO

According to WTO rules, members may enter into PTAs with other WTO members either concerning trade in goods, or trade in services, or both. With respect to trade in goods, WTO members that satisfy the requirements included in Article XXIV GATT can legally treat products originating in some WTO Members (those with which they have formed a PTA) more favourably than like products originating in the other WTO member countries. Article XXIV GATT distinguishes between two forms of PTA: free trade areas (FTAs) and customs unions (CUs). For an FTA to be GATT-consistent, its members must liberalise trade between them; for a CU to be GATT-consistent, its members must, beyond liberalising trade between them, agree on a common trade policy vis-à-vis the rest of the WTO membership. All the PTAs that will be considered here are FTAs, with the exception of the EC-Turkey agreement, which is a CU.

In the WTO, it is also possible to form PTAs under a separate legal instrument – the 'Enabling Clause'. But since this possibility is only available where all members of the PTA are developing countries, such agreements are not relevant to this study.

The specific conditions for satisfying consistency with the multilateral rules concerning goods trade are laid down in Article XXIV.5-8 GATT. Apart from requesting the PTA to encompass substantially all trade between its members, and not to raise the overall level of protection vis-à-vis the rest of the WTO membership, these provisions oblige WTO members wishing to enter into a PTA to show that they have complied with the relevant multilateral rules.

With respect to trade in services, Article V GATS mentions only one form of preferential scheme, entitled economic integration. It is akin to a GATT FTA since its members are

entitled to retain their own trade policies vis-à-vis third countries, although there are also some differences between the two schemes. The disciplines of economic integration echo those preferential schemes which apply to trade in goods: Article V.1 GATS requires that a PTA has substantial sectoral coverage, and Article V.4 GATS requires PTA members not to raise the overall level of barriers against non-participants.

2.2 The agreements under study

Table 2.1, overleaf, lists the set of agreements that are scrutinised in this study, which consists of all PTAs signed between the EC and the US, respectively, and other WTO members as of October 2008. The list includes agreements signed before and after the creation of the WTO, but excludes those where the partner is not a WTO member. It also includes agreements signed by the parties but not yet ratified, and therefore not yet notified to the WTO or actually in force. Of the 28 listed agreements 14 are EC PTAs and 14 are US PTAs, counting the EC agreements with individual EFTA partners (Liechtenstein and Switzerland counting as one owing to their economic union) and the European Economic Area agreement (between the EC and the EFTA countries, except Switzerland) as one PTA.

Several noteworthy features stand out from Table 2.1. First, all 14 EC PTAs are currently in force, except the EC-CARIFORUM, which was signed in October 2008 but still awaits ratification by the parties. By contrast, five of the 14 US PTAs are yet to enter into force, although two have already been ratified by the US Congress (Peru and Oman). 12 of the 14 US PTAs were signed in 2000 or later, whereas this is only the case for seven of the 14 EC PTAs.

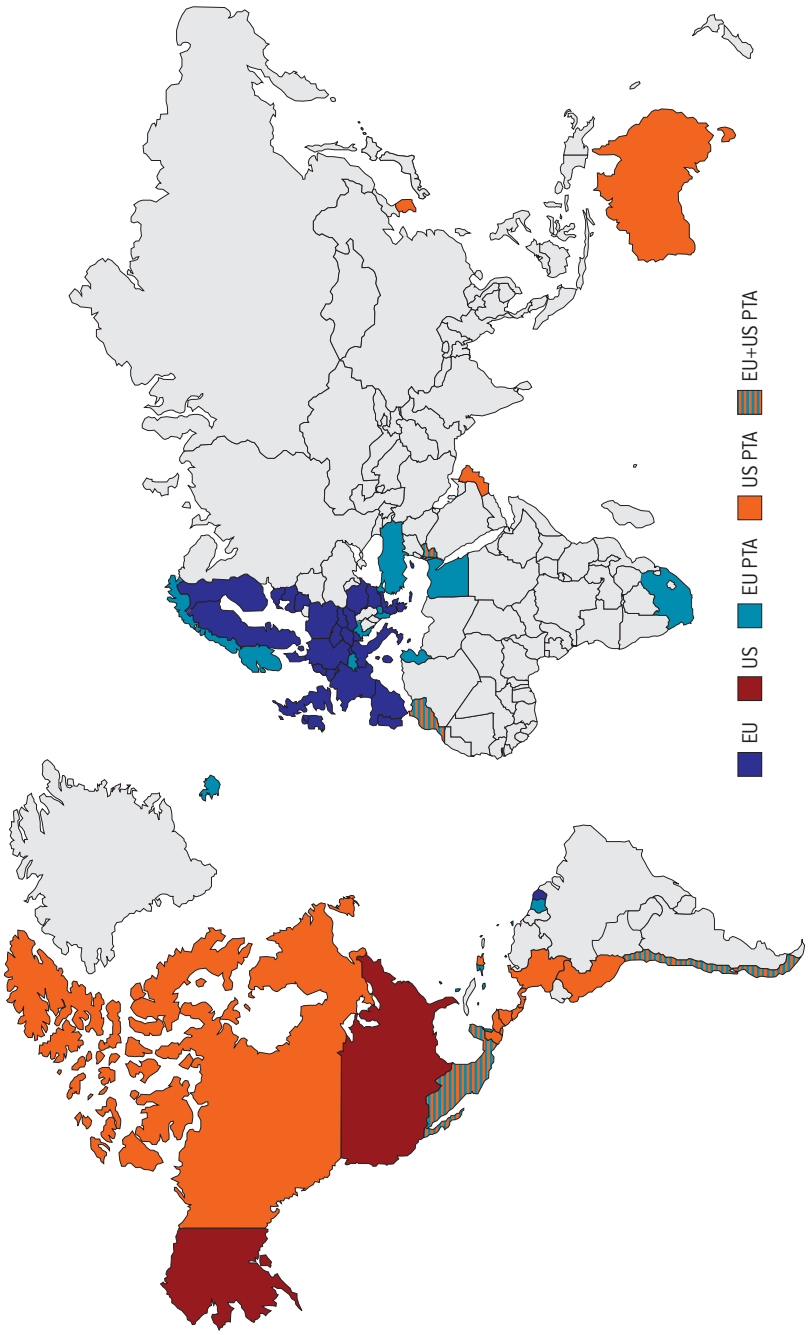
Second, the geographical spread of US partners is far greater than for the EC (see Map 1, overleaf), in the sense that, out of the 14 US agreements, eight are with countries/blocs outside the Americas: Australia, Bahrain, Israel, Jordan, Morocco, Oman, Singapore, and South Korea. By contrast, the majority of EC agreements are with neighbouring countries. The only EC partners from further afield are the CARIFORUM (Caribbean), Chile, Mexico and South Africa. It should be noted, however, that the EC in 2007 launched negotiations with several partners in the Asia/Pacific regions: ASEAN, India and South Korea.

Third, EC PTAs tend to cover only trade in goods (with the exception of the EEA and the PTAs with Mexico, Chile and the CARIFORUM), whereas all US PTAs (with the exception of the old agreement with Israel) also cover trade in services.

Table 2.1: EC and US PTAs with other WTO members, signed as of October 2008*

Agreement	Date of signature by parties	Date of entry into force of interim agreement**	Date of entry into force of full agreement	WTO notification under GATT Art. XXIV	WTO notification under GATS Art. V
EC – Norway	11/11/1970	-	01/07/1973	13/07/1973	*not applicable*
EC – Iceland	22/07/1972	-	01/04/1973	24/11/1972	*not applicable*
EC – Switzerland and Liechtenstein	22/07/1972	-	01/01/1973	27/10/1972	*not applicable*
EEA†	02/05/1992	-	01/01/1994	*not applicable*	13/09/1996
EC – Turkey	06/03/1995	-	31/12/1995	22/12/1995	*not applicable*
EC – Tunisia	17/05/1995	-	01/03/1998	15/01/1999	*not applicable*
EC – Israel	20/11/1995	-	01/06/2000	20/09/2000	*not applicable*
EC – Morocco	26/02/1996	-	01/03/2000	13/10/2000	*not applicable*
EC – Jordan	24/11/1997	-	01/05/2002	17/12/2002	*not applicable*
EC – South Africa	11/10/1999	-	01/01/2000	02/11/2000	*not applicable*
EC – Mexico	23/03/2000	-	01/07/2000	25/07/2000	*not applicable*
	27/02/2001	-	01/03/2001	*not applicable*	21/06/2002
EC – FYRoM	09/04/2001	01/06/2001	01/04/2004	23/10/2001	*not applicable*
EC – Egypt	25/06/2001	-	01/06/2004	03/09/2004	*not applicable*
EC – Croatia	29/10/2001	01/03/2002	01/02/2005	17/12/2002	*not applicable*
EC – Chile	18/11/2002	01/02/2003	01/03/2005	03/02/2004	28/10/2005
EC – Albania	12/06/2006	01/12/2006	-	07/03/2007	*not applicable*
EC – CARIFORUM	15/10/2008	-	01/11/2008	16/10/2008	16/10/2008
US – Israel	22/04/1985	-	19/08/1985	13/09/1985	*not applicable*
NAFTA	17/12/1992	-	01/01/1994	29/01/1993	*not applicable*
		-	01/04/1994	*not applicable*	01/03/1995
US – Jordan	24/11/2000	-	17/12/2001	15/02/2002	15/01/2002
US – Singapore	06/05/2003	-	01/01/2004	17/12/2003	
US – Chile	06/06/2003	-	01/01/2004	16/12/2003	
US – Australia	18/05/2004	-	01/01/2005	22/12/2004	
US – Morocco	15/06/2004	-	01/01/2006	30/12/2005	
US – CAFTA-DR	05/08/2004	-	01/03/2006	17/03/2006	
US – Bahrain	14/09/2004	-	01/08/2006	08/09/2006	
US – Peru	12/04/2006	-	-	-	
US – Oman	19/01/2006	-	-	-	
US – Colombia	22/11/2006	-	-	-	
US – Panama	28/06/2007	-	-	-	
US – South Korea	30/06/2007	-	-	-	

Source: World Trade Organisation (WTO), European Commission (DG External Relations) and Office of the US Trade Representative.
Notes: * The EC also has reciprocal PTAs with several non-WTO members: Algeria, Andorra, Faroe Islands, Lebanon, Overseas Countries and Territories (OTCs), the Palestinian Authority, San Marino, and Syria. ** Interim agreement refers to the part of the agreement that is devoted to trade and trade-related issues. † The EEA was signed between the European Community and the EFTA countries, except Switzerland. Some EFTA countries later joined the European Community (now Union). The remaining EFTA countries which belong to the EEA are Iceland, Liechtenstein and Norway. Switzerland has signed separate bilateral agreements with the European Community that also cover both trade in goods and in services. When we refer to the EEA, we will use the term loosely to cover all agreements that have been concluded between EFTA countries, including Switzerland, and the EC.



Map 2.1: EC and US PTAs with other WTO members, signed as of October 2008

Finally, there is a striking overlap between the EC and US partners. Five countries have agreements with both the EC and the US: Israel, Morocco, Jordan, Mexico and Chile. Five others will also have agreements with both hubs in the future if current EC negotiations with ASEAN (which includes Singapore), with the Gulf Cooperation Council (which includes Bahrain and Oman), and with South Korea, as well as US negotiations with the Southern African Customs Union (which includes South Africa), are all successful.

2.3 The coverage of the agreements

A basic aim of this study is to identify, more precisely than has been done in the literature so far, the legal obligations imposed by PTAs involving the EU and the US, and to compare the nature of these two sets of agreements. To this end, we have gone through the 28 agreements in their entirety, and characterised the obligations which they impose. The contents of these agreements have been divided into 52 policy 'areas'. This characterisation is intended to be exhaustive, in the sense that all the provisions contained in the 28 agreements fall under one or other of the areas, except for those that concern the administration of the agreement, which we disregard. The classification is largely based on the article headings in the case of the EC agreements, and on the chapter headings in the case of the US agreements.

In order to shed light on our central issue – whether the EC and US agreements provide for 'more of the same' relative to the WTO agreements, or impose obligations in areas other than those already covered in the WTO agreements – we classify the 52 policy areas into two broad groups: 'WTO-plus' (WTO+) and 'WTO-extra' (WTO-X). The former is meant to include obligations relating to policy areas that are already subject to some form of commitment in the WTO agreements. The PTA can here either reconfirm existing commitments, or provide for further obligations. The archetypal obligation here would be the formation of a FTA, since this would be a reduction in tariffs going beyond what is already committed to in the WTO context. Examples of other areas we have classified as WTO+ include obligations concerning SPS (sanitary and phytosanitary) measures, TBT (technical barriers to trade) measures, antidumping, state aid, and obligations covered by the GATS. We have also included those intellectual property rights provisions which address issues falling under the TRIPs agreement. Finally, we have also included export taxes, although the WTO contains no precise commitment in this area. Nonetheless, WTO members could negotiate commitments on export taxes under Article II GATT, so it can be argued that a WTO instrument already exists in this area.

A WTO-X designation is, on the other hand, meant to capture an obligation in an area that is 'qualitatively new', relating to a policy instrument that has not previously been regulated by the WTO. For instance, there are no undertakings with regard to environmental protection in the WTO. We thus classify an environmental obligation as WTO-X. Other such clear examples are obligations concerning labour laws or movement of capital.

Several caveats are in order at this stage. First, what is 'more of the same', and what is qualitatively new, cannot of course be determined with full precision. There is no generally agreed-upon classification of policy measures as falling under or outside the WTO agreements. For instance, take the case of competition policy. It could be argued that the GATT is really about market access, and that the removal of anti-competitive behaviours that hinder market access is very much in line with the agreement, and that this area should consequently be classified as WTO+. At the same time we classify it without much hesitation as a WTO-X area, since we feel that it goes sufficiently beyond the existing agreement. Or to take another example, the Preamble to the WTO Agreement speaks about the need '... to protect and preserve the environment...'. While there are no provisions in the WTO agreements specifically addressing the conduct of environmental policies with a trade impact, it could be said that because of the Preamble such provisions should be classified as WTO+. But we still classify this area as falling into the WTO-X category.

What these examples show is thus that the WTO+/WTO-X distinction necessarily involves judgement. Nonetheless, we believe that it is for the most part uncontroversial and reasonable.

Second, we will classify an area as being 'covered' by an agreement, when the agreement contains an article providing for some form of undertaking in this area. Clearly, however, the fact that an area is covered is not sufficient in order to define the impact of the obligation it contains, for at least two reasons. First, the obligation may not be legally enforceable due to loosely formulated legal language. Secondly, even if the language is such as to make it enforceable, the obligation may call for anything between no change to a major change in the policy, relative to what would have been the unilateral course of action opted for in the absence of the provision. We will discuss these two aspects – the 'legal enforceability' and the 'depth' of the undertakings below.

Third, we will compute various measures of the prevalence of different areas in the two sets of PTAs, mainly by counting the number of occurrences of the various areas.

Numbers computed in this way must obviously be interpreted with great care. For instance, as just pointed out, some of these areas may involve significant economic as well as legal undertakings, such as abolishment of tariffs through the formation of the preferential trading agreement, while other areas may be much less onerous, such as cooperation concerning statistics. What we will be doing is therefore to some extent comparing chalk and cheese. It is of course not necessarily wrong to do this, but care has to be exercised when interpreting the resulting numbers.

Tables 2.2 and 2.3 list the 52 areas we have thus defined, and classify them according to the WTO+/WTO-X distinction. The tables also provide a very brief indication for each area of what it entails. We will later in this section discuss in more detail the obligations in certain areas[7].

Table 2.2: Brief description of WTO+ areas identified in the 28 agreements

AREA COVERED	CONTENT
FTA industrial goods (FTA ind.)	Tariff liberalisation; elimination of non-tariff measures.
FTA agricultural goods (FTA agr.)	Tariff liberalisation; elimination of non-tariff measures.
Customs administration	Provision of information; publication on the Internet of new laws and regulations; training.
Export taxes	Elimination of export taxes.
Sanitary and phytosanitary (SPS) measures	Affirmation of rights and obligations under the WTO Agreement on SPS; harmonisation of SPS measures.
Technical barriers to trade (TBT)	Affirmation of rights and obligations under WTO Agreement on TBT; provision of information; harmonisation of regulations; mutual recognition agreements;
State trading enterprises (STE)	Establishment or maintenance of an independent competition authority; non-discrimination regarding production and marketing conditions; provision of information; affirmation of Art XVII GATT provisions.
Antidumping (AD)	Retention of AD rights and obligations under the WTO Agreement (Art. VI GATT).
Countervailing measures (CVM)	Retention of CVM rights and obligations under the WTO Agreement (Art VI GATT).
State aid	Assessment of anticompetitive behaviour; annual reporting on the value and distribution of state aid given; provision of information.
Public procurement	Progressive liberalisation; national treatment and/or non-discrimination principle; publication of laws and regulations on the Internet; specification of public procurement regime.
Trade-related investment measures (TRIMs)	Provisions concerning requirements for local content and export performance on foreign direct investment.
Trade in services agreement (GATS)	Liberalisation of trade in services.
Trade-related intellectual property rights (TRIPs)	Harmonisation of standards; enforcement; national treatment, most-favoured nation treatment.

7. Our classification exercise involved working through 28 individual agreements, most of which are longer than 200 pages, and some even going beyond 1000 pages. Errors or omissions are therefore possible. We would be grateful for any corrections/additions which readers may contribute.

Table 2.3: Brief description of WTO-X areas identified in the 28 agreements

AREA COVERED	CONTENT
Anti-corruption	Regulations concerning criminal offence measures in matters affecting international trade and investment.
Competition policy	Maintenance of measures to proscribe anticompetitive business conduct; harmonisation of competition laws; Establishment or maintenance of an independent competition authority.
Consumer protection	Harmonisation of consumer protection laws; exchange of information and experts; training.
Data protection	Exchange of information and experts; joint projects.
Environmental laws	Development of environmental standards; enforcement of national environmental laws; establishment of sanctions for violation of environmental laws; publications of laws and regulations.
Investment	Information exchange; Development of legal frameworks; Harmonisation and simplification of procedures; National treatment; Establishment of mechanisms for the settlement of disputes.
Movement of capital	Liberalisation of capital movement; prohibition of new restrictions.
Labour market regulations	Regulation of the national labour market; affirmation of International Labour Organisation (ILO) commitments; enforcement.
Intellectual Property Rights (IPR)	Accession to international treaties not referenced in the TRIPs Agreement.
Agriculture	Technical assistance to conduct modernisation projects; exchange of information.
Approximation of legislation	Application of EC legislation in national legislation.
Audio visual	Promotion of the industry; encouragement of co-production.
Civil protection	Implementation of harmonised rules.
Innovation policies	Participation in framework programmes; promotion of technology transfers.
Cultural cooperation	Promotion of joint initiatives and local culture.
Economic policy dialogue	Exchange of ideas and opinions; joint studies.
Education and training	Measures to improve the general level of education.
Energy	Exchange of information; technology transfer; joint studies.
Financial assistance	Set of rules guiding the granting and administration of financial assistance.
Health	Monitoring of diseases; development of health information systems; exchange of information.
Human rights	Respect for human rights.
Illegal immigration	Conclusion of re-admission agreements; prevention and control of illegal immigration.
Illicit drugs	Treatment and rehabilitation of drug addicts; joint projects on prevention of consumption; reduction of drug supply; information exchange.
Industrial cooperation	Assistance in conducting modernisation projects; facilitation and access to credit to finance.
Information society	Exchange of information; dissemination of new technologies; training.
Mining	Exchange of information and experience; development of joint initiatives.
Money laundering	Harmonisation of standards; technical and administrative assistance.
Nuclear safety	Development of laws and regulations; supervision of the transportation of radioactive materials.
Political dialogue	Convergence of the parties' positions on international issues.
Public administration	Technical assistance; exchange of information; joint projects; Training.
Regional cooperation	Promotion of regional cooperation; technical assistance programmes.
Research and technology	Joint research projects; exchange of researchers; development of public-private partnership.
Small and medium enterprise	Technical assistance; facilitation of the access to finance.
Social matters	Coordination of social security systems; non-discrimination regarding working conditions.
Statistics	Harmonisation and/or development of statistical methods; training.
Taxation	Assistance in conducting fiscal system reforms.
Terrorism	Exchange of information and experience; joint research and studies.
Visa and asylum	Exchange of information; drafting legislation; training.

2.4 The legal enforceability of identified areas

In order to determine the impact of the EC and US preferential trade agreements, it is important not only to identify the areas in which the agreements contain provisions, but also to determine the extent to which these provisions are legally enforceable. Unclearly specified undertakings, and undertakings that parties are only weakly committed to undertake, and that can be seemingly fulfilled with some token measure, are not likely to be successfully invoked by a complainant in a dispute settlement proceeding, and would presumably therefore also have little impact. In order to shed light on the extent to which this is an issue in practice, we have evaluated each provision in each agreement for the extent to which it specifies at least some obligation that is clearly defined, and that is likely effectively to bind the parties.

With a view to maintaining some degree of objectivity, we have classified certain terms as either implying enforceable or non-enforceable obligations. The following are some examples of terms that we interpret as creating legally enforceable obligations:

- *"The parties shall allow the free movement of capital ..."*
- *"Neither party may expropriate or nationalise a covered investment ..."*
- *"If a party does not accept the technical regulation that is equivalent of its own it shall, at the request of the other party, explain the reasons ..."*
- *"By the end of (exact date) a party shall accede to the following international conventions: ..."*
- *"Neither party may impose performance requirements or enforce any commitment or undertaking, in connection with the establishment, acquisition, expansion, management, conduct, operation or sale..."*
- *"Each party shall not fail effectively to enforce labour (environmental) laws ..."*

As can be seen, the word "shall" appears in many of these examples.

The following examples illustrate formulations that we define to be in the opposite category, not meeting the test of effectively binding the parties:

- *"The parties shall cooperate ..."*. It is likely to be very difficult to prove that a party has not 'cooperated'.
- *"Dialogue shall be established ..."*. It would require almost complete silence from the respondent for the complainant successfully to argue that no dialogue has been established.
- *"Special attention shall be paid to ..."*. How could it be verified that special attention

has not been devoted to an issue?

- *"Measures necessary for development and promotion of ..."*. It is likely to be very hard for a complainant in a dispute to prove either that that a measure is necessary or that it is not necessary for development.
- *"Parties may conclude ..."*. This phrase does not impose any restriction on the parties.
- *"Parties shall strive (aim) to ..."*. It would be difficult to prove absence of best endeavours.

Distinguishing the degree of legal enforceability in this way cannot only be defended from the point of view of practical experience, but also from the point of view of the principles of international law. One of the requirements in Article 2 of the Vienna Convention on the Law of Treaties for an agreement to be a treaty is that it is "governed by international law". This is normally interpreted to require the parties to intend that the agreement has legal effect under international law. The terminology of an agreement may indicate the extent to which such intent exists. To quote McCaffrey (2006, p. 81):

> '... the intent to create a legal relationship is distinct from the intent to create a moral obligation or political commitment. This is exemplified by words of obligation, most commonly "shall," but also "agree," "undertake," and the like. Obviously, references to "rights" and "obligations" are also indicators of intent to create a legal relationship. Terminology such as "should" and "will" do not typically indicate such an intent ...'

As a further illustration of the kind of differences between undertakings in a given area, in terms of legal enforceability, that we seek to capture, compare the following two examples. The first example is from the EU-Albania agreement, and concerns the social security coverage of Albanian workers in the EU:

> *Art. 46: "... treatment accorded to workers who are Albanian nationals and who are legally employed in the territory of a Member State shall be free of any discrimination based on nationality, as regards working conditions, remuneration or dismissal, compared to its own nationals..."*
>
> *...*
>
> *Art. 48.1: "Rules shall be laid down for the coordination of social security systems for workers with Albanian nationality, legally employed in the territory of a Member State, and for the members of their families legally resident there. To that effect ... all periods of insurance, employment or residence completed by*

such workers in the various Member States shall be added together for the purpose of pensions and annuities in respect of old age, invalidity and death and for the purpose of medical care for such workers and such family members…"

The second example is taken from the EU-Chile agreement:

Art. 44.1: "The Parties recognize the importance of social development (…). They shall give priority to the creation of employment and respect for fundamental social rights, notably by promoting the relevant conventions of the ILO (…)."

Art. 44.2: "Cooperation may cover any area of interest to the Parties."

Art. 44.3: "Measures may be coordinated with those of the Member States and the relevant international organizations."

Art. 44.4: "The Parties shall give priority to measures aimed at: (a) promoting human development (…)."

These two examples do not provide the whole text of the relevant provision, but we believe that they are fairly representative of the legal language that they contain. In our view, the first example contains obligations that are much more specific and clearer than the second. It would be next to impossible, we believe, successfully to argue during a dispute that the responding country has not given priority to fundamental social rights, or to measures aimed at promoting human development. Hence, we would classify the text in the EU-Chile agreement as not providing a legally enforceable obligation in this area, while at least some of the obligations contained the EU-Albania agreement would be defined to be enforceable.

More problematic is the presumption that vagueness in the legal text works to the benefit of the respondent in a dispute. It could reasonably be argued that a vague text provides opportunities for the legally more astute party to shape the interpretation of the agreement. Most probably, this would work to the advantage of the two hubs, which almost invariably have access to more legal competence than their partners.

Another complication is that provisions may be enforced not only through a formal judicial dispute settlement mechanism, but also through more political means. The existence of a provision in an agreement may in such a case still be important, since it may help the parties to coordinate their expectations concerning their implicit agreement. But while it is then not the legal strictness of the language that matters to the enforceability of the provision, it seems reasonable to assume that this strictness helps parties maintain their non-formal enforcement of the agreement.

We have so far discussed how vague and non-committal language makes it difficult to enforce a provision in a formal dispute settlement process. Another and more obvious reason is that the agreement explicitly states that dispute settlement is not available for the provision. When evaluating the enforceability of the various provisions, we naturally also take such carve-outs into account, and classify as non-enforceable any undertaking for which dispute settlement is expressly ruled out under the agreement.

The Bruegel website (www.bruegel.org) contains more detailed information on the reasons why the various areas have been classified as being covered and as legally enforceable or non-enforceable, as the case may be. This allows the reader to verify that the areas we identify exist, and to evaluate the grounds for our enforceability assessment. But there are other potential errors that will be harder to detect. For instance, our 52 areas may not suffice to cover all policy areas in the agreements, with the consequence that we fail to identify some commitments that have been made. It is also possible that, for the areas that we have identified, we fail to discover an existing binding commitment for some agreement(s), either because we fail to detect it altogether in the agreement, or because we have mistakenly focused on a non-enforceable part of the text, whereas in fact enforceable language also exists in another part. All we can hope is that such errors are sufficiently rare not seriously to affect the thrust of our findings.

3. WTO+ areas

This section discusses the extent to which the various WTO+ areas we have identified are covered in the 28 EC and US agreements, whether existing obligations are legally binding, and the extent to which they entail substantive undertakings[8].

3.1 Coverage of WTO+ areas

The coverage of WTO+ areas in the EC and US agreements is displayed under the heading 'AC' (for Area Covered) in, respectively, Tables 3.1 and 3.2, where a dark box indicates that a particular agreement contains an obligation in a particular area.

As can be seen, there is generally speaking a very high degree of coverage in both EC and US agreements. There are three areas for which all EC and all US agreements contain obligations: Industrial Products, Agricultural Products, and TRIPs. All the EC agreements also include obligations concerning Customs Administration, TBT, Antidumping and Countervailing Measures. Most (but not all) of the US agreements also cover these areas. All the US agreements include obligations concerning Public Procurement, and so do all but one of the EC agreements. Also, most EC and US agreements include provisions concerning State Trading Enterprises and State Aid. There is thus a fairly high degree of similarity between the two sets of agreements when it comes to the coverage of WTO+ areas. Both contain obligations in more or less the same areas.

There are, however, a few important differences between the two sets of agreements in terms of coverage. First, GATS obligations are included in all US agreements, but only in four EC ones. Second, most US agreements include TRIMs obligations, while none of the EC ones has anything explicit on this[9]. Third, all US agreements have

8. Section 4 will undertake a parallel analysis of WTO-X areas. While we will discuss some findings in the respective sections, we will save the broader discussion to Section 5.
9. Note, however, that by reaffirming the Art. III and XI GATT rights and obligations in its PTAs, the EC effectively introduces obligations with respect to the two forms of TRIMs currently sanctioned by the multilateral system, that is, export performance-, and local content-type of investment measures.

Table 3.1: Classification of WTO+ areas in EC agreements

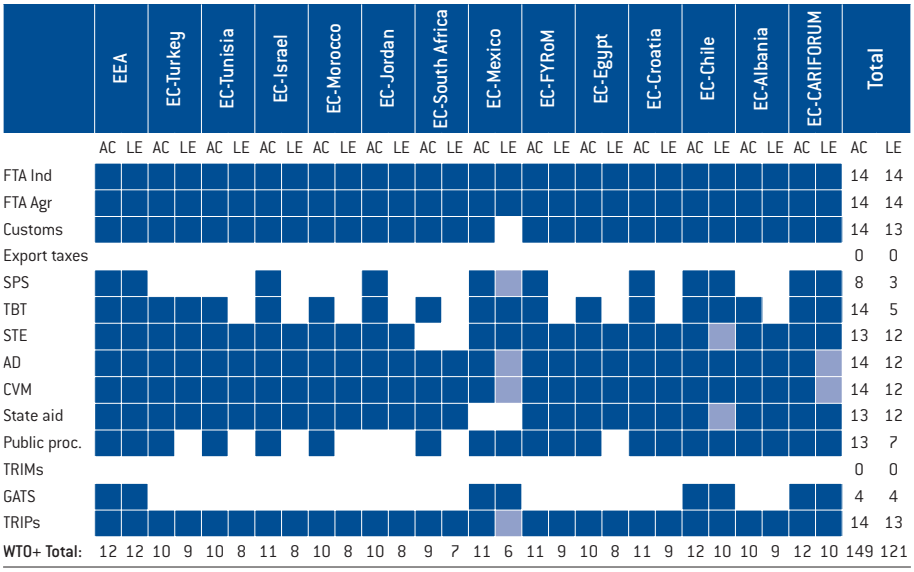
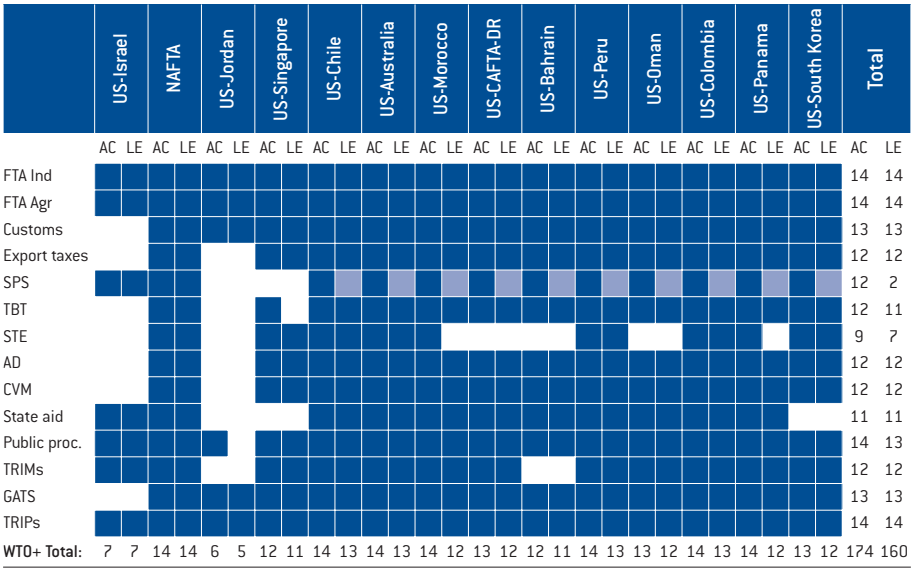


Table 3.2: Classification of WTO+ areas in US agreements



Source: Authors.
Note: The GATS area covers commitments related to services liberalisation. AC: area covered; LE: legally enforceable. Customs = customs administration. Public proc. = public procurement.
Light blue: legally enforceable language but carve-out from dispute settlement.

obligations regulating export taxes, but none of the EC agreements includes provisions in this area.

3.2 The enforceability of WTO+ obligations

So far we have discussed the areas that appear in the two sets of agreements. We next seek to identify those obligations that are legally enforceable. The 'LE' in tables 3.1 and 3.2 shows the areas where undertakings are legally enforceable.

A dark box indicates that the language is sufficiently precise or committing to provide a legally enforceable obligation. A cross-hatched box indicates that the language is sufficiently precise or committing, but that it is non-enforceable due to an explicit statement that dispute settlement is not available.

Let us start by pointing to the areas that are exempt from dispute settlement. As can be seen, the EC agreement with Mexico has four such exemptions, for SPS, Antidumping, Countervailing Measures, and TRIPs; the EC agreement with CARIFORUM has exemptions for the latter two areas, and the EC-Chile agreement has exemptions for State Trading Enterprises and State Aid. The US agreements contain exemptions from dispute settlement only in the context of SPS, but do so for 10 agreements, allowing dispute settlement regarding SPS measures only in the agreement with Israel and in NAFTA.

Turning to areas that are non-enforceable due to imprecise language, we note that, with respect to the EC agreements, in six of the 13 agreements Public Procurement undertakings are not enforceable; in nine out of the 14 agreements TBT undertakings are not enforceable; and in 10 out of 12 agreements SPS undertakings are not enforceable. The US agreements, on the other hand, contain relatively speaking substantially fewer areas where legally non-enforceable language has been included, both in absolute numbers and relative to the number of covered areas.

Turning to the areas with enforceable obligations, we observe that both sets of agreements include such obligations for all their agreements with regard to tariff liberalisation (FTAs) for both industrial and agricultural products, and with respect to 12 out of the 14 agreements in the areas of Customs Administration, Antidumping, Countervailing Measures, State Aid, and TRIPs.

3.3 The 'depth' of the commitments in enforceable WTO+ areas

We have so far identified the areas in which there are legally enforceable provisions. We have thus established the *existence* of such legal obligations, but nothing has been said so far about the *magnitude* of the undertakings involved. We believe that it is not warranted to describe in detail the obligations in *all* areas covered; the literature contains extensive studies dealing with just a single area, such as investment provisions, tariff reductions, technical standards, or competition policy. What we do instead in Appendix A is to describe very briefly those areas in which at least one of the hubs has legally enforceable obligations in at least five agreements. We also rely partly on external sources.

Although the analysis in Appendix A is insufficient to determine the exact magnitude of the undertakings in the relevant areas, it clearly shows that they are far from being trivial.

3.4 Main observations concerning WTO+ undertakings

Our initial conclusions concerning the WTO+ parts of the agreements are the following:

1. Both the EC and US sets of agreements have a large number of legally enforceable obligations with significant undertakings in areas covered by the current WTO mandate, such as tariff cuts in goods, Customs Administration, Antidumping, Countervailing Measures, Agriculture, and TRIPs.
2. Commitments in the 'new WTO areas' (GATS, TRIPs) figure prominently in both sets of agreements, although more so in US PTAs as far as services are concerned.
3. The extent of the overlap between the two sets of agreements notwithstanding, we still observe some notable differences: the US agreements have substantial, legally enforceable obligations concerning export taxes, TRIMS, TBT, and GATS, while the EC agreements contain significantly more obligations of this kind concerning State Trading Enterprises.
4. Both sets of agreements opt for staged tariff liberalisation with respect to both industrial and farm goods. Still, it is very difficult to pronounce on their consistency with the WTO rules in light of the confusion surrounding the meaning of the terms appearing in Article XXIV GATT, and the lack of practice regarding the interpretation of Article V GATS[10].

10. See Mavroidis (2007).

4. WTO-X areas

We now turn our attention to the WTO-X areas, which refer to provisions regarding commitments in policy areas not covered by the current mandate of the WTO.

4.1 The coverage of WTO-X areas

Tables 4.1 and 4.2 (overleaf) provide information about the coverage of the two sets of agreements for WTO-X areas.

We will start by describing the overlap between the two sets of agreements, and then revert to the differences among them. We should note at the outset however that, for the most part, the two sets of agreements differ significantly in their WTO-X subject-matter. Four areas – Environment, Intellectual Property, Investment, and Movement of Capital – appear in both sets of agreements; 12 of the 14 EC agreements include commitments in these areas, and so do 11 of the 14 US agreements. There is also some overlap with regard to Competition: all EC agreements include such a commitment, while 7 of the US agreements also do.

US agreements typically also include commitments in two additional areas: Labour Market Regulation, an item that has been included in 13 US agreements, and Anti-Corruption, included in 10. Besides these areas, US agreements contain commitments in two additional WTO-X areas – Data Protection, which has been included in two agreements, and Energy, which has been included in one.

All of the 38 WTO-X areas – except Anti-Corruption – are covered in at least one of the 14 EC agreements. Of the 14 agreements, ten include provisions concerning Agriculture[11], Cultural Cooperation, Education and Training, Energy, Financial Assistance, Human Rights, Illicit Drugs, Industrial Cooperation, Money Laundering, Political Dialogue, Regional Cooperation, Research and Technology, Social Matters, and Statistics. The only agreement that stands out in terms of coverage is the one

11. We refer to commitments that lie outside the current WTO mandate.

with Turkey, which contains commitments in only two areas: Competition and Intellectual Property Rights.

4.2 The enforceability of WTO-X obligations

While the EC agreements contain a larger number of WTO-X areas, it is the US agreements that contain the (proportionately speaking) higher number of legally enforceable obligations in these areas.

The US agreements contain few areas with non-enforceable provisions:

1. The main source of non-enforceability is the exemption of Competition-related disciplines from dispute settlement (illustrated by a light blue box under the heading LE in Table 4.2); all seven agreements that include a Competition provision explicitly exclude the commitments from dispute settlement.
2. There are four further instances of non-enforceability: two regarding Anti-Corruption and two concerning Consumer Protection. In total, only 13 percent (11 out of 82) of the covered provisions are deemed to be non-enforceable.

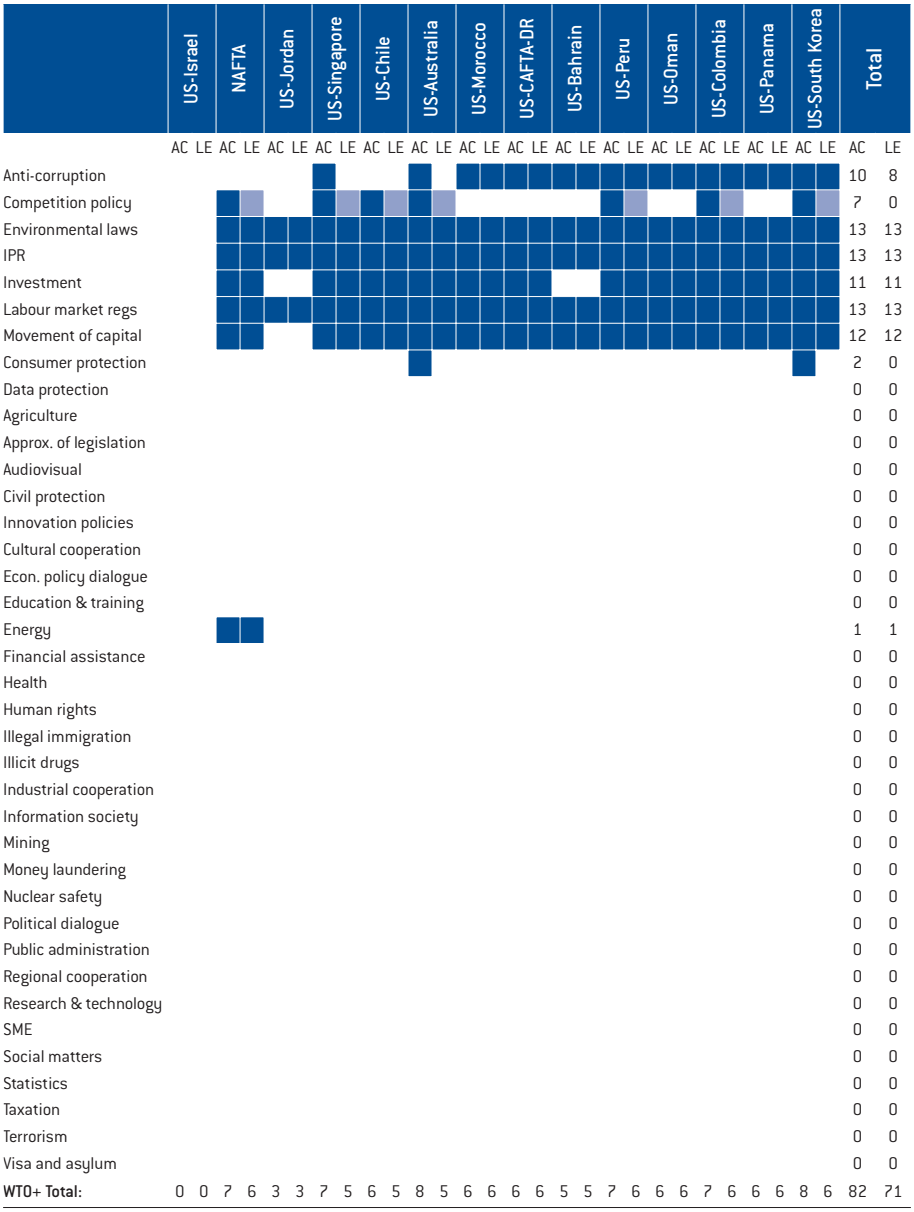
By contrast, nearly 75 percent (230 out of 310) of the provisions included in the EC agreements are non-enforceable. The EC agreements contain enforceable obligations in only five WTO-X areas in a significant number of agreements:

1. Competition (in 13 out of the 14 agreements that contain commitments in this area);
2. IPR (11 out of 14);
3. Movement of Capital (13 out of 13);
4. Investment (8 out of 12); and
5. Social Matters (7 out of 13).

For each of the remaining 33 areas, there are no legally enforceable obligations in more than three agreements signed by the EC. Most obligations are not enforceable at all. One agreement represents an outlier, the EEA, an agreement that involves the EC and some of its western European trading partners with whom there is a long tradition of multi-level cooperation.

Table 4.1: Classification of WTO-X areas in EC agreements

Table 4.2: Classification of WTO-X areas in US agreements



	US-Israel		NAFTA		US-Jordan		US-Singapore		US-Chile		US-Australia		US-Morocco		US-CAFTA-DR		US-Bahrain		US-Peru		US-Oman		US-Colombia		US-Panama		US-South Korea		Total	
	AC	LE	AC	LE	AC	LE	AC	LE	AC	LE	AC	LE	AC	LE	AC	LE	AC	LE	AC	LE	AC	LE	AC	LE	AC	LE	AC	LE	AC	LE
Anti-corruption																													10	8
Competition policy																													7	0
Environmental laws																													13	13
IPR																													13	13
Investment																													11	11
Labour market regs																													13	13
Movement of capital																													12	12
Consumer protection																													2	0
Data protection																													0	0
Agriculture																													0	0
Approx. of legislation																													0	0
Audiovisual																													0	0
Civil protection																													0	0
Innovation policies																													0	0
Cultural cooperation																													0	0
Econ. policy dialogue																													0	0
Education & training																													0	0
Energy																													1	1
Financial assistance																													0	0
Health																													0	0
Human rights																													0	0
Illegal immigration																													0	0
Illicit drugs																													0	0
Industrial cooperation																													0	0
Information society																													0	0
Mining																													0	0
Money laundering																													0	0
Nuclear safety																													0	0
Political dialogue																													0	0
Public administration																													0	0
Regional cooperation																													0	0
Research & technology																													0	0
SME																													0	0
Social matters																													0	0
Statistics																													0	0
Taxation																													0	0
Terrorism																													0	0
Visa and asylum																													0	0
WTO+ Total:	0	0	7	6	3	3	7	5	6	5	8	5	6	6	6	6	5	5	7	6	6	6	7	6	6	6	8	6	82	71

Source for both tables: Authors.
Note: AC: area covered; LE: legally enforceable.
Light blue: legally enforceable language but carve-out from dispute settlement.

4.3 The depth of legally binding commitments in WTO-X areas

In Appendix B we focus on the eight areas that contain legally enforceable commitments in at least five EC and/or US agreements, and describe the nature of these commitments.

Although the analysis in Appendix B is insufficient to determine the exact magnitude of the undertakings in the relevant areas, it clearly shows that they are far from being trivial.

4.4 Main observations concerning WTO-X undertakings

Our initial conclusions concerning the WTO-X parts of the agreements are as follows:

1. Whereas the US agreements typically contain few areas where enforceable obligations have been agreed, the EC agreements contain a smaller (proportional to the overall) number of areas with enforceable obligations, and a much larger number of areas where exhortatory language has been agreed. It thus seems that, whereas the US has adopted a rather 'functionalist' approach (ensuring legal enforceability of the selected areas), the EC has opted for 'legal inflation', whereby a large number of areas are included in the agreement, but very few of them are coupled with legally enforceable obligations.
2. Altogether, only eight of the 38 WTO-X areas involve legally enforceable obligations in a significant number of agreements.
3. Three of these eight areas concern both EC and US agreements: Intellectual Property Rights, Investment, and Movement of Capital.
4. Three areas concern mostly or solely US agreements: Anti-Corruption, Environment and Labour.
5. Two areas involve EC agreements only: Competition, and Social Matters.
6. Finally, provisions concerning Terrorism, Illegal Immigration, Visa and Migration, and Illicit Drugs appear in some of the EC agreements (in respectively 5, 6, 3 and 10 agreements), but typically the obligations are not enforceable. Contrary to what may have been expected, these national security-related areas are not present in US agreements.

5. PTAs and the WTO – more of the same, or breaking new ground?

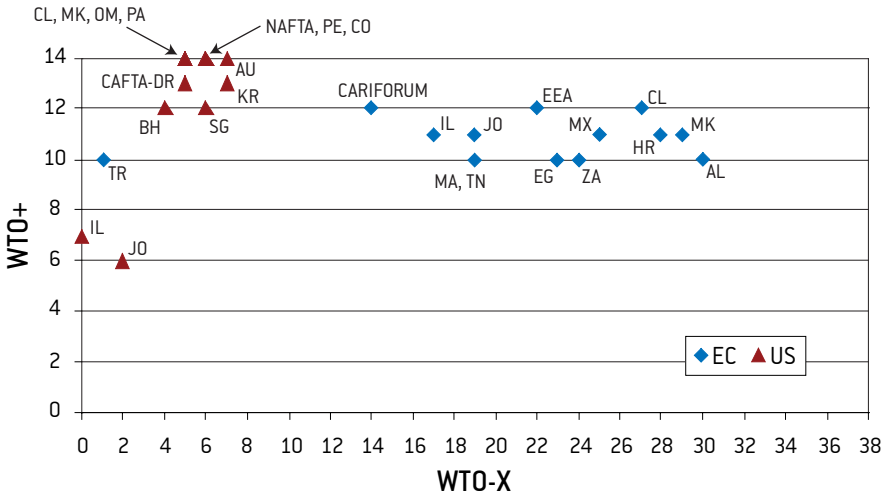
A central issue in the policy debate concerning PTAs has been whether they support or hinder multilateral trade liberalisation. This issue has received a new twist during the last decade, because of the common claim that these agreements are no longer about deeper integration in areas where the multilateral system already provides a degree of integration but are instead mainly to be seen as ventures into new policy areas. Having so far analysed the WTO+ and the WTO-X areas separately, we will in this section discuss the balance in the EC and US PTAs between the WTO+ and the WTO-X areas. Our purpose is to distil an overall picture of where the *centre of gravity* of these agreements lies. Are they essentially about further integration along the same lines as in the GATT/WTO, or are they mainly about providing integration in new policy areas? As before, we will put particular emphasis on the extent to which identified obligations are likely to be legally enforceable, and we will seek to characterise the areas where legal inflation is most pervasive, and also whether it is likely to be an intentional feature of certain areas.

5.1 Differences in coverage of EC and US PTAs

In order to detect the centre of gravity of the EC and US agreements in terms of coverage, Figure 5.1 plots the number of covered WTO+ areas (measured on the vertical axis) against the number of covered WTO-X areas (measured on the horizontal axis) for each of the 28 agreements. As can be seen, a very pronounced pattern emerges: all the EC agreements (with one exception) are positioned to the south-east of the US agreements. That is, *in terms of coverage, the EC agreements have more WTO-X and fewer WTO+ areas than the US agreements*. Hence, while both the EC and the US agreements cover a large proportion of WTO+ areas (between 10 and 12 for the EC and between 12 to 14 for the US, out of a maximum of 14), the EC PTAs cover a much

greater proportion of WTO-X areas (reaching around 30 in recent agreements, out of a maximum of 38) than US agreements (with less than ten areas covered, even in the most recent agreements).

Figure 5.1: The balance between WTO+ and WTO-X undertakings in terms of coverage



Source: Own calculations based on Table 3.1, Table 3.2, Table 4.1 and Table 4.2.

It is interesting to note that the EC dominance with regard to the coverage of WTO-X areas has tended to increase over time. The evolution of the centre of gravity of the EC and the US agreements is depicted in Figures 5.2 and 5.3, where the arrows illustrate the sequence in which agreements have entered into force.

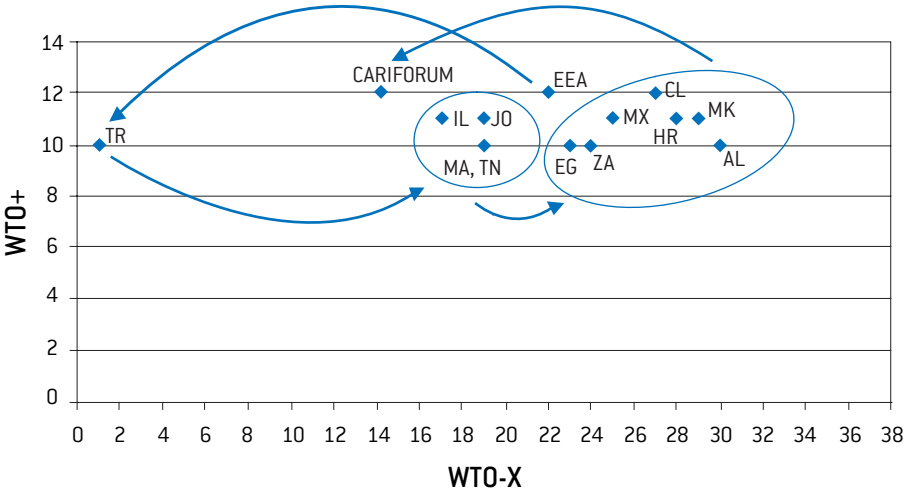
Figure 5.2 shows that there has been a pronounced tendency for the EC agreements to expand the number of WTO-X areas covered: the number has increased from two in the EC-Turkey PTA (dating from 1995) to 30 in the EC-Albania PTA (dating from 2006)[12]. Admittedly, this development has not been completely smooth. The EEA was agreed upon before the EC-Turkey agreement, but contains more WTO-X areas, and the recent EC-CARIFORUM PTA (signed only in October 2008, and not yet ratified or notified to the WTO) marks another interesting departure from this trend, with only 14 WTO-X areas covered. We will come back to this case later. These two instances do not change the overall picture, however. It is also interesting to contrast the WTO-X

12. The maximum number of WTO-X areas is 38.

evolution with the (non-)evolution in the WTO+ areas, where the coverage of EC agreements has remained fairly constant, between 10 and 12 areas[13].

There has been a much smaller increase over time in the number of WTO-X areas covered in the US agreements. Leaving aside the NAFTA agreement, this number has risen from zero in the US-Israel PTA (dating from 1985) to eight in the US-Korea PTA (signed in 2007, but not yet ratified or notified to the WTO). At the same time, the increase in WTO+ areas has been more significant, having risen from seven in the US-Israel agreement to between 12 and 14 since the US-Singapore agreement (dating from 2003).

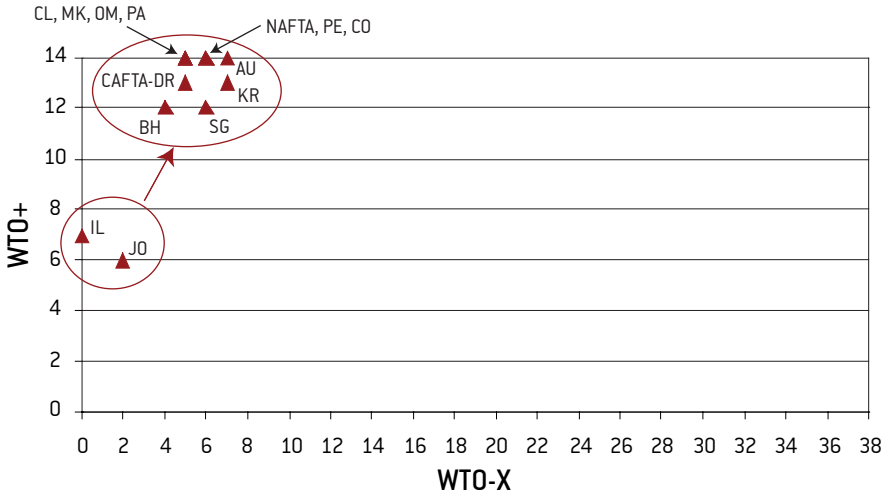
Figure 5.2: The evolution of the coverage of EC PTAs



Source: Own calculations based on Table 2.1, Table 3.1 and Table 4.1.

13. The maximum number of WTO+ areas is 14.

Figure 5.3: The evolution of the coverage of US PTAs



Source: Own calculations based on Table 2.1, Table 3.2 and Table 4.2.

5.2 Centre of gravity of EC and US PTAs adjusted for legal enforceability

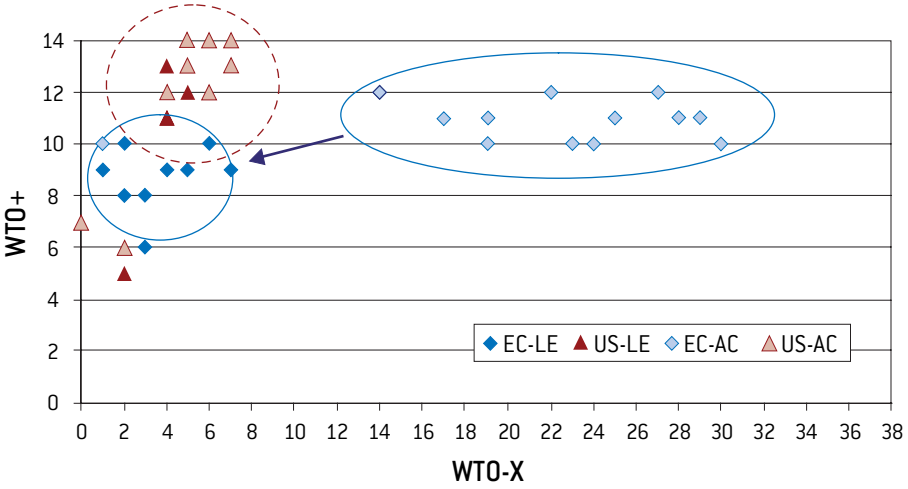
Discarding non-enforceable obligations, the picture which emerged above changes dramatically. As shown in Figure 5.4, while the number of WTO+ areas remains slightly larger for US agreements (ranging between 11 and 13) compared to EC agreements (ranging between 8 and 10), the number of WTO-X areas with legally enforceable provisions is now slightly higher for US (ranging between 5 and 6) compared to EC (ranging mostly between 3 and 5) agreements[14]. The EC agreements thus evidence a very considerable degree of 'legal inflation' in WTO-X areas, a phenomenon which is much less prevalent in the EC agreements for WTO+ areas, or in the WTO+ and WTO-X areas of the US PTAs.

It should be noted that the two latest EC agreements, with Albania and the CARIFORUM, contain slightly more legally enforceable WTO-X provisions than do the US agreements. In this respect, the EC-CARIFORUM agreement resembles more the US PTAs than any other EC PTA: it covers relatively few WTO-X areas, of which many contain legally enforceable provisions[15]. Still, only half of the 14 WTO-X areas that are

14. One agreement stands out in each set: the EEA agreeement on the EC side, with 23 legally binding provisions, and the US-Israel agreement, with zero.
15. The EC-Albania PTA is a more traditional EC agreement in this respect: it covers 31 WTO-X areas, of which only eight contain legally binding provisions.

covered contain enforceable obligations. And the EC-Albania agreement, while having eight areas with enforceable obligations, features the same degree of legal inflation – 23 out of the 31 areas in the EC-Albania agreement are classified as non-enforceable – as the other EC agreements.

Figure 5.4: The balance between WTO+ and WTO-X undertakings, discounting for the lack of legal enforceability



Source: Own calculations based on Table 2.1, Table 3.1, Table 3.2, Table 4.1 and Table 4.2. Note: LE: Legally enforceable; AC: Areas covered.

5.3 In which areas is legal inflation most pervasive?

Table 5.1 reorganises somewhat the data on coverage and legally enforceability in order to highlight the type of areas where legal inflation is most pervasive. The table divides all areas (ie both WTO+ and WTO-X areas) into five broad groups, along different lines than the WTO+/WTO-X distinction, which was designed to capture the nature of each area relative to the WTO agreements. In Table 5.1 the intention is instead to capture the content of each area in terms of policy objectives or instruments. Group 1, Trade- and Investment-related Obligations, is meant to capture obligations that address policy instruments affecting goods trade and investment, and which are applied at the border. Group 2, GATS/TRIPs/IPR, and Group 3, Migration-related Regulations, are self-explanatory. Group 4, Domestic Trade-related Regulations, is intended to include obligations concerning domestic (behind-the-border) regulations. Finally, Group 5, labelled 'Other', includes all remaining areas and

mainly contains development-related provisions from EC agreements. Although this grouping of areas is heuristic, we believe that it is informative in that it reflects sharp differences in legal inflation across groups as the discussion below indicates.

Table 5.1 gives, group by group, the number of times in EU or US agreements each area within a group occurs; it then gives, group by group, the number of instances each area within that group occurs with enforceable obligations. In addition, it calculates an Index of Legal Inflation, which is defined as the number of instances of legally non-enforceable obligations in a group of areas relative to the total number of times that group of areas occurs.

Table 5.1: Legal inflation by groups of areas

	EU PTAs			US PTAs		
	AC	LE	Legal inflation	AC	LE	Legal inflation
1. Trade and investment related obligations	95	86	9%	112	112	0%
2. GATS/TRIPs/IPR	32	28	13%	40	40	0%
3. Migration-related regulations	23	10	57%	-	-	-
4. Domestic trade-related regulations	103	60	42%	103	78	24%
Total trade and regulations	**253**	**184**	**27%**	**255**	**230**	**10%**
5. Other	**206**	**17**	**92%**	**1**	**1**	**0%**
Total all areas	**459**	**201**	**56%**	**256**	**231**	**10%**

Source: Own calculations based on Table A.5.1 and Table A.5.2 in the Appendix tables.

There are two main findings that emerge from the table. First, and once again, there is a striking difference between the EC and the US agreements. Taking all areas together, the inflation rate is 56 percent for the EC PTAs compared to only 10 percent for the US agreements. Second, there are significant differences across areas. Distinguishing between the Trade and Regulations areas (ie groups 1-4) on the one hand, and 'Other' areas on the other hand, one observes a second striking difference. For the EC the inflation rate is only 27 percent in the former grouping as opposed to 92 percent in the latter. Moreover, the difference in inflation rates between the EC and the US is much less for Trade and Regulations (27 versus 10 percent) than it is for the total of all areas.

We now detail these differences across the five groups. As can be seen from the table, there are clearly systematic differences in the extent of legal inflation in the different groups. At one end we have the Trade and Investment group, which displays literally zero legal inflation for the US agreements, and only nine percent for the EC agreements, with most of the latter explained by obligations in the WTO-X Investment area. Furthermore, not only is there little or no inflation, these areas are also covered in almost all agreements of both the EC and the US (with the exception of Export Taxes, and TRIMs in EC agreements), and they very often involve substantial undertakings. The GATS/TRIPs/IPR group displays a very similar pattern.

At the other end of the spectrum in terms of legal inflation is the 'Other' group, which largely consists of development-related undertakings appearing in the cooperation parts of the EC agreements. The US agreements effectively have no instances of this group of areas, and are therefore irrelevant here. For this group, which contains a large number of areas which are covered in a large number of EC agreements, the legal inflation rate is 92 percent! This average is higher than the inflation rate for any of the other groups, and is even higher than each individual area in all other groups, with the exception of two areas: the Visa, Border Control and Asylum area, and the Human Rights area. Based on this observation, we would argue that, to the extent that these agreements promote development, it is not because of the enforceability of their legal commitments.

Provisions related to domestic regulations, in the broad sense of the term, can be found in both WTO+ and WTO-X areas. In the group Domestic Trade-related Regulations we have tried to distinguish regulations which have more obvious potential to be used as legal arguments in a trade dispute from those that do not seem to have such potential. It is for this reason that, for instance, Labour and Environment areas are grouped together with the SPS and TBT areas, while areas such as Nuclear Safety and

Money Laundering – which can also be said to address domestic regulation – are kept under the 'Other' label. It is also for this reason that the Environment and Labour areas are classified as potentially affecting trade. Taking the US-Chile agreement as an example, it devotes the entire Chapter 19 to the Environment. The main obligation imposed by the US agreement is that the parties – read Chile – must maintain environmental laws that 'provide for high levels of environmental protection', and 'not fail to effectively enforce' these laws. These types of provision may be motivated by a concern for the environment. But there is also a trade dimension to these clauses, as exemplified by Article 19.2(2) in the US-Chile agreement:

> *"The Parties recognize that it is inappropriate to encourage trade or investment by weakening or reducing the protections afforded in domestic environmental laws. Accordingly, each Party shall strive to ensure that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws in a manner that weakens or reduces the protections afforded in those laws as an encouragement for trade with the other Party, or as an encouragement for the establishment, acquisition, expansion, or retention of an investment in its territory."*

This obligation thus provides a very clear basis for challenging imports on the basis of unacceptably low level of environmental protection. The provisions in the Labour area provide similar possibilities. Hence, our classification of these two areas into the group Domestic Trade-related Regulations.

Turning to the numbers, we see that this group reveals a more complicated pattern than the other groups. However, there is a significant difference in legal inflation in the group for the EC and the US agreements, with 42 percent of the areas covered in EC agreements being non-enforceable, compared to only 24 percent for the US.

An issue of particular interest with regard to EC and US PTAs is the extent to which they can be seen as a means of transferring the regulatory regimes of the EC and the US to other countries. The scattered pattern that emerges for this group makes it difficult to draw unambiguous conclusions in this regard, and may also indicate that the groups need to be redefined to answer this question properly. But it is noteworthy that in almost all the areas in this group, the PTAs extend either international or EU/US domestic regulatory standards to partner countries. Since the EU and the US already broadly meet the international or domestic regulatory standards contained in the PTAs, these agreements could indeed potentially be vehicles for transferring regulatory rules of the EC and the US to their PTA partners. One might imagine various

ways in which such a transfer occurs. For instance, the formation of the PTAs may affect domestic policy discussions concerning the choice of regulatory regime. However, for these agreements to effect such a transfer by legally binding the partner countries to a hub's regulatory regime, they must *contain enforceable provisions*. As we have seen, the picture seems to be mixed in this regard.

5.4 Is EU legal inflation designed in?

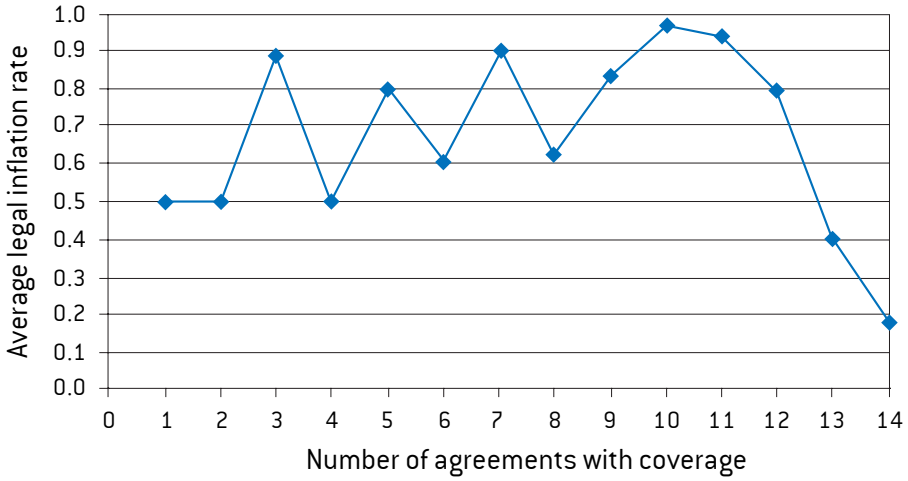
The analysis in the preceding section leads to the obvious question why there is such pervasive legal inflation, particularly in the EC agreements.

One possible (although admittedly not very plausible) explanation for legal inflation is that it reflects negligent drafting. If this were the case, the observed proportion of legally enforceable obligations should be the same across all areas, regardless of whether they occur in one, several or all agreements. Figure 5.5 investigates the extent to which this is the case. The horizontal axis in these figures measures the number of agreements that the various areas occur in. The vertical axis plots the average inflation rates for each of these numbers. Hence, the left-most observation in Figure 5.5 shows that for those areas that only occur in one EC agreement, the average inflation rate is 50 percent. The next observation moving to the right says that for those areas occurring in two EC agreements, the average inflation rate is 50 percent, and so on up to those areas occurring in all 14 EC agreements. For this calculation, we omit the areas which occur in no agreement at all, since if there is no provision in an area, the measure of legal inflation is irrelevant. If legal inflation were a random phenomenon that occurred in each area with the same probability, we would expect the legal inflation rate (and its average) to be independent of the number of agreements that we consider. In terms of the figure, the plotted observations would lie on a horizontal line.

Before turning to the figure, we must emphasise that we have more trust in the calculated average legal inflation rates for those areas that appear in many agreements – those to the right in the figures – compared to those at the other end[16].

16. One problem stems from the fact that the number of observations almost by construction increases as one moves to the right in the figure. To see why, assume that there is an equal number of areas appearing in one agreement only, in two agreements only, etc; say this number is one. When calculating the average legal inflation rate for the area appearing in only one agreement, we would only have one observation to use for the calculation. But when calculating the average rate for areas appearing in two agreements, we would have two observations – one from each of these agreements. This tendency would continue as we move to the right in the figure. This would mean that the averages can be calculated with greater precision, the larger the number of agreements where an area occurs. This problem is exacerbated by two factors. One is the fact that our measure of the legal

Figure 5.5: Average legal inflation rate vs. coverage in EC PTAs



Source: Own calculations based on Table A.5.1 in the Appendix tables.

As can be seen from the figure, there is a tendency for the dots to display an *inverse U-shaped* form. Generally speaking, such a shape would imply that there is relatively little legal inflation in areas that are either only represented in very few agreements, or in a large number of agreements, and that most legal inflation would be found between these extremes. Indeed, as can be seen from Figure 5.5, all areas that occur in the range from five to 12 agreements have average inflation rates exceeding 60 percent, while the areas with lower average inflation rates either occur in fewer or in more agreements.

An obvious question is why the degree of legal inflation might vary in this systematic fashion across different types of agreements. Here we can only speculate, lacking a well-established explanation for the rationale for legal inflation in trade agreements.

First, if an area is only included in one or very few agreements, this seems to suggest that there is something special about the partner country for which the area is included. If efforts are undertaken to negotiate a provision that reflects this special

enforceability is binary – it is either enforceable or not enforceable. The legal inflation variable can only take a discrete number of values, and this number is larger for higher values of the independent variable. Second, the distribution of the areas is such that there are only a few areas that appear in only a few agreements, while there are relatively speaking many areas that appear in 12-14 agreements.

character, it would make sense to give it some legal effect, by making it enforceable. At the other extreme, if an area appears in basically all agreements, and hence regardless of the type of partner, it seems to signal that the area is important to the hub. Given the likely weight of the hub in these negotiations, it seems plausible that it can ensure that the provision is made legally enforceable.

Looking at the data, we note that two areas occur in only one EC agreement. One is Civil Protection, which appears in enforceable form only in the EEA Agreement. The other is Competitiveness and Innovation, which is non-enforceable, and is found only in the agreement with CARIFORUM.

Turning to areas that occur in two agreements, we observe that Labour is enforceable in the EEA agreement and in the recent agreement with CARIFORUM; Development Cooperation is enforceable in the agreement with South Africa, and non-enforceable in the CARIFORUM agreement; and Nuclear Safety appears in the agreements with Croatia and FYROM, but the commitments are non-enforceable in both instances. We take these observations as partly supporting our hypothesis. The partners in the EEA agreement are special, in the sense they all have more or less the same level of development. Hence it is possible to agree on matters like Civil Protection and Labour. It is also natural that Nuclear Safety appears in the agreements with neighbouring countries, but not geographically distant countries. What is less in line with our hypothesis, however, is the fact that the obligations are non-enforceable. The other facts require a deeper investigation to explain.

Turning to the areas that occur in all EC agreements, we find FTA for Industrial and Agricultural goods, Customs Administration, Competition, TRIPs, TBT, Antidumping, and Countervailing Measures. In addition, Movement of Capital, State trading Enterprises, State Aid, and Public Procurement also appear in all but one of the EC agreements.

It would be straightforward to suggest reasons why enforceable provisions would be in the interest of the EC, as hypothesised, for each of these areas. (This does not exclude of course that contrary arguments could also be advanced.) On the other hand, it is from the perspective of our hypothesis less clear why Social Matters is also included with enforceable provisions in 13 of the 14 EC agreements, or why Environment (and also Energy) is included in an equal number of agreements, but without enforceable obligations. Overall we interpret the data as at least not flatly disproving our hypothesis concerning why the two extremes of the horizontal axis in Figure 5.4 display little legal inflation[17].

While our hypothesis suggests reasons why there should be relatively little legal inflation at the two ends of the scale, it does not by itself explain why there will be more inflation for areas that are covered in an intermediate number of agreements, since we have not yet provided any reason why there should be legal inflation in *any* agreement or area. It seems likely, however, that lack of enforceability of specific provisions may benefit one of the parties to an agreement, since many provisions involve benefits for one party and costs to the other.

Two opposing hypotheses for why the areas in the intermediate range tend to be less enforceable could be that either (i) the EC sees itself as being on the 'paying' end in these areas, and manages to ensure that it will more easily escape enforceable obligations in these areas; or (ii) the partners have less of an interest in these areas, and manage to ensure softer legal language in return for accepting the enforcement possibilities that the EC insists on in the areas at the upper end of the scale in terms of coverage. We leave it to the reader to decide which of these explanations seems more plausible, if any.

5.5 Closing remarks

The general picture that emerges from comparing the undertakings in the WTO+ and WTO-X areas for the two sets of PTAs is the following:

1. The EC agreements go much further than the US agreements in covering areas outside the scope of the WTO agreements. There has also been an increasing tendency to this effect.
2. When adjusting for non-enforceable language, one observes significant 'legal inflation' in non-WTO parts of the EC agreements. In fact, the EC agreements are similar to the US agreements in that much of the emphasis of enforeceable language is on existing WTO areas.
3. Both EC and US PTAs contain non-WTO areas with substantial undertakings. An important aspect of both sets of agreements is thus that they combine substantial undertakings in WTO areas and in non-WTO areas.
4. A significant proportion of the substantial, legally enforceable obligations is in areas where domestic or international regulations are important, but the specific regulatory areas differ for the two hubs.

17. It should also be said that, for the reasons discussed above, the downward-sloping part of the curve is statistically more reliable than the upward-sloping part, due to the small number of areas that occur in only one or two agreements.

5. There is a tendency for enforceable obligations to appear in particular in areas that occur in many agreements, and to some extent also in areas that occur in very few agreements.

6. Conclusion

There is growing concern about preferential trading agreements and the role they should play in the multilateral trading system. Not only are they becoming increasingly prevalent, there is also a perception that many recent PTAs, especially those centred on the EC and the US, go far beyond the scope of the current WTO agreements.

With a view to shedding light on whether the above perception corresponds to reality, this study has assessed in some detail all the PTAs signed by the EC or the US and other WTO members by dividing all the areas they include into two categories: WTO+ obligations, which are areas already covered by the present WTO agreements, and WTO-X obligations, which are areas currently falling outside these agreements.

Our examination of the two sets of PTAs yields two main findings.

First, both EC and US agreements contain a significant number of WTO+ and WTO-X obligations. However, EC agreements go much further in terms of WTO-X coverage than US agreements. When discounting for 'legal inflation' the picture remains largely the same for US agreements, but it changes dramatically for EC agreements. Adjusting for 'legal inflation', US agreements actually contain more legally binding provisions, both in WTO+ and WTO-X areas, than EC agreements.

It is thus clear that the EU and the US have chosen markedly different strategies for including provisions in their PTAs that go beyond the WTO agreements. In particular, EC agreements display a fair deal of 'legal inflation', a phenomenon almost totally absent in US agreements. The study does not permit us to draw precise conclusions about this asymmetry of behaviour between the EU and the US, but the fact that much of the 'legal inflation' occurs in development-related provisions, which are unique to the EC agreements, suggests that the EU has a greater need than the US to portray its PTAs as not driven solely by commercial interests. Our feeling is that this may reflect a lack of consensus on the part of EU member states about the ultimate purpose of these PTAs, the wide variety of provisions of weak legal value representing a compromise between various interests among EU members.

Second, although EC and US preferential trade agreements do go significantly beyond the WTO agreements, the number of legally enforceable WTO-X provisions contained in EC and US PTAs is still in fact quite small. Provisions that can be regarded as really breaking new ground compared to existing WTO agreements are few and far between: environment and labour standards for US agreements, and competition policy for EC agreements. These provisions clearly all deal with regulatory issues. The other enforceable WTO-X provisions found in EC and US PTAs concern domains that more or less relate to existing WTO agreements, such as investment, capital movement and intellectual property, which also concern regulatory matters.

The fact that the new, legally enforceable WTO-X provisions all deal with regulatory issues suggests that EC and US agreements effectively serve as a means for the two hubs to export their own regulatory approaches to their PTA partners. The study does not permit us to draw conclusions about the respective costs and benefits of this situation for the hubs and the spokes, but our feeling is that it serves primarily the interests of the two 'regulators of the world'. This feeling is based on the fact that the legally enforceable WTO-X provisions included in EC and US agreements have all been the subject of earlier, but failed, attempts by the EU and/or the US to incorporate them in WTO rules, against the wishes of developing countries. To the extent that our conclusion is correct, it supports the view expressed *inter alia* by WTO Director-General Pascal Lamy that PTAs might be breeding concern about unfairness in trade relations.

What the implications of our findings are for the 'regionalism-versus-multilateralism' issue is beyond the scope of this paper. But what is clear is that a serious discussion of this matter needs to start from a detailed assessment of the nature of EC and US PTAs, including the findings reported in this study.

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Appendix A
The 'depth' of commitments in WTO+ areas

(1) FTA Agricultural Products

Fisheries are excluded from the disciplines imposed on agricultural products under the WTO Agreement on Agriculture. The EC in its PTAs typically promises a staged trade liberalisation that, following a transitional period, will lead to total elimination of customs duties: for example, the EC-Chile Association Agreement[18] provides for the obligation on the EC to eliminate customs duties within a fixed period, that is, by 2013 (Arts. 71, 72). Chile must do the same within an equally lengthy period (Art. 73).

The US follows a similar strategy: it will typically request and obtain bilateral elimination of agricultural duties, usually within a shorter (than the corresponding EC) implementation period[19].

(2) FTA Industrial Products

In this context as well, the EC usually opts for staged trade liberalisation: it will agree to a shorter period for itself, and a longer one for the spoke: for example, Arts. 64-65 of the EC-Chile Association Agreement provide for a three-year period within which the EC must have eliminated its duties, and a longer one for Chile to do the same (Art. 66). In its agreements, the EC will also typically provide for an overall framework establishing the promotion and development of cooperation in industrial products: although the exact wording of this provision might differ across agreements, its 'best-endeavours' character is a constant[20].

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18. The EC must, for example, in accordance with Art. 67 of the EC-Chile Association Agreement, have eliminated its duties on fisheries by 2013, whereas a shorter period is provided for Chile to do the same (Art. 69).
19. For a typical illustration, see Art. 2.3.1 of the US-Morocco FTA. This agreement contains a number of Annexes (A, B, C, etc.), each one of which has a specific product coverage and provides for a transitional phase within which tariffs will be eliminated. A similar attitude is observed in other agreements signed by the US.

The attitude of the US in this respect is almost identical to that of the EC: staged liberalisation within brief transitional periods[21].

(3) Customs Administration

The more recent of the agreements examined in this study were negotiated in parallel with the (ongoing) WTO negotiation on trade facilitation: many of the concerns that had previously been expressed on this subject have found their way onto the multilateral agenda which, in turn, has seemingly influenced the shaping of the preferential agenda and pushed it into areas not discussed in previous preferential agreements. The EC favours, in general, the establishment of a framework for negotiation which aims to simplify customs procedures and reduce deadweight costs[22]. But sometimes its agreements exhibit other features as well: in the EC-Chile Association Agreement we read, for example, in Arts 79ff. that a Committee on Rules of Origin is established (Art. 81) to discuss the origin of goods that come before customs. We may recall that, following inconclusive negotiations during the Uruguay Round, no agreement on Rules of Origin could be reached. As a result, WTO members can apply their own laws on this score, provided that they do not discriminate between domestic and foreign goods. There is voluminous litigation still taking place which has provided negotiators with the impetus to continue negotiations on this item during the Doha Round. In the absence of a concrete outcome to date, the EC has sought to minimise the potential for conflict through bilateral initiatives such as the one described here.

The US also insists on establishing a framework for cooperation, as well as on enforceable obligations aiming at increased transparency in all laws, regulations etc. regarding customs administration: it will typically request that the other party publishes all customs-related laws[23].

(4) Export Taxes

There are no general prohibitions on export taxes in the WTO Agreement. Export taxes (tariffs) are treated symmetrically with import tariffs: WTO members can bind export taxes just as they bind import tariffs, and it is for this reason alone that we have chosen to classify this area as WTO+. Export tax provisions only appear in the US agreements[24]. These agreements, in this regard, could be seen as a bilateral negotiation to bind export taxes. The US agreements reveal enforceable obligations to the

20. See, for example, Art. 17 of the EC-Chile Association Agreement.
21. See Art. 2.3.1 of the US – Morocco FTA.
22. See, for example, Arts. 26 and 27 of the EC-Chile Association Agreement.
23. See Art. 6 of the US-Morocco FTA and, in particular, Art. 6.1, and Art. 6.5.

effect that the parties cannot use export taxes. For instance, Article 3.13 of the US-Chile agreement reads:

> *"Neither Party may adopt or maintain any duty, tax, or other charge on the export of any good to the territory of the other Party, unless such duty, tax, or charge is adopted or maintained on any such good when destined for domestic consumption."*

By the same token, Article 2.10 of the US-Morocco FTA entitled Export Taxes explicitly outlaws any recourse to this trade instrument.

(5) TBT/SPS

Enforceable TBT undertakings appear in five out of 14 EC agreements, and the picture is very much comparable to that of SPS. Typically, the EC will establish a forum aimed at promoting unilateral or mutual recognition of standards and conformity assessment, and for the rest the obligations reproduce the multilateral commitments under the WTO TBT and SPS agreements. For example, Art. 88 of the EC-Chile Association Agreement provides for a Special Committee where delegates from the two partners participate, and which aims at promoting the objectives described above[25].

In US agreements these provisions will typically re-confirm the WTO obligations of the preferential partners. Art. 7 of the US-Morocco FTA, for example, provides for the possibility of equivalence of standards/conformity assessment between the parties (Art. 7.5), while underscoring the multilateral obligations of the partners (Art. 7.2).

(6) State Trading Enterprises

Provisions concerning the operation of state trading enterprises (STE) exist in both sets of agreements: 12 out of 14 EC agreements contain legally enforceable provisions, while the corresponding number for the US agreements is 7 out of 14. Art. 179 of the EC-Chile Association Agreement is representative of the undertakings in this regard:

> *"With regard to public enterprises and enterprises to which special or exclusive rights have been granted... there is neither enacted nor maintained any measure distorting trade in goods or services between the Parties to an*

24. The EC has on many occasions during the Doha Round semi-officially advocated the position that Export Taxes should be regarded as GATT-inconsistent.
25. See the survey by Lesser (2007).

extent contrary to the Parties' interests and that such enterprises shall be subject to the rules of competition insofar as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them."

This is a typical provision that can be found in many other agreements signed by the EC; it is also a hybrid between a WTO+ and a WTO-X obligation since, on the one hand, STEs are covered by Article XVII GATT but, on the other, this provision does not call upon WTO members to ensure that their STEs will abide by national competition laws. All Article XVII GATT requests from WTO members is to guarantee that their STEs will behave in a non-discriminatory manner, an obligation that has been interpreted as obliging them to act in accordance with commercial considerations.

On the other hand, the coverage of STEs in the GATT-context extends to operators which usually import or export, that is, re-sell goods. Some of the EC agreements also extend to STEs that produce goods. We read, for example, in Art. 35 of the EC-Israel agreement:

"...shall progressively adjust any state monopoly so as to ensure that by the end of the fifth year no discrimination regarding the conditions under which goods are produced and marketed..."

The US attitude is not linear: only a few PTAs signed by the US include language on the behaviour of STEs, and the language is not the same across agreements. Whereas the US-Morocco FTA, for example, simply underscores the multilateral obligations of the two preferential partners, the US-Chile FTA seems to go further: Art. 16.4, which we reproduce in full below, suggests that the obligations imposed on STEs go beyond the GATT-framework, since the parties have accepted obligations with respect to activities (such as expropriation) not covered by the GATT mandate:

"Nothing in this Agreement shall be construed to prevent a Party from establishing or maintaining a state enterprise.

2. Each Party shall ensure that any state enterprise that it establishes or maintains acts in a manner that is not inconsistent with the Party's obligations under this Agreement wherever such enterprise exercises any regulatory, administrative, or other governmental authority that the Party has delegated to it, such as the power to expropriate, grant licenses, approve commercial transactions, or impose quotas, fees, or other charges.

3. Each Party shall ensure that any state enterprise that it establishes or

maintains accords non-discriminatory treatment in the sale of its goods or services to covered investments."

(7) Antidumping

Except for bilateral agreements with candidate countries (that is, countries which will eventually become new EU members), the EC has typically kept intact the possibility to impose AD duties on its partners (and vice-versa)[26].

Also the US agreements allow for the possibility that preferential partners impose AD duties against each other (see, for example, Art. 2.8.2 of the US-Morocco FTA).

(8) Countervailing Measures

Both the EC and the US attitudes are similar here to their attitudes to AD described supra[27].

(9) State Aid

Once again, the attitude of the EC depends on the status of the spoke: countries which might become candidate countries (and eventually new EU members) are those that will see the more meaningful disciplines imposed on them. For example, we read in the agreement between the EC and Albania:

"(a) Art. 71(1)(iii): state aid is incompatible with the proper functioning of the Agreement;

(b) Art. 71(2): state aids shall be assessed on the bases of criteria arising from Art 86 ECT;

(c) Art. 71(4): Albania shall establish an independent public body to overview state aids;

(d) Art. 71(5) a transparency requirement is imposed: an annual report on state aids will be issued, and information on state aids will be provided upon request."

Conversely, Art. 177 of the EC-Chile Association Agreement only includes an obligation to provide information about the state aids accorded by the two partners (transparency).

The US will typically request that the multilateral obligations be respected in this

26. An appropriate illustration is offered by Art. 78 of the EC-Chile Association Agreement.
27. *Idem*. See also Art. 2.8.2 of the US – Morocco FTA.

context. A standard US clause will request from the signatories to share the objective of multilateral elimination of export subsidies (WTO), and to avoid introducing or maintaining any export subsidy on any agricultural good destined for the territory of the other party.

(10) Public Procurement

The EC does not go beyond the disciplines imposed through the WTO Government Procurement Agreement (GPA). It essentially establishes a forum where the trading partners will make offers and will apply national treatment to each other in their respective procurement markets[28].

The US attitude in this respect is identical to that of the EC.

(11) TRIMs

As already mentioned, the EC, by including provisions akin to Articles III and XI GATT in its agreements, essentially outlaws the two TRIMs that are currently prohibited by the multilateral framework, that is, local content and export performance. It does not, however, include a heading 'TRIMs' in any of its agreements.

The US, on the other hand, does include specific provisions that explicitly outlaw local content and export performance restrictions[29].

(12) GATS

The EC approach is akin to that followed by the GATS. Reciprocal offers will be made, and the preferential trade in services will be based more or less on the same principles as those governing the GATS[30]. This does not mean that EC commitments are shallow on this point: there are agreements, like CARIFORUM, where the services component is quite substantial[31]. The US has adopted a more daring attitude in this context. Martin, Marchetti, and Lim (2007) report that the US has, on occasion, opted for obligations that cannot be found in GATS: for example, in its agreement with Chile, the US has included an obligation whereby both parties must communicate to the other party services-related laws at the draft stage, that is, before the law has been actually enacted. The other party will thus be in a position to comment upon it in advance and, although its comments are not binding on the legislating party, a rather active integration process is being fostered. The US did not manage to insert similar

28. See, for example, Arts. 33 and 136ff. of the EC-Chile Association Agreement.
29. See Art. 3 of the US-Chile FTA.
30. See for example Arts. 95ff. of the EC-Chile Association Agreement.
31. See Krajewski (2007), and Ortino (2008).

clauses in all its PTAs. No such vetting clause exists in GATS, where Article III imposes a general transparency obligation, and the possibility for cross-notifications.

(13) TRIPs

No major deviations from the multilateral agreement are observed as far as EC practice is concerned[32].

The US agreements often include provisions whereby the spoke will be asked to adhere to international conventions that are not covered by the TRIPs[33].

(14) Competition

We classify competition under WTO-X, since the WTO has no competence on this score. It is true, Article XXIX GATT calls upon all WTO members to observe ('best endeavours') Chapter V of the Havana Charter, which deals with restrictive business practices (RBPs). So, in principle, there is some measure of competition discipline in the WTO. However, practice shows that WTO members have not taken this appeal seriously: there has been no litigation concerning the ambit of the obligation included in Article XXIX GATT in spite of the global proliferation of RBPs. There are a couple of cryptic passages in the *Japan-Film* litigation (*Kodak-Fuji*), and in the panel report on *Mexico-Telecoms* regarding the understanding of Article XXIX GATT, but no claim has ever been lodged that this provision has been violated. Perhaps the best argument justifying our choice is provided by the experience of the Working Group on the Interaction between Trade and Competition Policies. This group was established following the Singapore Ministerial Conference Declaration (1996) in order to develop a regulatory framework on this score. Its very existence underscores the belief of WTO members that, with respect to competition policies, they were essentially free from any GATT obligation. During the Cancun Mid-Term Review (2003) it was decided that this group be discontinued. Since its dissolution, nothing more has happened here.

(15) Investment

Investment is partly treated as a WTO+ and partly as a WTO-X area. The TRIMs Agreement deals with two investment-related measures that were illegal anyway under the GATT. It does not deal with the establishment of investment, repatriation of profits and the like, in short issues that one typically sees in an investment liberalisation treaty. However, Mode 3 of GATS essentially amounts to a kind of an

32. See Arts. 168ff. of the EC-Chile Association Agreement.
33. See, for example, Art. 15 of the US-Morocco FTA.

international agreement on investment. It is nonetheless the only such instance in the WTO context. In a nutshell, there are multilateral provisions for some investments in services, but no provisions at all for foreign direct, or portfolio, investment in the field of goods[34]. Hence our choice to treat this as a WTO-X issue[35].

34. The OECD-sponsored MAI (Multilateral Agreement on Investment), which was supposed to fill this gap, was abandoned. As a result, investment is now regulated through bilateral agreements, the so-called BITs (bilateral investment treaties).

35. The EC was very much behind the introduction of Competition and Investment in the multilateral agenda. When this initiative stalled (as a result of disagreements across WTO members in Cancun, 2003), the EC strove to include these two items in its bilateral agenda. Moreover, the EC typically accompanies inclusion, as we will see *infra*, with legally binding language.

Appendix B
The 'depth' of commitments in WTO-X areas

(1) Anti-Corruption

None of the 14 EC agreements contains an Anti-Corruption clause. By contrast, all eight US agreements signed since the US-Morocco agreement contain such a clause, usually under a chapter entitled 'Transparency'. In the US agreements, the parties will typically discuss Anti-Corruption in two stages: first comes a statement of principle, whereby the parties affirm their resolve to eliminate bribery and corruption in international trade and investment; then, a legally enforceable obligation is included, which requires from each party to 'adopt or maintain the necessary legislative or other measures to establish that it is a criminal offense under its law' for a person to engage in bribery and corruption 'in matters affecting international trade or investment'. It also requires from each party to 'adopt or maintain penalties and procedures to enforce the criminal measures' adopted or maintained against bribery and corruption.

(2) Competition

All but one EC agreements contain Competition-related provisions that are legally enforceable; these provisions are explicitly excluded from dispute settlement in the EC-Chile agreement. By contrast only half the US agreements contain Competition provisions, and none is legally enforceable.

The extent of legal enforceability varies across EC agreements. Most prohibit all agreements between undertakings 'which have as their object or effect the prevention, restriction or distortion of competition' as well as 'the abuse by one or more undertakings of a dominant position' on the territory of the parties, insofar as they affect trade between the parties. The agreements also mandate that the competition authorities of the parties cooperate to ensure that this prohibition is enforced. Many

agreements also prohibit 'any public aid which distorts, or threatens to distort, competition by favouring certain undertakings or the production of certain goods'. These prohibitions mirror precisely the disciplines contained in the EC treaty, which apply to intra-EC trade (Articles 81ff. of the EC Treaty).

As we alluded to above, the level of legal enforceability varies across agreements signed by the EC. The EC agreements with Latin American countries contain less far-reaching obligations than those signed with other countries. For example, the agreement with Mexico uses softer language and does not refer to prohibitions, as some other agreements do: Article 11.1 of this agreement simply mandates that 'the Parties shall agree on the appropriate measures in order to prevent distortions or restrictions of competition that may significantly affect trade between Mexico and the Community. To this end, the Joint Council shall establish mechanisms of cooperation and coordination among their authorities with responsibility for the implementation of competition rules. Such cooperation shall include mutual legal assistance, notification, consultation and exchange of information in order to ensure transparency relating to the enforcement of competition laws and policies'[36]. But the legal enforceability is present: there is an obligation at least to negotiate the means to achieve the stated ends, and it is thus impossible for one of the parties to remain idle here. True, such clauses might not be very meaningful, but there is a distinction to be drawn between legal enforceability and meaningfulness of commitments undertaken.

(3) Environment

With the exception of the US-Israel agreement, the oldest of all US PTAs, all US agreements contain legally enforceable obligations regarding Environmental Protection. By contrast only two EC agreements – the oldest, EEA, and the youngest, with the CARIFORUM countries – contain legally enforceable obligations in this area. All the other EC agreements (except EC-Turkey) contain non-enforceable provisions.

None of the agreements require adherence to new or detailed environmental standards. Instead, the agreements commit the parties to protect the environment generally by calling upon them to enforce their own domestic environmental laws and not weaken them to foster exports or foreign investment.

An interesting comparison is between the EC-Chile and the US-Chile agreements, which are fairly representative of the EC and US agreements. Article 28 in the EC-Chile

36. See Desta and Barnes (2007).

agreement, the main legal text concerning environmental rules, comprises approximately 120 words. It appears in the cooperation part of the agreement, and is essentially development-related. On the other hand, the US-Chile agreement devotes the entire Chapter 19 to the matter, and comprises some 3,100 words. Part of the text also deals with cooperation, as in the EC-Chile agreement. However, the text of the US agreement also states that 'recognizing the right of each Party to establish its own levels of domestic environmental protection and environmental development policies and priorities, and to adopt or modify accordingly its environmental laws, each Party shall ensure that its laws provide for high levels of environmental protection and shall strive to continue to improve those laws.' It also calls upon each party 'not [to] fail to effectively enforce its environmental laws', and to 'recognize that it is inappropriate to encourage trade or investment by weakening or reducing the protections afforded in domestic environmental laws'. There were no such provisions in EC agreements until the CARIFORUM agreement (signed in October 2008), which contains a full chapter on Environment similar to that found in US agreements. The latter usually require that partners show the impact of a violation of environmental law on trade between the parties and, occasionally, the threat of retaliatory action has been removed through an exchange of side letters[37].

(4) Intellectual Property Rights

Nearly all EC and US agreements contain legally binding clauses that oblige the parties to become signatories to various international intellectual property (IP) agreements that are not covered by the TRIPs Agreement. However, as shown in Appendix Tables A.3.1 and A.3.2, US agreements impose obligations concerning many more aspects of IP than EC agreements do. For instance, the 1974 Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite and the 1994 Geneva Trademark Treaty are legally binding in ten or more US agreements, but not in a single EC agreement[38].

(5) Investment

Like IP rights, Investment is an area where a majority of EC and US agreements contain legally enforceable obligations. There is, however, a significant difference between the type of obligations that EC and US agreements impose on the parties. We use the agreements with Chile and Morocco to illustrate the difference: Art. 21 of the EC-Chile agreement provides for cooperation to promote investment. The article con-

37. See Cordonnier (2007), and Dawar (2008).
38. See the analyses of Mercurio (2007) and Pugatch (2007), who discuss in detail IP provisions in various PTAs signed by the EC and the US.

tains just two paragraphs that fit into less than one page. The first states that the aim of cooperation is 'to promote... an attractive and stable reciprocal investment climate.' The second paragraph elaborates on what cooperation in this area entails: establishing mechanisms to provide information on investment rules; developing a bilateral legal framework to promote and protect investment; technical assistance; and developing administrative procedures. The corresponding clauses in the US-Chile agreement go much further. Chapter 10 of the agreement, which is devoted to Investment, contains 27 articles and 8 annexes covering more than 25 pages. The chapter contains legally enforceable rules whereby parties agree to extend MFN and National Treatment to each other. It also provides mechanisms for compensation in case of expropriation, as well as detailed rules for arbitration in case of conflict. These provisions are typical in US agreements.

(6) Labour

There is almost totally parallel treatment of Labour and Environment provisions by each hub[39]. All US agreements (besides US-Israel) commit the parties to protect labour rights by calling upon them to enforce their own domestic labour laws and not weaken them to foster exports or foreign investment. No such language can be found in EC agreements, except for the CARIFORUM agreement.

The 'enforce-your-own-laws' standard contained in US agreements did not compromise ratification by the US Congress. The Congress's attitude towards such clauses changed when the CAFTA-DR was submitted for ratification. At that stage, critics argued that the standard was insufficient because both the laws and the enforcement in these countries were simply too weak to give any credence to the commitments[40]. Subsequently, reference to ILO conventions has been made.

(7) Movement of Capital

This is the WTO-X area where the largest number of EC (13 out of 14) and US (12 out of 14) agreements contain legally enforceable obligations. There is a high degree of similarity between the two sets of agreements as far as the substance of the obligations assumed is concerned. Typically, the obligations relate, at the very least, to direct investment. For instance, Art. 165 of the EC-Chile agreement provides that 'with regard to movement of capital of the Balance of Payments...the Parties shall allow the free movement of capital relating to direct investments made in accordance with the laws of the host country and investments...and the liquidation or

39. See Dawar (2008).
40. See the chapter by Kimberly Ann Elliott in Schott (2006). See also Bartels (2008).

repatriation of these capitals and of any profit stemming there from.' The link between movement of capital and investment is even more explicit in US agreements, where the obligation of free capital movement is inserted in the chapter on investment. For instance, Art. 10.8 of the US-Chile agreement, entitled Transfers, provides that 'each Party shall permit all transfers relating to a covered investment to be made freely and without delay into and out of its territory.' Most EC agreements, especially those with current or potential candidate countries, as well as those with Mediterranean countries, also specify that current payments connected with the movement of goods, persons, services or capital within the framework of the agreement shall be free of all restrictions, except for those permitted under Arts. VIII and XIV of the Articles of Agreement of the International Monetary Fund.

(8) Social Matters

This area, which is only present in EC agreements, covers various social matters. The most important one, and the one which is legally enforceable in most agreements with countries that send significant numbers of migrants to the EC, deals with the rights of migrant workers. The relevant clauses provide for non-discrimination between national and foreign workers from the partner countries with regard to working conditions, remuneration and social security[41].

41. Note that this is an area where the EU's courts (Court of First Instance, CFI, and European Court of Justice, ECJ) have been quite active and, through their case-law, have substantially added to the original agreement.

Appendix tables

Table A.3.1 Commitments on intellectual property under both WTO-covered and non-covered agreements, EC PTAs

	EC-Turkey	EC-Tunisia	EC-Israel	EC-Morocco	EC-Jordan	EC-South Africa	EC-Mexico*	EC-FYRoM	EC-Egypt	EC-Croatia	EC-Chile	EC-Albania	EC-CARIFORUM
Agreements covered under WTO													
International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (Rome, 1961)	LE	LE	LE	LE	LE	AC	AC	AC	O	AC	AC	AC	AC
Paris Convention for the Protection of Industrial Property in the 1967 Act of Stockholm (Paris Union)	LE	AC	AC	AC	AC	AC	AC	AC	AC	AC	AC	AC	O
Bern Convention for the Protection of Literary and Artistic Works in the Act of Paris of 24 July 1971	LE	AC	LE	AC	LE	AC	AC	AC	AC	AC	AC	AC	O
Washington Treaty on Intellectual Property in Respect of Integrated Circuits (1989)	O	O	O	O	O	O	O	O	O	O	O	O	O
Agreements not covered under WTO													
Locarno Agreement establishing an International Classification for Industrial Designs (Locarno Union 1968, amended in 1979)	O	O	O	O	O	O	O	O	O	O	LE	O	O
Madrid Agreement concerning the International Registration of Marks in the 1969 Act of Stockholm (Madrid Union)	O	O	LE	AC	LE	O	O	AC	AC	AC	AC	AC	O
Patent Cooperation Treaty (Washington 1970, amended in 1979 and modified in 1984)	LE	LE	LE	LE	LE	AC	AC	AC	LE	AC	LE	AC	LE
Convention for the Protection of Producers of Phonograms against Unauthorised Duplications of their Phonograms (Geneva 1971)	O	O	O	O	O	O	O	AC	LE	AC	LE	LE	O
Strasbourg Agreement Concerning the International Patent Classification (Strasbourg 1971, amended in 1979);	O	O	O	O	O	O	O	O	O	O	LE	O	O
European Patent Convention (1973)	O	O	O	O	O	O	O	O	O	O	O	AC	O
Vienna Agreement establishing an International Classification of Figurative Elements of Marks (Vienna 1973, and amended in 1985)	O	O	O	O	O	O	O	O	O	O	AC	O	O

Table A.3.1 continued

	EC-Turkey	EC-Tunisia	EC-Israel	EC-Morocco	EC-Jordan	EC-South Africa	EC-Mexico*	EC-FYRoM	EC-Egypt	EC-Croatia	EC-Chile	EC-Albania	EC-CARIFORUM
Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite (1974)	0	0	0	0	0	0	0	0	0	0	0	0	0
Budapest Treaty on the International Recognition of the Deposit of Micro-Organisms for the Purposes of Patent Procedure (1977/1980)	LE	LE	LE	LE	LE	AC	AC	LE	LE	0	LE	AC	LE
Nice Agreement concerning the International Classification of Goods and Services for the purposes of the Registration of Marks (Geneva, 1977/1979)	LE	LE	AC	AC	LE	AC	AC	AC	LE	AC	LE	AC	0
International Convention for the Protection of the New Varieties of Plants (1978, Act of Geneva, 1991)	LE	LE	AC	LE	LE	AC	AC	LE	LE	0	AC	LE	AC
Protocol relating to the Madrid Agreement concerning the International Registration of Marks (1989)	LE	0	LE	AC	LE	AC	0	LE	LE	0	AC	AC	AC
Trademark Law Treaty (Geneva, 1994)	0	0	0	0	0	0	0	0	0	0	LE	0	0
WIPO Copyright Treaty (Geneva, 1996)	0	0	0	0	0	AC	AC	0	0	AC	LE	LE	LE
WIPO Performances and Phonograms Treaty (Geneva, 1996)	0	0	0	0	0	0	AC	0	0	AC	LE	AC	LE
Hague Agreement for the International Registration of Industrial Designs (1999)	0	0	0	0	0	0	0	0	0	0	0	0	AC
Joint Recommendation Concerning Provisions on the Protection of Well-Known Marks (1999)	0	0	0	0	0	0	0	0	0	0	0	0	0
Patent Law Treaty WIPO (2000)	0	0	0	0	0	0	0	0	0	0	0	AC	AC
Singapore Treaty on the Law of Trademarks (2006)	0	0	0	0	0	0	0	0	0	0	0	0	0

* Provisions on IP included in the EU-Mexico PTA are excluded from dispute settlement under the agreement.
(AC) Non-legally enforceable commitments: recognise/confirm the importance; continue to ensure; express attachment; shall endeavour to accede; shall make its best efforts to comply; shall give effect to substantive provisions of.
(LE) Legally enforceable commitments: shall accede or ratify; shall give effect to the following articles (..); affirm it has ratified; shall comply with.

Table A.3.2 Commitments on intellectual property under both WTO-covered and non-covered agreements, US PTAs

	NAFTA	US-Jordan	US-Singapore	US-Chile	US-Australia	US-Morocco	US-CAFTA-DR	US-Bahrain	US-Peru	US-Oman	US-Colombia	US-Panama	US-South Korea
Agreements covered under WTO													
International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (Rome, 1961)	0	0	0	0	0	0	0	0	0	0	0	0	0
Paris Convention for the Protection of Industrial Property in the 1967 Act of Stockholm (Paris Union)	AC	0	0	0	LE	0	0	0	0	0	0	0	LE
Bern Convention for the Protection of Literary and Artistic Works in the Act of Paris of 24 July 1971	AC	0	0	0	LE	0	0	0	0	0	0	0	LE
Washington Treaty on Intellectual Property in Respect of Integrated Circuits (1989)	AC	0	0	0	0	0	0	0	0	0	0	0	0
Agreements not covered under WTO													
Locarno Agreement establishing an International Classification for Industrial Designs (Locarno Union 1968, amended in 1979)	0	0	0	0	0	0	0	0	0	0	0	0	0
Madrid Agreement concerning the International Registration of Marks in the 1969 Act of Stockholm (Madrid Union)	0	AC	0	0	0	0	0	0	0	0	0	0	0
Patent Cooperation Treaty (Washington 1970, amended in 1979 and modified in 1984)	0	AC	LE	LE	LE	LE	LE	LE	LE	LE	LE	LE	LE
Convention for the Protection of Producers of Phonograms against Unauthorised Duplications of their Phonograms (Geneva 1971)	AC	0	0	0	0	0	0	0	0	0	0	0	0
Strasbourg Agreement Concerning the International Patent Classification (Strasbourg 1971, amended in 1979);	0	0	0	0	0	0	0	0	0	0	0	0	0
European Patent Convention (1973)	0	0	0	0	0	0	0	0	0	0	0	0	0
Vienna Agreement establishing an International Classification of Figurative Elements of Marks (Vienna 1973, and amended in 1985)	0	0	0	0	0	0	0	0	0	0	0	0	0

Table A.3.2 continued

	NAFTA	US-Jordan	US-Singapore	US-Chile	US-Australia	US-Morocco	US-CAFTA-DR	US-Bahrain	US-Peru	US-Oman	US-Colombia	US-Panama	US-South Korea
Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite (1974)	0	0	LE	LE	LE	LE	LE	LE	LE	LE	LE	LE	LE
Budapest Treaty on the International Recognition of the Deposit of Micro-Organisms for the Purposes of Patent Procedure (1977/1980)	0	0	0	0	LE	LE	LE	LE	LE	LE	LE	LE	LE
Nice Agreement concerning the International Classification of Goods and Services for the purposes of the Registration of Marks (Geneva, 1977/1979)	0	0	0	AC	0	LE	LE	LE	LE	LE	LE	LE	LE
International Convention for the Protection of the New Varieties of Plants (1978, Act of Geneva, 1991)	AC	LE	LE	LE	LE	LE	LE	LE	LE	LE	LE	LE	LE
Protocol relating to the Madrid Agreement concerning the International Registration of Marks (1989)	0	0	AC	AC	LE	LE	AC	LE	AC	LE	AC	AC	LE
Trademark Law Treaty (Geneva, 1994)	0	0	LE	LE	LE	LE	LE	LE	LE	LE	LE	LE	LE
WIPO Copyright Treaty (Geneva, 1996)	0	LE	LE	0	LE	LE	LE	LE	LE	LE	LE	LE	LE
WIPO Performances and Phonograms Treaty (Geneva, 1996)	0	LE	LE	0	LE	LE	LE	LE	LE	LE	LE	LE	LE
Hague Agreement for the International Registration of Industrial Designs (1999)	0	0	AC	AC	AC	AC	AC	AC	AC	AC	AC	AC	AC
Joint Recommendation Concerning Provisions on the Protection of Well-Known Marks (1999)	0	LE	LE	AC	0	0	0	0	0	0	0	0	0
Patent Law Treaty WIPO (2000)	0	0	0	AC	AC	AC	AC	AC	AC	AC	AC	AC	AC
Singapore Treaty on the Law of Trademarks (2006)	0	0	0	0	0	0	0	0	0	0	0	0	AC

(AC) Non-legally enforceable commitments: recognise/confirm the importance; continue to ensure; express attachment; shall endeavour to accede; shall make its best efforts to comply; shall give effect to substantive provisions of.
(LE) Legally enforceable commitments: shall accede or ratify; shall give effect to the following articles (..); affirm it has ratified; shall comply with.

Table A.5.1: Legal inflation by groups of areas

	EU PTAs			US PTAs		
	AC	LE	Legal inflation	AC	LE	Legal inflation
Group 1: trade and investment related obligations						
FTA ind	14	14	0%	14	14	0%
FTA ag	14	14	0%	14	14	0%
AD	14	12	14%	12	12	0%
Customs administration	14	13	7%	13	13	0%
CVM	14	12	14%	12	12	0%
Export taxes	0	-	-	12	12	0%
Investment	12	8	33%	11	11	0%
Movement of capital	13	13	0%	12	12	0%
TRIMs	0	-	-	12	12	0%
Total (1):	**95**	**86**	**9%**	**112**	**112**	**0%**
Group 2: GATS/TRIPs						
GATS*	4	4	0%	13	13	0%
TRIPs	14	13	7%	14	14	0%
IP	14	11	21%	13	40	0%
Total (2)	**32**	**28**	**13%**	**40**	**40**	**0%**
Group 3: Migration-related regulations						
Illegal immigration	6	3	50%	0	-	-
Social matters	13	7	46%	0	-	-
Visa and asylum	4	0	100%	0	-	-
Total (3)	**23**	**10**	**57%**	**0**	**-**	**-**
Group 4: Domestic trade-related regulations						
Anti-corruption	0	-	-	10	8	20%
Competition	14	13	7%	7	0	100%
Consumer protection	7	1	86%	2	0	100%
Data protection	6	3	50%	0	-	-
Environment	13	2	85%	13	13	0%
Labour	2	2	0%	13	13	0%
Public procurement	13	7	46%	14	13	7%
SPS	8	3	63%	12	2	83%
State aid	13	12	8%	11	11	0%
STE	13	12	8%	9	7	22%
TBT	14	5	64%	12	11	8%
Total (4)	**103**	**60**	**42%**	**103**	**78**	**24%**

Table A.5.2: Legal inflation by groups of areas

	EU PTAs			US PTAs		
	AC	LE	Legal inflation	AC	LE	Legal inflation
Group 5: other						
Approximation of legislation	9	2	78%	0	-	-
Audiovisual	9	1	89%	0	-	-
Civil protection	1	1	0%	0	-	-
Innovation policies	1	0	100%	0	-	-
Cultural cooperation	12	1	92%	0	-	-
Economic policy dialogue	6	1	83%	0	-	-
Education and training	10	1	90%	0	-	-
Energy	13	1	92%	1	1	0%
Financial assistance	11	3	73%	0	-	-
Health	3	1	67%	0	-	-
Human rights	12	0	100%	0	-	-
Illicit drugs	10	0	100%	0	-	-
Industrial cooperation	11	0	100%	0	-	-
Information society	7	0	100%	0	-	-
Mining	3	0	100%	0	-	-
Money laundering	10	0	100%	0	-	-
Nuclear safety	2	0	100%	0	-	-
Political dialogue	11	0	100%	0	-	-
Public administration	5	1	80%	0	-	-
Regional cooperation	11	0	100%	0	-	-
Research and technology	12	1	92%	0	-	-
SME	7	1	86%	0	-	-
Statistics	11	1	91%	0	-	-
Taxation	3	0	100%	0	-	-
Terrorism	5	1	80%	0	-	-
Total (5)	**206**	**17**	**92%**	**1**	**1**	**0%**
Total all areas (1+2+3+4+5)	**459**	**201**	**56%**	**256**	**231**	**10%**

About Bruegel

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Beyond the WTO?
An anatomy of EU and US preferential trade agreements

There is growing concern about preferential trading agreements (PTAs) and the role they should play in the multilateral trading system. Not only are they becoming increasingly prevalent, there is also a perception that many recent PTAs, especially those centred on the EC and the US, go far beyond the scope of the current WTO agreements and may be creating unfair trade relations.

In an attempt to shed light on whether the above concern is justified, this study for the first time looks in detail at all the provisions of all the PTAs signed by the EC or the US and other WTO members, especially those provisions which are legally enforceable. The study finds that the EC and the US have adopted very different approaches in their respective PTAs. The study also hints that both powers may be seeking, through their PTAs, to project their regulatory priorities globally.

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bruegel
33, rue de la Charité, Box 4, 1210 Brussels, Belgium
www.bruegel.org

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