MODALITIES OF SECURING POLICY AUTONOMY IN PREFERENTIAL TRADE AGREEMENTS

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ABSTRACT

After the collapse of multilateralism, states began concluding Preferential Trade Agreements with a rapid clip. However, balancing the benefits of liberalization with policy autonomy[1] *became a challenging issue. A topic that has gained less attention thus far is how parties employ various carve-out devices to secure their policy*

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[1] "Regulatory power", "policy space", "sovereignty power", "regulatory space", and "policy autonomy" are interchangeably used in the literature. This article uses the term "policy autonomy" for the purpose of this article. For the definition of "policy autonomy", see Veijo Heiskanen, *The Regulatory Philosophy of International Trade Law*, 38(1) J. WORLD TRADE 1, 2-5 (2004); Michael Trebilcock & Robert Howse, *Trade Liberalization and Regulatory Diversity: Reconciling Competitive Markets with Competitive Politics*, 6(1) EUR. J. L. & ECON. 5, 28, 32 (1998); Robert Howse, *Democracy, Science, and Free Trade: Risk Regulation on Trial at the World Trade Organization*, 98(7) MICH. L. REV. 2329, 2329-30 (2000); Michael Ming Du, *Domestic Regulatory Autonomy Under the TBT Agreement: From Non-discrimination to Harmonization*, 6(2) CHINESE J. INT'L L. 269, 271-72 (2007); Michael Ming Du, *Autonomy in Setting Appropriate Level of Protection Under the WTO Law: Rhetoric or Reality?*, 13(4) J. INT'L ECON. L. 1077, 1077-78 (2010); Emily Reid, *Regulatory Autonomy in the EU and WTO: Defining and Defending Its Limits*, 44(4) J. WORLD TRADE 877, 900-01(2010).

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autonomy while expanding their markets. This study is the first to introduce modalities of securing policy autonomy in preferential trade agreements. We used typology to analyze this phenomenon and examine the extent to which parties can secure policy autonomy in each modality. The article also explains the comparative advantages and disadvantages of each modality, and illustrates the complex and difficult nature of selecting modalities.

KEYWORDS: *policy autonomy, regulatory power, carve out devices, modalities, exceptions, reservation lists, side letters, general exceptions, TBT, security exceptions*

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I. INTRODUCTION

The number of Preferential Trade Agreements (hereinafter "PTAs") has skyrocketed over the past two decades. PTAs became a prominent feature of the global trading regime. They became an effective instrument among selected negotiating parties to reflect a rapidly changing society, which enables parties to reach a consensus on timely subjects, such as digital trade or artificial intelligence.[2] These proliferating PTAs facilitate trade liberalization by encouraging to attract foreign investment and removing barriers to trade, such as restrictions on trade in services, import tariffs and other regulations that impede the free flow of trade.

It is important to note, however, that many states and their constituents have a mutual interest in ensuring that they clarify and secure the states' policy autonomy and regulatory power for legitimate objectives while they fulfil their purpose of liberalizing the markets. In fact, searching for an optimal (or at least appropriate) equilibrium between trade liberalization and states' policy autonomy when negotiating PTAs is still the most challenging aspect.[3]

This article is the first piece to develop a typology of modalities of securing policy autonomy, examine comparative advantages and disadvantages of each modality and explains the complex and difficult nature of selecting modalities. Previous literature has elaborated on the different functions that securing policy autonomy plays at the margins of World Trade Organization (hereinafter "WTO") law but never has introduced a typology of modalities yet.[4] In particular, the article characterizes the modalities of securing policy autonomy along the three criteria, as highlighted in the box below (Table 1).

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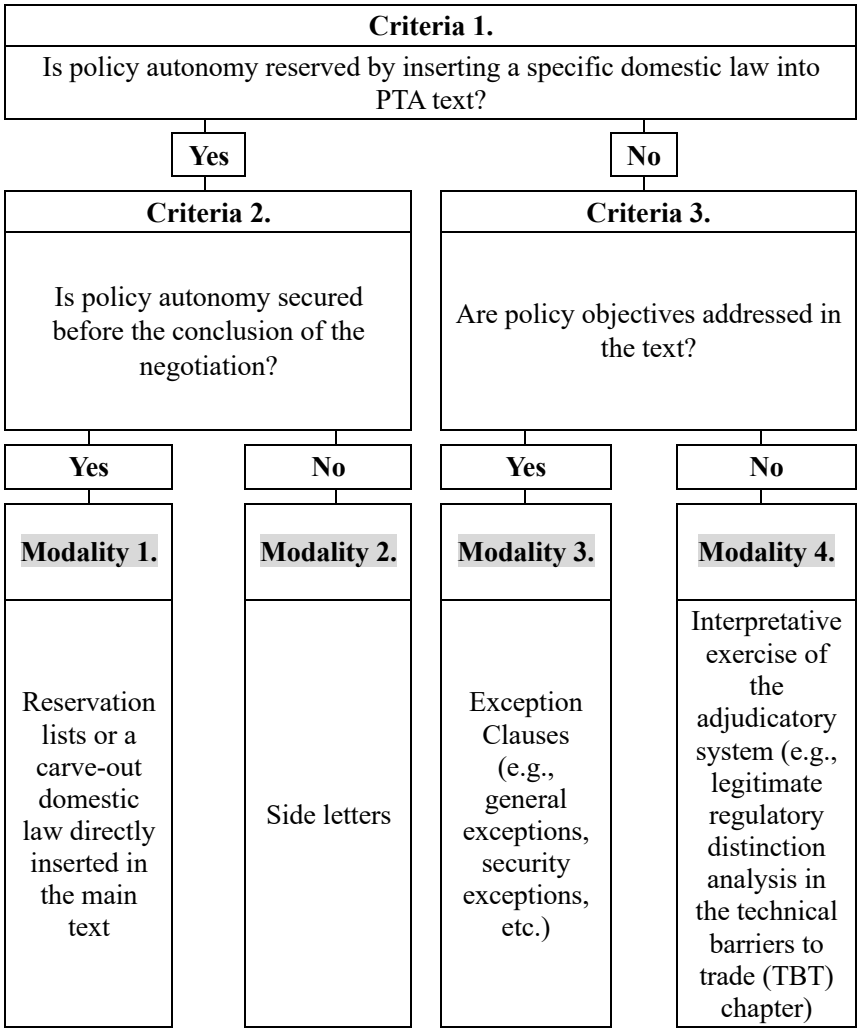
[2] *See, e.g.*, Australia–Singapore Digital Economy Agreement, Austl.-Sing., Aug. 6, 2020, https://www.dfat.gov.au/sites/default/files/australia-singapore-digital-economy-agreement.pdf.

[3] Bregt Natens & Jan Wouters, *Regulatory Autonomy Constraints from GATS' Unconditional Obligations: The Case of the European Union* 24 (Leuven Ctr. for Glob. Governance Stud., Working Paper No. 132, 2014); Panagiotis Delimatsis, *The Fragmentation of International Trade Law*, 45(1) J. WORLD TRADE 87, 96 (2011) (Noting that "the need for a balance is inherent because trade rules by nature impinge on other policy areas and trade restriction is an inevitable corollary of policies with non-trade objective.").

[4] *See generally* Oisin Suttle, *Reasons, Institutions, Authorities: Three Models of Exceptions in World Trade Organization Law*, *in* EXCEPTIONS IN INTERNATIONAL LAW 375 (Lorand Bartels & Federica Paddeu eds., 2020).

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TABLE 1: Modalities of Securing Policy Autonomy in PTAs



We introduce three criteria to distinguish the four modalities. The first question we ask is whether policy autonomy is reserved by inserting a specific domestic law into PTA text. Modalities 1 and 2 answer this question, and we further divide these by asking whether the policy autonomy is secured before or after the conclusion of the negotiation of the PTA. Modalities 3 and 4 answer the first question, and we divide them by asking whether policy objectives are addressed in the text of the PTA at issue.

Modality 1 refers to reservation lists or a carve-out that fits directly into

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the PTA text. This device enables the parties to pinpoint the specific domestic law and carve out of the text before the PTA negotiation concludes. Modality 2 refers to side letters, which enable parties to carve out specific domestic laws for securing policy autonomy. However, unlike Modality 1, the letter is drafted and exchanged after the conclusion of the PTAs. Modality 3 refers to our familiar exception clauses, such as general or essential security exceptions. Instead of directly carving out the specific law as in Modality 1 or 2, Modality 3 allows to maintain the relevant domestic law that pursues those policy objectives under certain conditions, even if such laws violate other provisions of the PTA. Modality 4 refers to the method by which policy autonomy never existed in the treaty text at issue is granted as a result of the interpretative exercise of the adjudicatory system. That is, policy autonomy is newly found as a result of the interpretative exercise of the adjudicatory system. Unlike Modalities 1 and 2, where parties pre-emptively seek to examine their domestic markets and carve out the relevant laws in the text, the opportunities and grants for securing policy autonomy are used solely by the adjudicatory system.

Next, the article analyzes the comparative advantages and disadvantages of each modality, and illustrates difficulties and complexities encountered when determining the modalities. In fact, such questions are empirical issues that depend on various institutional factors, such as the parties' domestic negotiation strategies, the level of expertise and experience in PTAs, its similarities to previously ratified PTAs for a smoother ratification procedure, prior experience in dispute settlement related to exception clauses, the capacity to prepare modalities of securing policy autonomy, and so forth. This article will demonstrate how these various factors tend to interact with each other and how the capacity to prepare the modality of securing policy autonomy may significantly influence the choice of modality.

In short, Part II explains the four modalities in greater detail, expounding on the various natures of each modality and demonstrating the extent to which the parties secure policy autonomy. Part III explains the comparative advantages and disadvantages of each modalities, illustrates complex nature of determining modality priorities and how capacity to prepare the modality influences the choice of modality, and Part IV concludes with some comments.

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II. CLASSIFICATION OF THE MODALITIES

A. Modality 1: Reservation Lists[5] and Carve-Out Domestic Laws in PTA Text

Modality 1 refers to drafting a reservation list or carve-out for a domestic law, which is done directly in the PTA text. Reservation lists are smart flexibility devices for parties to pinpoint the domestic law to secure their policy autonomy. They are frequently used in various chapters of PTAs, such as services,[6] investments,[7] financial services,[8] government procurement.[9] The Investment and Services chapter of the PTA is perhaps the most frequently used chapter for the reservation lists. This section will use an example of reservation lists under a negative list approach in the Investment and Services chapter of the PTAs to illustrate the extent and method that parties can carve out specific domestic laws from the text before concluding a PTA.

Under the negative list approach, the main features of the non-conforming measures must be specified in detail. These measures include: 1) the economic sector in which the reservation is made, 2) the specific industry in which the reservation is made, 3) the activity covered by the reservation, 4) the substantial or procedural obligation under which the reservation is made (e.g., the most favoured nation (MFN) or national treatment (hereinafter "NT")), and 5) a description of the specific legislation, regulation, or other measures for which the reservation is made.[10] The following is an example of a reservation list in the United States (hereinafter

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[5] The reservation list either includes the conforming measures under a positive list approach or identifies non-conforming measures under a negative list approach. This article only examines the negative list approach for the purpose of this article. The positive list approach is used only for the services chapter of the Preferential Trade Agreements [hereinafter PTAs], and as most countries are recently switching to the negative list approach, its utility as a policy autonomy carve out tool is expected to be very low in the future. On the other hand, the negative list approach is more promising as the approach is widely used in practice not only for the services and investment chapter, but also for the chapters on financial services, state-owned enterprises, and government procurement, etc. For more analysis on reservation lists, see generally U.N. CONF. ON TRADE & DEV. [hereinafter UNCTAD], PRESERVING FLEXIBILITY IN IIAS: THE USE OF RESERVATION, U.N. Doc. UNCTAD/ITE/IIT/2005/8, U.N. Sales No. E.06.II.D.14 (2006).

[6] *See, e.g.*, United States–Chile Free Trade Agreement, Chile-U.S., Annex II, June 6, 2003, https://ustr.gov/sites/default/files/uploads/agreements/fta/chile/asset_upload_file293_4024.pdf.

[7] *See, e.g.*, Korea–Canada Free Trade Agreement, Can.-S. Kor., Annex I, Mar. 11, 2014, https://fta.go.kr/webmodule/_PSD_FTA/ca/2/eng/24(1)_EN_CKFTA_Annex_I_Korea.pdf.

[8] *See, e.g.*, Australia–Singapore Free Trade Agreement, Austl.-Sing., Annex 6, Feb. 17, 2003, https://www.dfat.gov.au/sites/default/files/safta-annex-6-explanatory-notes.pdf.

[9] The list is scheduled under the form of positive list approach. See Vietnams lists in the Comprehensive and Progressive Agreement for Trans-Pacific Partnership [hereinafter CPTPP], Annex 15-A, Mar. 8, 2018, https://wtocenter.vn/chuyen-de/12782-full-text-of-cptpp.

[10] For more explanation, see generally, UNCTAD, *supra* note 5.

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"US")–Mexico–Canada Agreement (hereinafter "USMCA"):[11]

Sector:	Transportation Services - Customs Brokers
Sub-Sector:	
Obligations Concerned:	National Treatment (Articles 14.4 and 15.3) Local Presence (Article 15.6)
Level of Government:	Central
Measures:	19 U.S.C. § 1641(b)
Description:	Investment and Cross-Border Trade in Services: A customs broker's license is required to conduct a customs business on behalf of another person. An individual may obtain such a license only if that individual is a United States (US) citizen. A corporation, association, or partnership may receive a customs broker's license only if it is established under the laws of any state and at least one officer of the corporation, association, or one member of the partnership holds a valid customs broker's license.

A customs broker's license is required to conduct a customs business on behalf of another person. An individual may obtain such a license only if that individual is a US citizen. A corporation, association, or partnership may receive a customs broker's license only if it is established under the laws of any state and at least one officer of the corporation, association, or one member of the partnership holds a valid customs broker's license.

As seen above, the US successfully use domestic law carve-outs (19 U.S.C. § 1641(b)) in the transportation service industry. The US domestically imposes restrictions on requirements for a customs broker's license in the

[11] Agreement Between the United States of America, the United Mexican States, and Canada, Can.-Mex.-U.S., Annex I, Nov. 30, 2018, https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement [hereinafter USMCA].

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transportation services industry. Hence, they want to ensure that the obligations of national treatment and local presence in relation to the customs broker's license are carved out. In particular, the US wants to ensure that only its citizens may obtain a customs broker's license, and a corporation, association, or partnership may receive a customs broker's license only if it is established under the laws of any state and at least one officer of the corporation or association, or one member of the partnership holds a valid customs broker's license. Although such an imposition is arguably a violation of NT and a local presence article under Investment and Cross-Broder Trade in Services Chapter in the USMCA, the US successfully pinpoints and secured the relevant domestic law by stipulating 19 U.S.C. § 1641(b) in the measure section of the reservation lists.

Currently, foreign investors from Canada and Mexico can use 19 U.S.C. § 1641(b) to understand the extent to which their investment projects are eligible. In 19 U.S.C. § 1641(b), a detailed definition of custom brokers and specific legal requirements to obtain a license are included. It also lists the scope of custom brokers' duties and associated penalty provisions.[12] This information seems sufficient for foreign investors to judge the boundaries between investment protection and policy autonomy.

In addition to reservation lists, carving out the name of the domestic law directly into the main text of the PTAs is another effective method of securing policy autonomy under Modality 1. Without utilizing reservation lists, parties could directly insert domestic law into the main text of the PTA. Generally, reservation lists are negotiated after the completion of the negotiation of the main text. However, parties could carve out domestic laws during the main text negotiations.

For instance, the Korean government is extraordinarily sensitive to real estate price stabilisation policies because of the high price of its real estate; thus, the government continuously carved out the real estate price stabilisation policy[13] from the Annex of expropriation articles in the investment chapter of its previously concluded PTAs, as follows:

> ANNEX 11-B
> EXPROPRIATION
> . . .
> (b) . . . Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, the environment, and *real estate price stabilization* (through, for example, measures to improve the housing conditions for low-

[12] 19 U.S.C. §1641(b) (Supp. V 2006).
[13] *See generally* Jeong Ho Kim, *Housing Price Hike and Price Stabilization Policy in Korea*, KDI SCH. PUB. POL'Y & MGMT. (June 2005), http://www.kdi.re.kr/upload/7837/2_3.pdf.

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income households), do not constitute indirect expropriations.[14]

Annex 11-B 3(b) stipulates a boundary by listing out exceptions to indirect expropriation. The Annex allows a party to engage in what would otherwise be prohibited to protect legitimate public welfare. Real estate price stabilization is listed as an example of this.

Likewise, the Philippines secured its policy autonomy by successfully carving out its actual domestic law in Article 10.14 (Denial of Benefits) in the investment chapter of the Regional Comprehensive Economic Partnership (hereinafter "RCEP"). Paragraph 6 of Article 10.14 of the RCEP states that the Philippines is allowed to deny the benefits of this chapter to investors and investments that are in breach of the "provisions of *Commonwealth Act No. 108*, entitled *An Act to Punish Acts of Evasion of Laws on the Nationalization of Certain Rights, Franchises or Privileges*, as amended by *Presidential Decree No. 715*, otherwise known as *The Anti-Dummy Law*, as may be amended."[15] Thus, when foreign investments were established in breach of the Anti-Dummy Law of the Philippines, the Philippines can deny its benefits.

In sum, both reservation lists and a direct carve out in the main text under Modality 1 allow parties to secure their domestic law. The actual name of the domestic law is carved out in the text or reservation lists, so PTA readers can understand the concepts and boundaries of policy autonomy.

B. Modality 2: Side Letters

Modality 2 refers to the exchange of side letters. As in Modality 1, the parties can carve out a specific domestic law to secure their policy autonomy by stating the law in the letter. However, this is different from Modality 1 because the carve-out is made after a conclusion and before an official signing of the PTA. Simply put, the letter is not exchanged during the negotiation phase; instead, it is exchanged after the conclusion of the PTAs. The next paragraph explains the letters and the extent to which the parties can secure their policy autonomy by exchanging the letter.

Article 13 of the Vienna Convention on the Law of Treaties states that "[t]he consent of States to be bound by a treaty constituted by instruments exchanged between them is expressed by that exchange when: a) The instruments provide that their exchange shall have that effect; or b) [i]t is

[14] Free Trade Agreement Between the United States of America and the Republic of Korea, S. Kor.-U.S., Annex 11-B ¶ 3(b), June 30, 2007, https://ustr.gov/sites/default/files/uploads/agreements/fta/korus/Chapter_Eleven_Investment.pdf [hereinafter KORUS FTA] (emphasis added) (Stating that "[f]or greater certainty, the list of 'legitimate public welfare objectives' in subparagraph (b) is not exhaustive.").

[15] Regional Comprehensive Economic Partnership Agreement [hereinafter RCEP] art. 10.14, Nov. 15, 2020, https://rcepsec.org/legal-text/.

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otherwise established that those States were agreed that the exchange of instruments shall have that effect."[16]

Parties can express their consent to be bound by an "exchange of letters or notes".[17] The letter may take on various forms, including notes, letters, correspondences, communications, messages, or memoranda. A major characteristic of an exchanged letter is the absence of formality, although it must be in the form of a written document.

The flexible nature of letters is perhaps the main reason for parties to exchange them.[18] The letter is flexible because it enables the parties to freely determine the level of specificity or legal status of the domestic law to secure their policy autonomy after the signing of the PTAs. For instance, parties can either 1) carve out a specific name of the relevant domestic law in the letter, or 2) depict the exact status of the reform if the domestic law is not ready and is currently being reformed or revised. First, Parties can always state the name of the industry or economic area without specifying the name of domestic law and many PTAs provide evidence of this:

> (3) During the negotiations, the Parties discussed existing regulations applicable to the establishment, extension, or transfer of educational institutions within certain geographical areas under the Seoul Metropolitan Area Readjustment Planning Act (Law No. 7308, December 31, 2004). The Parties shared the understanding that such restrictions are not inconsistent with Article 12.4 (Market Access).
>
> . . .
>
> (5) During the negotiations, the Parties discussed a measure that may establish requirements regarding the types and quantities of raw materials for producing liquor under the Liquors Act (Law No. 7841, Dec. 31, 2005) and its subordinate regulations. The Parties shared the understanding that such measure is not inconsistent with Article 11.8 (Performance Requirement),

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[16] Vienna Convention on Law of Treaties art. 13, May 23, 1969, 8 I.L.M. 679.

[17] For a definition of the exchange of letters, see *Glossary: Exchange of Letters/Notes*, U.N. TREATY COLLECTION, https://treaties.un.org/pages/overview.aspx?path=overview/glossary/page1_en.xml (last visited May 30, 2022). *See* THE VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY 246-86 (Olivier Corten & Pierre Klein eds., 2011) (Examining the general characteristics (e.g., objective and purpose) and validity problems of exchanging letters); VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY 175-79 (Oliver Dörr & Kirsten Schmalenbach eds., 1st ed. 2012) (Examining the negotiation history of Article 13 and the legal effect of the letter). *See also* MARK E. VILLIGER, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 199-201 (2009). *See generally* Alexandru Bolintineanu, *Expression of Consent to Be Bound by a Treaty in the Light of the 1969 Vienna Convention*, 68(4) AM. J. INT'L L. 672 (1974).

[18] Tae Jung Park, *The Uses and Advantages of Side Letters in the Investment Chapters in Preferential Trade Agreements*, 12 J. INT'L. DISP. SETTLEMENT 84, 98 (2021).

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> provided that it is applied in a manner consistent with the WTO Agreement on Trade-Related Investment Measures.

In the above side letter exchanged in the Korea–US FTA, for instance, Korea successfully carved out "*Seoul Metropolitan Area Readjustment Planning Act* (Law No. 7308, 31 December 2004)" and the "*Liquors Act* (Law No. 7841, 31 December 2005)," which would have otherwise been a violation of Art. 12.4 (Market Access) and Art. 11.8 (Performance Requirements) in the Korea–US FTA.[19]

Second, the letter may include a detailed description of the reform schedule for domestic laws if the law is currently being reformed or revised.[20] For instance, the side letter for the Korea–US FTA sets out specific commitments pertaining to the supply of express delivery services, and Korea agreed to amend its Postal Services Act to expand the exceptions to the Korean Postal Authority's monopoly over express delivery services.[21]

Interestingly, the parties could also agree to carve out the name of the industry without pinpointing the name of the law itself.

> The Honorable Alberto Trejos Minister of Foreign Trade San Jose, Costa Rica
>
> Dear Minister Trejos:
>
> . . . Nothing in Chapter Ten (Investment) or Eleven (Cross-Border Trade in Services) prevents the United States or Costa Rica from adopting, maintaining, or enforcing any measure consistent

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[19] A full version of the side letter exchanged in the KORUS FTA, *Letter from Hyun Chong Kim, Minister for Trade, Repub. of Kor., to Susan C. Schwab, U.S. Trade Representative*, FTA.GO.KOREA (June 30, 2007), https://fta.go.kr/webmodule/_PSD_FTA/us/doc/eng/24-Services_Confirming%20Letter-from-Korea-final.pdf.

[20] Park, *supra* note 18, at 102.

[21] KORUS FTA, *supra* note 14, Annex 12-B; *Letter from Hyun Chong Kim, Minister for Trade, Repub. of Kor., to Susan C. Schwab, U.S. Trade Representative*, FTA.GO.KOREA (June 30, 2007), https://ft a.go.kr/webmodule/_PSD_FTA/us/doc/eng/69-Service-EDS%20Reform-from-Korea-final.pdf. The letter reads as follows:

> Korea intends to expand gradually the exceptions to the Korean Postal Authority's monopoly to increase the scope of private delivery services that are permitted and to establish a scheme ensuring the independence of Korea's postal regulatory system. This will be done through amendments to the *Postal Services Act*, related laws, or their subordinate regulations.
>
> . . .
>
> In determining the nature and extent of such amendments, Korea will consider various factors, including domestic market conditions, experiences of other countries with postal liberalization, and the need to ensure universal service. Korea plans to implement these amendments within the next five years.

In applying these reformed criteria and regulatory system, Korea will provide non-discriminatory opportunities to all postal and express delivery services suppliers in Korea.

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> with the Agreement relating to sportsbooks or other gambling activities within their respective national territories. . . .
>
> Robert B. Zoellick

The above letter for the Dominican Republic–Central America Free Trade Agreement (hereinafter "CAFTA-DR") shows that the parties agreed to carve out the adoption, maintenance, or enforcement of any measure relating to sportsbooks or other gambling activities within their respective national territories.[22]

Here, it is important to note that the letter is signed after a conclusion and before the official signing of the PTA. This is different from Modality 1, where reservation lists and direct carve-outs are all concluded within the negotiation phase. For instance, in the abovementioned letter for the CAFTA-DR, the US concluded negotiations with Costa Rica on 25 January 2004. After four months, this letter was exchanged on 28 May 2004, when ministers of Central America and the US trade representatives signed the treaty before the ratification. Apparently, this letter was exchanged within the period of the domestic implementation process. It was presumably prepared within the four-month period between the conclusion of the treaty on 25 January 2004 and the signing by ministers on 28 May 2004. Subsequently, the treaty and letter were ratified on 2 August 2005, when the President of the US at the time, George W. Bush, signed the treaty. As the last portion of the letter states, it constitutes an agreement and, therefore, becomes an integral part of the treaty. Consequently, both the treaty text and the letter are currently in force after this ratification.

C. Modality 3: Exception Clauses

Modality 3 permits the policy autonomy of parties under certain conditions, including the requirements that domestic law seeks to pursue listed policy objectives that are agreed by the parties. In other words, the exceptions to the basic PTA rules (e.g., trade liberalization, non-discrimination, and market access rules) are stipulated clearly in the text of PTAs, allowing parties to adopt trade-restrictive measures that pursue, for example, the policy objectives such as the protection of public morals, public health, and national security under certain conditions. The rest of this section examines how and to what extent the parties could reserve and achieve their policy autonomy through these exception clauses, namely general and security exceptions.[23]

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[22] A full version of the side letter exchanged in the CAFTA-DR, *Letter from Robert B. Zoellick, U.S. Trade Representative, to Alberto Trejos, Minister for Foreign Trade, Costa Rica*, SICE (May 28, 2004), http://www.sice.oas.org/trade/cafta/caftadr_e/asset_upload_file211_3977.pdf.

[23] Besides general and security exceptions, a prudential carve out in the financial chapter of the PTAs

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General and security exceptions were first introduced in the General Agreement on Tariffs and Trade (hereinafter "GATT").[24] In most cases, the general exceptions chapter in PTAs assimilates the general exceptions provided for in the GATT by simply stating that the exceptions under these agreements are "incorporated into and made part of [the PTA], *mutatis mutandis*."[25] Likewise, the language and architecture of security exceptions in PTAs are virtually identical to the security exceptions provided for in the GATT.[26] This section will, thus, examine the exception clauses under the GATT as they have been invoked many times in WTO dispute settlement for their interpretation and application.[27]

First, general exceptions under the GATT are contained in Article XX, which consists of two parts: an introductory clause, often referred to as the "chapeau", and paragraphs enumerating measures that fall under its scope. A measure's "specific contents" are examined under the paragraphs, whereas the chapeau is concerned with "the manner in which that measure is applied."[28] As stated by the panel in the *US — Section 337 Tariff Act*, Article XX provides for "limited" and "conditional" exceptions from obligations under other provisions.[29] The exceptions are "limited" in the sense that the list of exceptions under Article XX is exhaustive, and "conditional" in that the exceptions are justified only when the conditions set out in Article XX are met. Article XX applies only to measures that are inconsistent with the provisions of the GATT. It will be invoked by parties to justify its GATT-inconsistent measure. A measure fulfilling the conditions set out in Article XX would thus be allowed, despite its inconsistency with other provisions of the GATT. In terms of the sequence of steps when analyzing a claim of justification under Article XX, the Appellate Body in *US — Shrimp* clarified that a panel must first examine whether the measure can be justified under one of the specific exceptions listed in paragraphs (a) to (j); and if so, whether

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or economic emergency exceptions, normally referred to as safeguard measures, would be another type of exceptions clauses addressed in the legal text, which allow parties to maintain the relevant domestic law that pursues the policy objectives under certain conditions. *See*, *e.g.*, RCEP, *supra* note 15, ch. 7, § A; CPTPP, *supra* note 9, ch. 6.

[24] General Agreement on Tariffs and Trade [hereinafter GATT] arts. XX, XXI, Oct. 30, 1947, 55 U.N.T.S. 194.

[25] *See, e.g.*, RCEP, *supra* note 15, art. 17.12; CPTPP, *supra* note 9, art. 29.1; USMCA, *supra* note 11, art. 32.1.

[26] *See, e.g.*, RCEP, *supra* note 15, art. 17.13; CPTPP, *supra* note 9, art. 29.2.

[27] With the establishment of the World Trade Organization [hereinafter WTO], general and security exceptions were also introduced in the General Agreement on Trade in Services [hereinafter GATS]. GATS arts. XIV, XIV *bis*, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994).

[28] Appellate Body Report, *United States — Standards for Reformulated and Conventional Gasoline*, at 22, WTO Doc. WT/DS2/AB/R (adopted May 20, 1996) [hereinafter Appellate Body Report, *US — Gasoline*].

[29] Panel Report, *United States — Section 337 of the Tariff Act of 1930*, ¶ 5.9, WTO Doc. L/6439 - 36S/345 (adopted Nov. 7, 1989) [hereinafter Panel Report, *US — Section 337 Tariff Act*].

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the application of the measure meets the requirements of the chapeau.[30] Thus, a two-tier analysis under Article XX first concentrates on the measure itself and then on the application of that measure.

Specific measures addressed in paragraphs (a) to (j) do not aim to carve out specific domestic laws of the parties. Rather, these measures broadly protect policy objectives, such as public morals, health, exhaustible natural resources, and national treasures. Depending on the features and complexities of the parties' legal system in these respective areas, the number of relevant domestic laws under these policy objectives can be small or large.

Interestingly, parties must fulfil the different thresholds required for each policy objective stated in paragraphs (a) to (j).[31] For instance, some measures are "necessary" for the protection of the policy objective pursued (i.e., the protection of public health under paragraph (b)), whereas other measures need to be "related to" the policy objective pursued (i.e., the conservation of exhaustible natural resources under paragraph (g)). To date, case law on paragraphs (a), (b), (d), (g), and (j) do exist, but not with respect to the others.

The abovementioned chapeau of Article XX concerns the manner in which the measure is applied.[32] Its purpose and object are thus to prevent the "abuse" or "misuse" of the exceptions.[33] According to the Appellate Body in *US — Shrimp*, the task of interpreting and applying the chapeau is to locate a line of equilibrium between the right of members to maintain trade-restrictive measures that pursue certain policy objectives, and the right of other members to liberalize trade pursuant to the rules of the GATT.[34]

Second, the security exceptions under Article XXI of the GATT also

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[30] *See* Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, ¶¶ 118-20, WTO Doc. WT/DS58/AB/R (adopted Nov. 21, 2001) [hereinafter Appellate Body Report, *US — Shrimp*].

[31] With respect to the terms used in different paragraphs of Article XX, the Appellate Body in *US — Gasoline* stated that:

> In enumerating the various categories of governmental acts, laws or regulations which WTO Members. may carry out or promulgate in pursuit of differing legitimate state policies or interests outside the realm of trade liberalization, Article XX uses different terms in respect of different categories: "necessary" - in paragraphs (a), (b) and (d); "essential" - in paragraph (j); "relating to" - in paragraphs (c), (e) and (g); "for the protection of" - in paragraph (f); "in pursuance of" - in paragraph (h); and "involving" - in paragraph (i).

Appellate Body Report, *US — Gasoline*, *supra* note 28, at 17.

[32] The Appellate Body in *Brazil — Retreaded Tyres* stated that: "[t]he focus of the chapeau, by its express terms, is on the application of a measure already found to be inconsistent with an obligation of the GATT 1994 but falling within one of the paragraphs of Article XX." Appellate Body Report, *Brazil — Measures Affecting Imports of Retreaded Tyres*, ¶ 215, WTO Doc. WT/DS332/AB/R (adopted Dec. 17, 2007).

[33] Appellate Body Report, *US — Gasoline*, *supra* note 28, at 22.

[34] Appellate Body Report, *US — Shrimp*, *supra* note 30, ¶ 159.

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exempt parties from complying with obligations under other provisions of the GATT pursuant to national security.[35] Article XXI provides justification for the otherwise GATT-inconsistent measures under three specified situations: (a) when a member avoids the requirement to provide "any information[,] the disclosure of which it considers contrary to its essential security interest;" (b) when a member takes "any action which it considers necessary for the protection of its essential security interest;" and (c) when a member takes any action pursuant to "its obligations under the United Nations Charter for the maintenance of international peace and security." Paragraphs (a) and (c) are confined to the situations of disclosure of information affecting security interests and implementation of the United Nations Charter obligations, respectively. Hence, paragraph (b) would probably be applicable to "general" trade measures for Article XXI justification.[36] Measures to protect "essential security interests" under paragraph (b) are further specified into three sub-paragraphs, as measures: (i) relating to fissional materials; (ii) relating to the traffic in arms and in other materials for the purpose of military use; and (iii) taken in times of war or other emergencies of international relations. Unlike Article XX of the GATT, Article XXI does not have a chapeau to prevent misuse or abuse of the exceptions listed therein.

Regarding the term "action which it considers necessary" in Article XXI (b), the question arises as to whether the panel lacks jurisdiction to review a member's invocation of Article XXI (b), as it creates a member broad discretion to take national security measures that it considers necessary for the protection of its essential security interests. However, the panel in *Russia — Traffic in Transit* noted that "Article XXI (b) vest[s] in [the] panels the power to review whether the requirements of the enumerated subparagraphs

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[35] Van den Bossche and Zdouc address that there are three types of situations where national security is preferred due to the benefits of trade in international relations:

> First, States may consider it necessary to restrict trade in order to protect strategic domestic production capabilities from import competition. The judgment as to which production capabilities deserve to be qualified as strategically important differs among countries and is, to a great extent, political . . . Second, Sates may wish to use . . . trade sanctions, as an instrument of foreign policy, against other States, which either violate international law or pursue policies considered to be unacceptable or undesirable. Third, States may want to prohibit the export of arms or other products of military use to countries with which they do not have friendly relations[.]

PETER VAN DEN BOSSCHE & WERNER ZDOUC, THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION 671-72 (5th ed. 2022).

[36] With respect to paragraph (c), once the Security Council has determined the existence of any threat to the peace, breach of the peace or act of aggression, it may decide to take economic sanctions under the United Nations [hereinafter UN] Charter. All UN Members are obliged to implement such decisions. Indeed, Article XXI(c) facilitates WTO Members, that are also members to the UN, to implement their obligations under the UN Charter. U.N. Charter arts. 25, 41.

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are met, rather than leaving it to the unfettered discretion of the invoking Member."[37] Hence, Article XXI(b) does not have a "self-judging" nature.[38] Any action that falls under one of the specific security exceptions is subject to panel scrutiny and objective assessment.

In sum, Modality 3 is a familiar and universal form to any PTA negotiator. General exceptions or security exceptions clauses are all familiar topics that most PTA negotiators are accustomed to. Particularly with respect to general exceptions, Modality 3 is user-friendly with numerous WTO precedents which increases the predictability of its uses. Having numerous precedents, PTAs negotiators are able to analyze and predict the boundaries to policy autonomy to a certain extent.

D. Modality 4: Interpretative Exercise of the Adjudicatory System

Unlike other modalities, policy autonomy under Modality 4 is granted as a result of the interpretative exercise of the adjudicatory system.[39] Under Modalities 1, 2, and 3, parties take pre-emptive action to carve out their policy autonomy, either in the negotiation phase or after the conclusion of the negotiation. Modality 4 is strikingly different from other modalities in that policy autonomy is not clearly addressed in the text of the PTA, but it is granted due to the interpretative exercise of the adjudicatory system. Thus, such an exercise plays a major role in providing an opportunity for the parties to secure policy autonomy during the dispute settlement process.

The best illustration of such an instance would be the Agreement on Technical Barriers to Trade (hereinafter "TBT Agreement") chapter within the PTAs which assimilates the WTO TBT Agreement by simply stating that certain provisions of the TBT Agreement are "incorporated into and made part of [the PTA], *mutatis mutandis*."[40] The views of the WTO adjudicatory system on the TBT Agreement, thus, would be worth of attention as the TBT chapter within the PTAs will likely be interpreted and applied in the same manner as the TBT Agreement.

The WTO Appellate Body in *US — Clove Cigarettes* first introduced a "legitimate regulatory distinction" analysis to interpret the national treatment obligation under Article 2.1 of the TBT Agreement with regard to technical regulations.[41] The term "legitimate regulatory distinction" does not appear

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[37] Panel Report, *Russia — Measures Concerning Traffic in Transit*, ¶ 7.102, WTO Doc. WT/DS512/R (adopted Apr. 26, 2019).

[38] *Id*.

[39] Gabrielle Marceau, *The New TBT Jurisprudence in* US — Clove Cigarettes*, WTO* US — Tuna II*, and* US — COOL, 8(1) ASIAN J. WTO & INT'L HEALTH L. & POL'Y 1, 11-12 (2013).

[40] *See, e.g.*, CPTPP, *supra* note 9, art. 8.4; Agreement on Technical Barriers to Trade, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 120 [hereinafter TBT Agreement].

[41] Article 2.1 of the TBT Agreement reads as follows: "Members shall ensure that in respect of

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in the TBT Agreement itself; instead, it is a newly developed concept rendered by the Appellate Body. The Appellate Body observed that although the TBT Agreement does not contain a list of policy objectives for exceptions that are equivalent to Article XX under the GATT, the balance that it maintains between "the objective of trade liberalization" and "a member's policy objectives" is not all that different from the balance maintained between the national treatment obligation provided under Article III and the general exceptions provided under Article XX under the GATT.[42] And, it further argued that such a balance is to be found under Article 2.1 of the TBT Agreement "itself".[43]

In particular, the Appellate Body stated that the "treatment no less favourable" requirement of Article 2.1 prohibited both de jure and *de facto* discrimination against imported products.[44] However, in the case of *de facto* discrimination, it stated that the existence of detrimental impacts on imported products was insufficient to establish a violation of Article 2.1.[45] The Appellate Body stated that a panel must further analyse "whether the detrimental impact on imports stems exclusively from a legitimate regulatory distinction rather than reflecting discrimination against the group of imported products."[46] To determine that the detrimental impact on imports stems exclusively from a legitimate regulatory distinction, a panel must carefully examine the following: "The particular circumstances of the case, that is, the design, architecture, revealing structure, operation, and application of the technical regulation at issue, and, in particular, whether that technical regulation is

technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country."

[42] Appellate Body Report, *United States — Measures Affecting the Production and Sale of Clove Cigarettes*, ¶¶ 101, 109, WTO Doc. WT/DS406/AB/R (adopted Apr. 24, 2012) [hereinafter Appellate Body Report, *US — Clove Cigarettes*]. *See* Jonathan Carlone, *An Added Exception to the TBT Agreement After* Clove*,* Tuna II*, and* COOL, 37(1) B.C. INT'L & COMP. L. REV. 103, 128 (2014) (Arguing that the incorporation of the test under Article XX of the GATT into the analysis under Article 2.1 of the TBT Agreement, "the Appellate Body has effectively added an exception provision to the TBT Agreement."); Jason Houston-McMillan, *The Legitimate Regulatory Distinction Test: Incomplete and Inadequate for the Particular Purposes of the TBT Agreement*, 15(4) WORLD TRADE REV. 543, 559-60 (2016) (Arguing that although a finding of consistency with Article 2.1 through a "legitimate regulatory distinction" test will not yet necessitate a finding of justification under Article XX, this provides the direction that the Appellate Body is heading towards.).

[43] Appellate Body Report, *US — Clove Cigarettes*, *supra* note 42, ¶ 109.

[44] *Id.* ¶ 181.

[45] *Id.* ¶ 182.

[46] *Id.* After *US — Clove Cigarettes*, the Appellate Body has applied the "legitimate regulatory distinction" element regularly in subsequent cases in interpreting the term "treatment no less favourable" under Article 2.1 of the TBT Agreement. *See, e.g.*, Appellate Body Report, *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, ¶ 298, WTO Doc. WT/DS381/AB/R (adopted June 13, 2012) [hereinafter Appellate Body Report, *US — Tuna II*]; Appellate Body Report, *United States — Certain Country of Origin Labelling (COOL) Requirements*, ¶ 349, WTO Doc. WT/DS384/AB/R, WT/DS386/AB/R (adopted July 23, 2012) [hereinafter Appellate Body Report, *US — COOL*].

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even-handed, in order to determine whether it discriminates against the group of imported products."[47]

The Appellate Body rendered such an interpretation of Article 2.1 based on its context, object and purpose of the TBT Agreement, by relying on the sixth recital of the preamble to the TBT Agreement, "recognizing that no country should be prevented from taking measures necessary" to ensure policy objectives, including the protection of public health, the environment, and the prevention of deceptive practices, provided that these measures "are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination" or a "disguised restriction on international trade."[48]

Although the sixth recital of the preamble to the TBT Agreement uses the lukewarm term "recognize", it lists certain policy objectives clearly, such as public health and the environment that should not be prevented when carrying out technical regulations.[49] Moreover, the Appellate Body stated that the object and purpose of the TBT Agreement are to maintain a balance between "the objective of trade liberalization" and "a member's policy objectives."[50] Article 2.1 is, thus, not meant to be understood as "prohibiting any detrimental impact on competitive opportunities for imports[,] in cases where such detrimental impact on imports stems exclusively from legitimate regulatory distinctions."[51] An assessment of the term "legitimate regulatory distinction" seems to obviate the possibility of an excessively restrictive reading of Article 2.1.[52]

The Appellate Body held that the design, architecture, revealing structure, operation and application of the measure at issue (which was a ban on clove and other flavoured cigarettes, with the exemption of menthol cigarettes) strongly suggests that the detrimental impact on competitive opportunities for clove cigarettes reflects discrimination against the group of similar products that were imported from Indonesia.[53] The products prohibited under the measure were predominantly clove cigarettes imported from Indonesia; whereas the products that were allowed under the measure were menthol cigarettes manufactured in the US.[54]

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[47] Appellate Body Report, *US — Clove Cigarettes*, *supra* note 42, ¶ 182.
[48] *Id.* ¶¶ 172-73. With regard to the interpretation of the term "treatment no less favourable," the Appellate Body also observed Annex 1.1 and Article 2.2 of the TBT Agreement. *See* Appellate Body Report, *US — Clove Cigarettes*, *supra* note 42, ¶¶ 169-71. *See also* Appellate Body Report, *US — Tuna II*, *supra* note 46, ¶ 213; Appellate Body Report, *US — COOL*, *supra* note 46, ¶ 271.
[49] Simon Lester, *The WTO Seal Products Dispute: A Preview of the Key Legal Issues*, 14(2) AM. SOC'Y INT'L L. (Jan. 13, 2010), https://www.asil.org/insights/volume/14/issue/2/wto-seal-products-dispu te-preview-key-legal-issues.
[50] Appellate Body Report, *US — Clove Cigarettes*, *supra* note 42, ¶ 174.
[51] *Id.*
[52] Marceau, *supra* note 39, at 12.
[53] Appellate Body Report, *US — Clove Cigarettes*, *supra* note 42, ¶ 224.
[54] *Id.*

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As both clove and menthol cigarettes have the same product characteristics (i.e., flavours reducing the harshness of tobacco and thus appealing to young smokers), the Appellate Body held that the detrimental impact of the measure on competitive opportunities for imported clove cigarettes did not stem from a legitimate regulatory distinction.[55]

As the objective of the measure at issue is to protect public health by reducing smoking amongst the youth, the Appellate Body did not consider regulatory distinctions other than health reasons legitimate. It was not persuaded by the US's non-health ground argument such as the risk of development of a black market of menthol cigarettes.[56]

In sum, the Appellate body introduced a "legitimate regulatory distinction" analysis to allow parties to secure their policy autonomy. The Appellate Body emphasized the policy objectives listed in the preamble to the TBT Agreement and draws a boundary and scope for where the regulatory distinction may be considered. The US failed to secure its law *in casu*, but this opens a new avenue for other parties to secure their policy autonomy by successfully satisfying the legitimate regulatory distinction test.

III. THE ADOPTION OF MODALITIES

A. Comparative Advantages and Disadvantages of Each Modality

1. Comparison of Modalities 1, 2 & Modalities 3, 4 — Modalities 1 and 2 differ from Modalities 3 and 4 in that the specific name of the domestic law is reserved in the PTA text. The parties could simply examine their markets and pinpoint their laws to carve out the relevant policy autonomy. This increases the transparency and predictability of policy autonomy for both parties and readers of PTAs. Stipulating the actual name of the domestic law assures the parties that the law is completely secured for the relevant policy autonomy and the readers of the treaty could simply look at the domestic law and be able to draw its boundaries.

Unlike Modalities 1 and 2, where the parties could carve out only a select domestic laws stipulated in the text, Modalities 3 and 4 are eligible for carving out numerous domestic laws under certain conditions. As long as a number of policy objectives are listed clearly in the text and satisfy the requirements thereunder or the adjudicatory system understands regulatory distinction at issue legitimate and "policy objectives" in favor of the parties, such parties could secure a wide range of domestic laws that satisfy their policy objectives.

However, the level of predictability and transparency of policy

[55] *Id.* ¶ 225.
[56] *Id.*

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autonomy under Modalities 3 and 4 are relatively low, as the parties cannot preemptively pinpoint and carve out the law. The laws should meet the threshold required by the exception clauses or a "legitimate regulatory distinction" test.

In sum, PTA negotiators are likely to pursue Modalities 1 and 2 if they have a strong willingness to secure certain domestic laws. However, if it is not easy to identify such a law, PTA negotiators can put a common exception clause that they are familiar with under Modality 3 or expect the policy autonomy from the interpretative exercise of the adjudicatory system under Modality 4.

2. Comparison of Modalities 1 & 2 — As noted, both Modalities 1 and 2 allow the parties to secure domestic law and relevant policy autonomy with a high level of predictability and transparency. Both Modalities 1 and 2 assure the parties that the stipulated law is completely and absolutely carved out from the text. Here, Modality 2 is significantly different from Modality 1 in that it is made after the negotiation is concluded. As noted, the reservation lists to carve out a law directly in the text of PTA under Modality 1 is completed within a formal negotiation period, while a side letter under Modality 2 is made after the negotiation is completed and before the ratification of the PTAs.

In practice, many parties renegotiate the terms continuously, even after the PTAs are concluded, and finally reach an agreement during the domestic implementation through side letters. They always lack the time to complete the PTAs, and the domestic implementation phase is another opportunity to complete their agreements. Here, various informal methods allow parties to exchange letters after the conclusion of the treaty. The parties routinely use emails, conference calls, or in-person conversations, with the type that is selected often depending on the subject matter. If the matter is minor, such as clarification or updates, then an email or conference call would suffice to exchange the letter. However, if the issue is complex, in-person communication is preferred. In-person meetings can take place in various settings, such as the legal scrubbing phase or parallel negotiations of an ongoing PTA.[57]

The legal scrubbing meeting is primarily for editing the text of the PTAs, but this can be a good forum for discussing complex issues, such as renegotiating the concluded text or introducing new carve-out laws for policy autonomy. Thus, parties regard the legal scrubbing phase as an additional round of primary negotiations.[58]

In addition, Modality 2 enjoys a wider flexibility in describing the law. As stated above, Modality 1 requires the parties to put an exact name of

[57] Park, *supra* note 18, at 93.
[58] *Id*.

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domestic law in the "measure" section of the reservation.[59] In contrast, Modality 2 allows the parties to freely determine the level of specificity or legal status of domestic law. If the domestic law is not ready and is currently being reformed or revised, the letter can depict the exact status of the reform.

However, the problem of Modality 2 is that the side letter is often not publicly available for readers of the PTAs, which lowers the transparency of policy autonomy. For instance, many countries publicize and upload the main treaty texts, including the reservation lists, but do not generally upload side letters.[60] This makes it difficult for citizens to determine that their countries have made certain concessions or carve-outs. Although exchanging letters have the same legal consequences as inserting the terms into the main text, many negotiators prefer using this method to conceal the concession so that their domestic participants, including the media and interest groups, do not recognize them. For instance, if countries A and B negotiate the PTA and country B would like to carve out a culture-related law, country B might prefer to use the letter confidentially if they have not made such concessions to previous negotiating partners. Otherwise, they need to conduct a burdensome explanation to their domestic participants for such concessions.

In sum, both Modalities 1 and 2 have comparative advantages of carving out stipulated laws with absolute certainty. However, the timing and method of preparing modalities are quite different, and most of all, Modality 2 has wider flexibility in describing the laws. A PTA negotiator may prefer Modality 1 as long as the law is ready within the negotiation phase to avoid additional negotiation in the domestic implementation phase. However, if the parties fail to agree on a certain carve-out within the negotiation phase, the side letter under Modality 2 is a good option. Moreover, if the law itself is not ready yet due to reforms, Modality 2 is a good alternative to flesh out reform procedures for transparency purposes. PTA negotiators should also note that the letter may not be publicly available for certain countries

[59] For the purpose of this article, reservation lists are listed under the name of Annex I (Current Measures) which only lists up the currently existing laws. But the PTAs could include various other Annexes. For instance, Annex II (Reservations for Future Measures) sets out the economic sectors and activities where new restrictive measures can be implemented in the future, regardless of whether non-conforming measures are currently being applied. Thus, the Reservation Measures section in the reservation lists (under Annex II) is usually left blank because relevant domestic law does not exist from the period of negotiation. In practice, parties could also utilize the Annex II when they expect a new law or a current law is being reformed. So the parties should choose to write in full name of domestic laws in Annex I or leave blank in Annex II. In contrast, the letter can stand in between. For the purposes of this article, Annex I is only considered Modality 1. Strictly speaking, Annex II may not belong to Modality 1, since the specific law is not readily available during the negotiation period. However, once the law is available, the parties frequently move those laws to Annex I during the PTA renegotiation phase or a subsequent PTA negotiation for transparency purposes.

[60] The United States Trade Representative generally uploads all the ratified side letters in its website but negotiating partners of the US fail to do so. In fact, many countries do not upload their treaty themselves. For investment treaties, see Rodrigo Polanco Lazo et al., *Missing Investment Treaties*, 21(3) J. INT'L ECON. L. 703, 703 (2018).

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depending on the parties' internal policies, which reduces transparency.

3. Comparison of Modalities 3 & 4 — Unlike Modality 4, policy objectives are clearly addressed in the text under Modality 3. Article XX of the GATT, for instance, enumerates ten policy objectives to be exempted from GATT-inconsistent measures. Domestic origin-neutral measures with genuine regulatory purposes other than the listed objectives cannot be justified under Article XX. In contrast, Article 2.1 of the TBT Agreement does not express the policy objectives for such exemption which implies that technical regulations are qualified for any non-protectionist policy justification.[61] Moreover, satisfying the threshold requirements in Modality 3 seems relatively difficult compared to Modality 4. There are a number of disputes where the measures at issue were found to be provisionally justified under the subparagraphs of Article XX, but the application of the measures failed to satisfy the requirements of the chapeau of Article XX.[62]

Unlike Modalities 1 and 2, however, the parties bear a certain level of burden of proof for securing policy autonomy under both Modalities 3 and 4. Interestingly, both modalities have substantially the same rules for distribution of the burden of proof. In the context of the GATT, for example, under Modality 3, when claiming for a violation of national treatment obligations, the complaining party has to demonstrate that the measure concerned has a detrimental impact on the competitive opportunities of imported products within the relevant market, while the responding party has to demonstrate that despite the existence of such an impact and the resulting inconsistency with Article III, the challenged measure could be justified under Article XX.[63] Likewise, in the context of Article 2.1 of the TBT

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[61] Zhou argues that, as both GATT and the TBT Agreement aim to maintain a balance between trade liberalization and regulatory autonomy, it is unreasonable for "technical regulations to enjoy a much broader scope of policy space than all other types of domestic regulations." Weihuan Zhou, US — Clove Cigarettes *and* US — Tuna II (Mexico)*: Implications for the Role of Regulatory Purpose Under Article III:4 of the GATT*, 15(4) J. INT'L ECON. L. 1075, 1112 (2012). Here, it is worth mentioning again that the sixth recital of preamble of the TBT Agreement enumerates policy justification that technical regulations are entitled to. However, it is uncertain whether such enumeration is exhaustive.

[62] *See, e.g.*, Appellate Body Report, *US — Gasoline*, *supra* note 28, at 29-30; Appellate Body Report, *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products*, ¶ 5.339, WTO Doc. WT/DS400/AB/R, WT/DS401/AB/R (adopted June 18, 2014).

[63] With regard to the nature of Article XX of the GATT, the panel in *US — Section 337 Tariff Act* stated that:

> Article XX is entitled "General Exceptions" and that the central phrase in the introductory clause reads: "nothing in this Agreement shall be construed to prevent the adoption or enforcement . . . of measures . . . ." Article XX(d) thus provides for a limited and conditional exception from obligations under other provisions. The Panel therefore concluded that Article XX(d) applies only to measures inconsistent with another provision of the General Agreement, and that, consequently, the application of Section 337 has to be examined first in the light of Article III:4. If any inconsistencies with Article III:4 were found, the Panel would then examine whether they could be justified

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Agreement under Modality 4, the complaining party must demonstrate that the measure had a detrimental impact on the competitive opportunities of imported products within the relevant market. However, the responding party has to rebut that such an impact on imported products stems exclusively from a legitimate regulatory distinction if they want to claim that the challenged measure is not inconsistent with Article 2.1.[64]

In sum, Modality 3 clearly addresses policy objectives in the text whereas Modality 4 does not. Both Modalities, however, require a certain level of burden of proof, and, as mentioned earlier, the interpretation and application of exceptions under Modality 3 and an interpretative exercise of the adjudicatory system under Modality 4 would not be different from the WTO jurisprudence. Therefore, PTA negotiators would likely rely on the relevant interpretation of the WTO adjudicatory system to understand these modalities. The only concern here would be whether inexperienced panels under the PTA dispute settlement procedure provide a solid and consistent interpretation and application of the exception clauses and "legitimate regulatory distinction" as compared to the relevant interpretation and application made by the WTO adjudicatory system. Modality 4 enjoys a wider scope and coverage of policy autonomy than Modality 3, so PTA negotiators would likely prefer Modality 4 to Modality 3 in terms of having more chances to be entitled to policy justification.

B. The Complex and Difficult Nature of Selecting Modalities

Under which circumstances is a specific modality more likely to be adopted than another? This question is an empirical issue; thus, it is difficult to answer in practice because it depends on various institutional factors, such as the parties' domestic negotiation strategies, the level of expertise and experience in the PTAs, similarities of previously ratified PTAs for a smoother ratification procedure, prior experience in dispute settlement relating to exception clauses, and so forth.

The following scenario shows the complexity and difficulties that are encountered when selecting the modalities. Let us assume that a party's previously ratified PTAs have a general exception clause to carve out public

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under Article XX(d).

Panel Report, *US — Section 337 Tariff Act*, *supra* note 29, ¶ 5.9.

[64] Appellate Body Report, *US — Tuna II*, *supra* note 46, ¶ 216. It is noteworthy that both Modalities 3 and 4 may be available for the particular obligation. The WTO panel in *EU — Seal Products*, for example, not only conducted a "legitimate regulatory distinction" test under Article 2.1 of the TBT Agreement, but also examined the requirements set out under Article XX of the GATT regarding the EU's measure prohibiting the importation and marketing of seal products. Panel Report, *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products*, ¶¶ 7.171-.353, 7.618-.651, WTO Doc. WT/DS400/AB/R, WT/DS401/AB/R (adopted June 18, 2014).

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moral-related laws. It is likely that the party has an internal negotiation strategy to constantly place a general exception clause into the ongoing PTAs to avoid any inconsistencies from the previously ratified text, thus, ensuring a smoother ratification procedure; otherwise, they face the burdensome task of explaining and persuading the deviation to their legislative body.

Suppose that the party undergoes a WTO dispute settlement or other form of disputes relating to the public moral-related policy and loses the dispute due to a tribunal's unfavorable interpretation of the general exception clause. The party may then start to consider taking reservation lists or a side letter in the next PTA negotiation, to make it crystal clear that the public moral-related law is completely carved out from the PTA's text, so that they can avoid any unpredictable interpretation from the future tribunals and maintain their policy space. The fact that the party lost the dispute is useful when convincing the legislative body about why they need other carve-out instruments, such as reservation lists or side letters.

Here, the party may not completely withdraw the general exception clause under Modality 3 because it has its own merits and comparative advantages. For instance, the general exception clause leaves room for carving out a myriad of national laws related to public morals, while reservation lists or side letters can carve out a particular domestic law. Without the necessity to sort out the relevant public moral domestic law, the party could freely enact public moral-related laws, even after the ratification of the PTA, and could maintain such laws under the realm of a general exception clause as long as the tribunal's interpretation is favorable.

While Modality 3 has the above merits, the PTA negotiators may not prefer Modality 4 because adjudicatory system has a total discretion to grant the carve out. Modality 4 is strikingly different from Modality 3 in that policy autonomy is not addressed in the text of the PTA at all, but it is granted solely due to the interpretative exercise of the adjudicatory system. Therefore, the negotiators may prefer Modality 3 in this regard.

To conclude, this may not be a matter of choosing one of the two options. Instead, it may be a matter of having both or multiple models in parallel, as shown in the abovementioned scenario.[65]

In addition to the various factors mentioned above, the capacity to prepare the modality makes the problem more complicated. Even if a party finds a preferred modality, they may not have the full capacity to prepare the modality of exception. Could the party successfully examine its market and sort out the domestic law to prepare the reservation list or a side letter? This is no easy task, especially for many developing nations, due to their ongoing domestic legal reforms. Apparently, many developing nations, including

[65] Apparently, most PTAs utilize Modalities 1, 2 and 3 all at the same time. For instance, in Korea–US FTA, both parties stipulated a general exception clause in Chapter 23 and utilized side letters and reservation lists. *See* KORUS FTA, *supra* note 14, ch. 23.

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China and India, fail to sort out their domestic laws and leave empty or incomplete reservation lists in their PTA texts.[66] Due to their ongoing legal reforms, these countries face extreme difficulties when pinpointing their laws and analyzing the interaction between the law and PTA text.

In addition, even if the law is complete, limited coordination and cooperation between the negotiation team and line ministries make it difficult for a party to prepare reservation lists or side letters. Completing the reservation lists requires the negotiation team to collect requests and responses from various ministries that are responsible for the carve-out policies.[67] The problem arises when line ministries do not immediately respond to requests by the negotiation team, which delays the negotiation process. This problem occurs because the relevant ministries have their own prioritized tasks. Hence, cooperation with the negotiation team is not their first priority.

In addition to ongoing legal reforms and the failure to cooperate by the ministries, a lack of legal expertise is another significant factor that influences the choice of modality.[68] Many Asian developing countries' PTA negotiators serve only 1-2 years before leaving their positions, which is insufficient to accumulate the necessary expertise. They also frequently fail to transfer their expertise to their successors, making it difficult for the successors to grasp the dynamics of ongoing negotiations fully. Thus, using a new carve-out device may be burdensome for these countries' negotiators, who will likely withdraw such devices and find alternative modalities to use.

The third round of RCEP, held in Kuala Lumpur in 2014, is a relevant example of how certain countries lack legal expertise to draft reservation lists. During this negotiation period, Australia held an informal seminar on drafting the reservation lists, as many RCEP countries (particularly developing nations) had never drafted and concluded the reservation lists previously.[69] Specifically, the Indian negotiator did not know that the "measure" section should include laws that reflect the description section of the reservation list, for transparency purposes. She incorrectly believed that she could include any list of domestic laws in the "measure" section that

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[66] Tae Jung Park, *Missing Reservation Lists in China's International Investment Agreements*, 16(1) ASIAN J. WTO & INT'L HEALTH L. & POL'Y 99, 99 (2021).

[67] Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42(3) INT'L ORG. 427, 427 (1998).

[68] For more information on the lack of human resources in host developing countries, see Off. of the Chairman of the Grp. of 77 N.Y., *Strengthening Developing Countries' Capacity for Trade Negotiations: Matching Technical Assistance to Negotiating Capacity Constraint*s, THE GRP. OF 77 AT THE U.N., ¶¶ 20-40, http://www.g77.org/doha/Doha-BP04%20-Strengthening_Southern_trade-related_negotiating_capacity.pdf.

[69] For Round 3 of RCEP negotiation history, see *Regional Comprehensive Economic Partnership (RCEP)*, CTR. FOR WTO & ECON. INTEGRATION VIET. CHAMBER OF COM. & INDUS., https://aecvcci.vn/tin-tuc-n1781/regional-comprehensive-economic-partnership-rcep.htm (last visited May 30, 2022).

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contained any relation to the carve-out. In fact, many of India's reservation lists include a provision on India's Constitution, believing that such Constitutional provisions are somehow related to the carve-out policy. Other countries have shown similar problems. For instance, the Philippines placed a single Constitutional provision—Article XII—under its reservation list, specifically under the category of "utilization of maritime resources."[70] The reservation list in question placed a maximum limit of 40% for foreign equity on corporations, associations, or partnerships wishing to engage in deep-sea fishing agreements with the government of the Philippines, which was not stipulated under Article XII of the Constitution.[71]

Due to these dramatic inequalities in the legal expertise between and among countries when preparing reservation lists, a side letter could become a good alternative option to avoid the necessity of fulfilling the formal structures of the reservation lists.[72] The parties are no longer required to insert the domestic law that precisely matches the policy space carve-out in the "measure" section of the reservation lists. They can simply add a few paragraphs stating that they would like to carve out certain policies or laws.[73]

In sum, a party should consider the many interacting factors when deciding on modalities, and thus it is difficult to precisely determine which modalities are better. Different institutional factors and capacity levels may determine appropriate modalities in different contexts of the negotiation.

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[70] The Philippines' reservation list reads as follows:

Sector:	Fisheries
Sub-Sector:	Utilization of Marine Resource
Industry Classification:	
Type of Reservation:	National Treatment (Article 89)
Measures:	The Constitution of the Republic of the Philippines, Article XII
Description:	1. No foreign participation is allowed for small-scale utilization of marine resources in archipelagic waters, territorial sea and exclusive economic zones. 2. For deep-sea fishing, corporations, associations or partnerships with maximum 40 percent foreign equity can enter into co-production, joint venture or production sharing agreement with the Philippine Government.

[71] Article XII (National Economy and Patrimony) generally describes nationality requirements in the context of various industries. *See* CONST., (1987), art. XII (Phil.).

[72] As noted in Section III. A, Modality 2 may not completely replace Modality 1 as Modality 2 is often not publicly available for PTA readers, reducing the transparency of policy autonomy.

[73] *See generally* Park, *supra* note 18.

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IV. CONCLUSION

This article classified four modalities of securing policy autonomy in PTAs by using the three above mentioned criteria and explained the difficult nature of selecting the modalities.

It is important to note that the scope and use of the four modalities may evolve over time. Parties could start drafting letters on the complicated issue of tariff rates on trade in goods and reservation lists can be utilized in other chapter of the PTA besides services and investment chapters.[74] The dispute settlement panel may begin introducing legitimate regulatory distinction tests in various PTA chapters or establish a new test as a last resort to secure policy autonomy. Parties may also begin adding policy objectives into general exceptions or create new articles, namely 'special exceptions' instead of "general exceptions". All modifications evolve within the four modalities that were introduced. This article does not intend to suggest the best of the four modalities in terms of securing policy autonomy. Rather, we expect the introduction of typology to create a groundwork for future research and open new avenues for further discussions of these modalities in detail. This article is intended to be a useful and immediate contribution to academics and practitioners, especially PTA negotiators. It intends to illuminate this debate for a wide audience of scholars, practitioners and policymakers globally.

[74] The state-owned enterprises [hereinafter SOE] chapter in the CPTPP is the first agreement in which parties have negotiated disciplines with SOE and monopolies. Many commentators and academic literature acknowledge that the SOE chapter is concluded in PTA for the first time in history but pay little attention to the fact that reservation lists under a negative list approach are employed in the SOE chapter for the first time.

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REFERENCES

Books

Corten, Olivier & Pierre Klein (eds.) (2011), THE VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY.

Dörr, Oliver & Kirsten Schmalenbach (eds.) (2012), VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY, 1st ed.

VAN DEN BOSSCHE, PETER & WERNER ZDOUC (2022), THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION, 5th ed.

VILLIGER, MARK E. (2009), COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES.

Articles

Bolintineanu, Alexandru (1974), *Expression of Consent to Be Bound by A Treaty in the Light of the 1969 Vienna Convention*, 68(4) AMERICAN JOURNAL OF INTERNATIONAL LAW 672.

Carlone, Jonathan (2014), *An Added Exception to the TBT Agreement After* Clove*,* Tuna II*, and* COOL, 37(1) BOSTON COLLEGE INTERNATIONAL AND COMPARATIVE LAW REVIEW 103.

Delimatsis, Panagiotis (2011), *The Fragmentation of International Trade Law*, 45(1) JOURNAL OF WORLD TRADE 87.

Du, Ming Michael (2007), *Domestic Regulatory Autonomy Under the TBT Agreement: From Non-discrimination to Harmonization*, 6(2) CHINESE JOURNAL OF INTERNATIONAL LAW 269.

Du, Ming Michael (2010), *Autonomy in Setting Appropriate Level of Protection Under the WTO Law: Rhetoric or Reality?*, 13(4) JOURNAL OF INTERNATIONAL ECONOMIC LAW 1077.

Heiskanen, Veijo (2004), *The Regulatory Philosophy of International Trade Law*, 38(1) JOURNAL OF WORLD TRADE 1.

Houston-McMillan, Jason (2016), *The Legitimate Regulatory Distinction Test: Incomplete and Inadequate for the Particular Purposes of the TBT Agreement*, 15(4) WORLD TRADE REVIEW 543.

Howse, Robert (2000), *Democracy, Science, and Free Trade: Risk Regulation on Trial at the World Trade Organization*, 98(7) MICHIGAN LAW REVIEW 2329.

Marceau, Gabrielle (2013), *The New TBT Jurisprudence in* US — Clove Cigarettes*, WTO* US — Tuna II*, and* US — COOL, 8(1) ASIAN JOURNAL OF WTO & INTERNATIONAL HEALTH LAW AND POLICY 1.

Park, Tae Jung (2021), *Missing Reservation Lists in China's International Investment Agreements*, 16(1) ASIAN JOURNAL OF WTO & INTERNATIONAL HEALTH LAW AND POLICY 99.

Park, Tae Jung (2021), *The Uses and Advantages of Side Letters in the*

臺灣大學學術期刊資料庫

Investment Chapters in Preferential Trade Agreements, 12 JOURNAL OF INTERNATIONAL DISPUTE SETTLEMENT 84.

Polanco Lazo, Rodrigo et al. (2018), *Missing Investment Treaties*, 21(3) JOURNAL OF INTERNATIONAL ECONOMIC LAW 703.

Putnam, Robert D. (1998), *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42(3) INTERNATIONAL ORGANIZATION 427.

Reid, Emily (2010), *Regulatory Autonomy in the EU and WTO: Defining and Defending Its Limits*, 44(4) JOURNAL OF WORLD TRADE 877.

Suttle, Oisin (2020), *Reasons, Institutions, Authorities: Three Models of Exceptions in World Trade Organization Law*, *in* EXCEPTIONS IN INTERNATIONAL LAW 375 (Lorand Bartels & Federica Paddeu eds.).

Trebilcock, Michael & Robert Howse (1998), *Trade Liberalization and Regulatory Diversity: Reconciling Competitive Markets with Competitive Politics*, 6(1) EUROPEAN JOURNAL OF LAW AND ECONOMICS 5.

Zhou, Weihuan (2012), US — Clove Cigarettes *and* US — Tuna II (Mexico)*: Implications for the Role of Regulatory Purpose Under Article III:4 of the GATT*, 15(4) JOURNAL OF INTERNATIONAL ECONOMIC LAW 1075.

WTO Cases

Appellate Body Report, *Brazil — Measures Affecting Imports of Retreaded Tyres*, WTO Doc. WT/DS332/AB/R (adopted December 17, 2007).

Appellate Body Report, *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products*, WTO Doc. WT/DS400/AB/R, WT/DS401/AB/R (adopted June 18, 2014).

Appellate Body Report, *United States — Certain Country of Origin Labelling (COOL) Requirements*, WTO Doc. WT/DS384/AB/R, WT/DS386/AB/R (adopted July 23, 2012).

Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc. WT/DS58/AB/R (adopted November 21, 2001).

Appellate Body Report, *United States — Measures Affecting the Production and Sale of Clove Cigarettes*, WTO Doc. WT/DS406/AB/R (adopted April 24, 2012).

Appellate Body Report, *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WTO Doc. WT/DS381/AB/R (adopted June 13, 2012).

Appellate Body Report, *United States — Standards for Reformulated and Conventional Gasoline*, WTO Doc. WT/DS2/AB/R (adopted May 20, 1996).

Panel Report, *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products*, WTO Doc. WT/DS400/AB/R, WT/DS401/AB/R (adopted June 18, 2014).

臺灣大學學術期刊資料庫

Panel Report, *Russia — Measures Concerning Traffic in Transit*, WTO Doc. WT/DS512/R (adopted April 26, 2019).
Panel Report, *United States — Section 337 of the Tariff Act of 1930*, WTO Doc. L/6439 - 36S/345 (adopted November 7, 1989).

Treaties

Agreement Between the United States of America, the United Mexican States, and Canada, November 30, 2018, https://ustr.gov/trade-agreements/free-trade-agreements/united-statesmexico-canada-agreement.
Agreement on Technical Barriers to Trade, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 120.
Australia–Singapore Digital Economy Agreement, Australia-Singapore, August 6, 2020, https://www.dfat.gov.au/sites/default/files/australia-singapore-digital-economy-agreement.pdf.
Australia–Singapore Free Trade Agreement, Australia-Singapore, February 17, 2003, https://www.dfat.gov.au/sites/default/files/safta-annex-6explanatorynotes.pdf.
Comprehensive and Progressive Agreement for Trans-Pacific Partnership, March 8, 2018, https://wtocenter.vn/chuyen-de/12782-full-text-of-cptpp.
Free Trade Agreement Between the United States of America and the Republic of Korea, South Korea-United State, June 30, 2007, https://ustr.gov/sites/default/files/uploads/agreements/fta/korus/Chapter_Eleven_Investment.pdf.
General Agreement on Tariffs and Trade, October 30, 1947, 55 U.N.T.S. 194.
General Agreement on Trade in Services, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994).
Korea–Canada Free Trade Agreement, Canada-South Korea, March 11, 2014, https://fta.go.kr/webmodule/_PSD_FTA/ca/2/eng/24(1)_EN_CKFTA_Annex_I_Korea.pdf.
Regional Comprehensive Economic Partnership Agreement, November 15, 2020, https://rcepsec.org/legal-text/.
United States–Chile Free Trade Agreement, Chile-United States, June 6, 2003, https://ustr.gov/sites/default/files/uploads/agreements/fta/chile/asset_upload_file293_4024.pdf.
Vienna Convention on Law of Treaties, May 23, 1969, 8 I.L.M. 679.

U.N.-related Documents

U.N. Charter.
UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, PRESERVING FLEXIBILITY IN IIAS: THE USE OF RESERVATION, U.N. Doc.

臺灣大學學術期刊資料庫

UNCTAD/ITE/IIT/2005/8, U.N. Sales No. E.06.II.D.14 (2006).

Internet Sources

Glossary: Exchange of Letters/Notes, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/pages/overview.aspx?path=overview/glossary/page1_en.xml.

Kim, Jeong Ho, *Housing Price Hike and Price Stabilization Policy in Korea*, KDI SCHOOL OF PUBLIC POLICY AND MANAGEMENT, http://www.kdi.re.kr/upload/7837/2_3.pdf.

Lester, Simon, *The WTO Seal Products Dispute: A Preview of the Key Legal Issues*, 14(2) AMERICAN SOCIETY OF INTERNATIONAL LAW (January 13, 2010), https://www.asil.org/insights/volume/14/issue/2/wto-seal-products-dispute-preview-key-legal-issues.

Letter from Hyun Chong Kim, Minister for Trade, Repub. of Kor., to Susan C. Schwab, U.S. Trade Representative, FTA.GO.KOREA (June 30, 2007), https://fta.go.kr/webmodule/_PSD_FTA/us/doc/eng/24Services_Confirming%20Letter-from-Korea-final.pdf.

Letter from Hyun Chong Kim, Minister for Trade, Repub. of Kor., to Susan C. Schwab, U.S. Trade Representative, FTA.GO.KOREA (June 30, 2007), https://fta.go.kr/webmodule/_PSD_FTA/us/doc/eng/69ServiceEDS%20Reform-from-Korea-final.pdf.

Letter from Robert B. Zoellick, U.S. Trade Representative, to Alberto Trejos, Minister for Foreign Trade, Costa Rica, SICE (May 28, 2004), http://www.sice.oas.org/trade/cafta/caftadr_e/asset_upload_file211_3977.pdf.

Office of the Chairman of the Group of 77 New York, *Strengthening Developing Countries' Capacity for Trade Negotiations: Matching Technical Assistance to Negotiating Capacity Constraint*s, THE GROUP OF 77 AT THE UNITED NATIONS, http://www.g77.org/doha/Doha-BP04%20-Strengthening_Southern_trade-related_negotiating_capacity.pdf.

Regional Comprehensive Economic Partnership (RCEP), CENTER FOR WTO AND ECONOMIC INTEGRATION VIETNAM CHAMBER OF COMMERCE AND INDUSTRY, https://aecvcci.vn/tin-tuc-n1781/regional-comprehensive-economic-partnership-rcep.htm.

Working Paper and Other Sources

19 U.S.C. §1641(b) (Supplement V 2006).

Constitution, (1987) (Phil.).

Natens, Bregt & Jan Wouters (2014), *Regulatory Autonomy Constraints from GATS' Unconditional Obligations: The Case of the European Union* (Leuven Centre for Global Governance Studies, Working Paper No.132).

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