

Editorial EYIEL 6 (2015)

This sixth volume (2015) of the European Yearbook of International Economic Law puts a special emphasis on non-tariff barriers (NTBs) to trade and the world trade order. With the steady reduction of tariff rates since the entry into force of the GATT 47, focus in the past years has been on the vast and complex landscape of non-tariff barriers to trade. Practitioners as well as scholars seemingly struggle with the multitude of measures pooled under that expression as no single, acknowledged definition of the term exists and its relation to the term “non-tariff measures” remains equally blurred. Particularly in practice and on the multilateral level, there appears to be some awkwardness when it comes to coping with NTBs as multilateral trade rules often seem to be in conflict with national regulatory autonomy in the pursuit of policy objectives. This volume undertakes to shed some light on the problems of non-tariff barriers to trade that can act as NTBs that arise in various fields.

In his Distinguished Essay, *Robert Howse* examines how border taxes and regulatory measures can be implemented as WTO-compliant climate mitigation strategies. He starts from the assumption that unilateral actions may be more effective to approach the problem of climate change as long as multilateral agreement seems out of reach. Analysing particularly, but not exclusively, previous GATT and WTO jurisprudence, *Robert Howse* comes to find that WTO law is not in principle opposed to the introduction of border carbon adjustment but would have to satisfy strict standards of non-discrimination.

Timothy Lyons explores the interaction between customs and non-tariff barriers. Starting from the impact that customs-related NTBs have, he reveals the changing responsibilities of customs authorities, particularly in the EU, from mere financial interests to security and environmental concerns. He provides an overview of when such NTBs usually occur as well as of international bodies and agreements that aim to regulate customs NTBs. *Timothy Lyons* further points to the problem to uniformly apply customs regulations that arise within the EU with its 28 Member States, internally as well as externally.

Nikita Lomagin approaches the topic of NTBs from an economic perspective. He offers an overview of quantitative and qualitative evaluations of NTBs. He highlights the difficulties that economists face when they attempt to estimate the effects that NTBs have due to the sheer number and complexity of such measures. *Nikita Lomagin* outlines the different approaches that have been taken so far and illustrates that the evaluations show that the effect is indeed significant. He further draws on recent developments regarding import bans and their economic effects, particularly focusing on Russia and the EU.

Akbar Rasulov critically discusses the Horizontal Mechanism, a proposal within the WTO Negotiating Group on Market Access to introduce procedures for the resolution of disagreements in the field of non-tariff measures that shall be conducted outside the legal framework of the Dispute Settlement Understanding. He finds this shift from substance to procedure to be a mere symptom of the underlying problem of the complexity and great variety of NTBs that has not yet been solved in international trade law.

Gracia Marín Durán unfolds the variety of problems that the issue of process and production methods as non-tariff barriers to trade entails. She does this in light of two recent WTO rulings, i.e. *US – Tuna II* and *EC – Seal Products*, and places the arguments around product-related and non-product-related process and production methods in the context of the scholarly debate. *Gracia Marín Durán* then examines—based on existing WTO case law—to what extent measures relating to the process and production methods are covered by the TBT Agreement, as well as the scope of WTO members' obligations under the TBT Agreement in relation to GATT obligations. She comes to the conclusion that the approach currently followed by the dispute settlement bodies leads to the outlandish result that less trade-restrictive labelling requirements based on process and production methods are subject to the strict TBT disciplines, while more restrictive regulations based on process and production methods are not.

Nikolay Mizulin and *Huijian Zhu* assess NTBs and private conduct in the context of labelling, an area that has so far received only little attention. They undertake to answer the question whether WTO law does in fact cover the conduct of privates by thoroughly examining previous GATT and WTO case law, focusing on the Agreement on Technical Barriers to Trade (TBT) and the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS). They conclude that seemingly private conduct that can be traced back to a member's regulatory requirements can, in line with existing case law, be addressed with WTO rules; further, under the TBT and the SPS Agreement members are under an obligation to control private conduct with measures reasonably available to them.

The elimination of NTBs plays a significant role in the ongoing TTIP negotiations between the US and the EU, as *Christian Pitschas* illustrates. He focuses on efforts with regard to standard setting, providing an outline of the negotiators' ambitions as expressed in the regulatory chapter and further comparing it to the respective process in the WTO Agreements.

In the section on regional integration, we have a special emphasis on relations between East Asia and the European Union.

Shotaro Hamamoto portrays the landscape of Japan's Economic Partnership Agreements (EPAs). Japan has started to actively engage in concluding such agreements only in 2002 as it very much relied on the multilateral system before that. Nonetheless, *Shotaro Hamamoto* demonstrates very clearly that Japan has since then been keeping up with the general trend towards regional trade agreements and is now also actively involved in several negotiations on "mega" trade agreements.

Won-Mog Choi assesses the close trade relations between Korea and the EU that have recently been intensified through the Korea–EU Free Trade Agreement. He analyses the key features of the Korea–EU Free Trade Agreement and finds that it does not only further shape relations between these two partners but rather marks a stepping stone for future preferential trade agreements. This is particularly so because it contains areas that are currently still difficult to negotiate on the multilateral level such as non-tariff barriers, sustainable development or cultural cooperation. *Won-Mog Choi* further notes that this comprehensive approach illustrates what he calls aggressive regionalism and serves as an example of a paradigm shift in the design of regional trade agreements that should have to move beyond the regulation of mere economic issues.

Locknie Hsu takes a closer look at the trade and investment relations between the EU and East Asia. She thereby puts a special emphasis on the EU–Singapore Free Trade Agreement as it is the first of the EU's FTAs with an Asian State that will contain an investment chapter. The EU–Singapore FTA is further to be regarded as a stepping stone as it might pave the way for other agreements between the EU and ASEAN States as long as an EU–ASEAN FTA cannot be achieved.

In his essay, *Chien-Huei Wu* takes a critical look at the EU's ambitions to counterbalance China and the US in East Asia and doubts whether the existent policy tools suffice to achieve the aspired goal. He unfolds the many-faceted view the EU has of Asia—as a threat, a strategic partner and a market—and provides an overview of the EU's strategy papers on Asia during the past 20 years. *Chien-Huei Wu* further sets out the instruments and fora used to shape EU–Asia relations and ultimately comes to conclude that neither the ambitions of the EU as a civilian power nor its competences or more apparent interest in the Balkans, Eastern Europe and the Mediterranean seem to equip it for a credible East Asia policy that could achieve the aim of counterbalancing China and the US in the region.

Julien Chaisse provides a comprehensive overview of investment treaties or preferential trade agreements with chapters on investment concluded by Asian States. He illustrates the broad range of investment treaty practices among those States, quantitatively as well as qualitatively, and identifies the Trans-Pacific Partnership as possibly shaping the EU's future investment negotiations in Asia. *Julien Chaisse* concludes that for the EU, with its newly gained competences in the field of foreign direct investment, Asia holds great opportunities but possibly also difficulties considering that there are currently 187 intraregional investment agreements in force in Asia.

In the section on International Economic Institutions, *Catharine Titi* portrays recent developments in investor–State dispute settlement in general and within the

ICSID system in particular. In light of the ongoing (reform) discussions about investor–State arbitration, she traces trends that affect the system. *Catharine Titi* thereby focuses on current EU negotiations and the issue of shared responsibility of the EU and its Member States, mass claims and claims relating to sovereign bonds, as well as the adoption of the UNCITRAL Rules on Transparency in Treaty-based investor-State Arbitration adopted in July 2013.

Jan Bohanes and *Karolyn Salcedo* provide us with a sound outline of WTO rulings during the year 2013.

Joy Kategekwa portrays recent institutional trends in the WTO and the challenge going forward. She highlights the significance of an organisation whose purpose it is to promote global trade in a post-crisis time with still stagnating economic growth rates and increasing numbers of trade restrictions among G-20 States. Further developments examined by *Joy Kategekwa* include the areas of accession to the WTO, the dispute settlement system and technical assistance. She also discusses the outcome of the last Ministerial Conference in Bali in December 2013 and concludes that the very spirit leading to the success of Bali should be put to use to move forward in the Doha negotiations.

Andrea Wechsler describes WIPO's global copyright priorities and developments during the year 2013 and provides a detailed examination of the Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired, or otherwise Print Disabled. She illustrates recent developments from the fields of trademarks, patents, innovation and developing policies to environmental and anti-piracy policies. *Andrea Wechsler's* analysis of the new Marrakesh Treaty sheds light on the treaty's backgrounds and objectives and emphasises the paradigm shift that it presents through the introduction of mandatory ceilings rather than minimum exceptions with regard to copyrights.

After book reviews by *Wolfgang Weiß*, *Christian Pitschas* and *Christian Tams*, we have introduced a new section with new publications in the field of international economic law.

This volume could not have been put together without the help of numerous people. Our thanks go once more to Dr. Brigitte Reschke of Springer and her team. Evin Dalkilic and Dr. Stephanie Weitendorf took care of the editing, the list of contributors, etc. Many thanks for the fantastic job.

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