Dr Luke Nottage ***BCA/LLB/PhD (VUW), LLM (Kyoto)***
Professor of Comparative and Transnational Business Law
Associate Dean (International Students), Sydney Law School
Co-Director, Australian Network for Japanese Law (ANJeL)

22 June 2012

Productivity Commission
Canberra

By email:

Dear Sir/Madam

Submission on Issues Paper - Strengthening Economic Relations between Australia and New Zealand

I append my Sydney Law School Research Paper, updated October 2011 from an international economic law conference held in Wellington, which has been shortened and somewhat further updated as a chapter in a Routledge book co-edited by Prof Susy Frankel and Meredith Kolsky-Lewis at VUW. My paper deals with many topics raised by your Issues Paper, arguing that lessons from the Trans-Tasman context can be useful also for the wider Asia-Pacific region, including the need to promote economic integration that is:

1. deeper and broader (addressing matters traditionally conceived as “behind-the-border” matters not amenable to Free Trade Agreements);
2. but also ‘fairer’ (including more scope for regulatory safeguards).

My paper and Abstract are also available online as follows:

> Nottage, Luke R., Asia-Pacific Regional Architecture and Consumer Product Safety Regulation for a Post-FTA Era (October 4, 2011). Sydney Law School Research Paper No. 09/125. Available at SSRN: http://ssrn.com/abstract=1509810
>
> **Abstract:**
> Imagine a transnational regime with these institutional features:
> • Virtually free trade in goods and services, including a "mutual recognition" system whereby compliance with regulatory requirements in one jurisdiction (such as qualifications to practice law or requirements when offering securities) basically means exemption from compliance with regulations in the other jurisdiction. And for sensitive areas, such as food safety, there is a trans-national regulator.
> • Virtually free movement of capital, underpinned by private sector and

Faculty of Law
New Law Building F10
Eastern Avenue
The University of Sydney
NSW 2000 Australia

T +61 2 9351 0210
F +61 2 9351 0200
luke.nottage@sydney.edu.au
www.law.usyd.edu.au/anjel

ABN 15 211 513 464
CRICOS 00026A

governmental initiatives.
• Free movement of people, with permanent residence available to nationals from the other jurisdiction - not tied to securing employment.
• Treaties for regulatory cooperation, simple enforcement of judgments (a court ruling in one jurisdiction being treated virtually identically to a ruling of a local court), and to avoid double taxation (including a system for taxpayer-initiated arbitration among the member states).
• Government commitment to harmonising business law more widely, for example for consumer and competition law.

No, this is not necessarily the European Union (EU). These aspects characterise the Trans-Tasman framework built up between Australia and New Zealand, particularly over the last two decades. Sometimes this has been achieved through treaties (binding in international law), sometimes in softer ways (such as parallel legislation in each country), and sometimes even through unilateral abrogation of national sovereignty. Both countries are also now actively pursuing bilateral and now some regional Free Trade Agreements (FTAs), especially in the Asia-Pacific. So can these Trans-Tasman initiatives, and perhaps even some EU developments, provide a template for true “Asia Pacific Community” (beyond what Australian Prime Minister Kevin Rudd apparently has in mind) or an “East Asian Community” (as suggested by the new Japanese PM, Yukio Hatoyama)?

More generally, the Global Financial Crisis (GFC) is generating a reorientation of burgeoning Asia-Pacific production chains towards exports within the region, in conjunction with a reassessment of market liberalisation policies themselves. In light also of the limited economic benefits of bilateral and even regional Free Trade Agreements, compared to multilateral initiatives, we should be looking for ways to promote additional “free but fair” movement of capital, people, services and goods throughout our region. Collaboration in regulating consumer product safety, financial markets, environmental protection, labour standards and investment regimes are only some of many possibilities explored in this paper. A more holistic, systematic and balanced approach to negotiating true Economic Partnership Agreements (EPAs) would assist not only Australia and New Zealand, but also partner countries that are already erecting new socio-economic regional architecture.

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I hope some of these arguments and examples are useful for your project.

Luke Nottage

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Asia-Pacific Regional Architecture and Consumer Product Safety Regulation beyond Free Trade Agreements*

Dr Luke Nottage

I. Introduction: Beyond FTAs

More and more countries are entering into bilateral Free Trading Agreements (FTAs), including now throughout the Asia-Pacific region.[1] This was not such a problem when the world economy was growing, but it and the multilateral WTO regime are now in crisis. Inefficient 'trade diversion' is likely even if bilateral FTA partners begin to connect up under regional FTAs, as under the recent ASEAN-Australian-NZ Free Trade Agreement (AANZFTA). This is because greater liberalisation already achieved between bilateral FTA partners tends to be preserved under such regional agreements.[2] And burgeoning FTAs diminish the incentives for national governments to press for a new multilateral system.[3]

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* This is an edited and updated version of a paper originally presented at the NZ Centre of International Economic Law conference, 'Trade Agreements: Where Do We Go From Here?', 22-23 October 2009, Wellington; revised for the 4th Consumer Law Roundtable, 4 December 2009, Sydney Law School; longer version at http://ssrn.com/abstract=1509810. Thanks, but certainly no responsibility attributed, to participants at both events as well as Ichiro Araki, Bill Hastings, Gary Hawke, Meredith Kolsky Lewis, Chandra Long, Philomena Murray and Brett Williams. I am also grateful for research assistance from Glenn Kembrey, CAPLUS intern for 2009 at Sydney Law School, and for editorial assistance from Wan Sang Lung and Eriko Kadota.

[1] See, e.g., Masahiro Kawai and Ganeshan Wignaraja, 'Asian FTAs: Trends and Challenges' (2009) 144 *ADBI Working Paper* http://ssrn.com/abstract=1480508; Masahiro Kawai and Ganeshan Wignaraja, 'Introduction', in Masahiro Kawai and Ganeshan Wignaraja (eds), *Asia's Free Trade Agreements: How is Business Responding?* (Cheltenham: Edward Elgar Publishing, 2011), p. 3 at pp. 7-10 and 22-31; and Productivity Commission, Bilateral and Regional Trade Agreements: Research Report ['PC Report'], 13 December 2010, http://www.pc.gov.au/projects/study/trade-agreements/ pp. 49-60.

[2] In other words, bilateral liberalisation is not necessarily extended to all partners under the regional FTA. See, e.g., tariff rates in AANZFTA (via http://www.dfat.gov.au/trade/fta/asean/aanzfta/) and PC Report, pp. 67-9. This creates an incentive for trade between firms from states party to a bilateral arrangements, even where there exists a regional arrangement, even though a firm from a third state may be a more efficient supplier.

[3] Brett Williams, 'The Korea-Australia FTA: Obstacle or Building Block?', East Asia Forum, 14 April 2009, http://www.eastasiaforum.org/2009/04/14/the-korea-australia-fta-obstacle-or-building-

THE UNIVERSITY OF SYDNEY

Some therefore call for a 'crisis Round' to try to revive the system, but that seems unlikely.[4] Another impediment is that the persuasiveness of conventional economic models, and market forces as the best way to maximise socio-economic growth, are under broader threat in the wake of the Global Financial Crisis (GFC) and the world economy.[5]

We need now a fundamental reassessment of the roles and potential of FTAs, compared to other arrangements, in advancing sustainable socio-economic integration among states. One possible response is the 'back to the future' agenda proposed by Australia's Productivity Commission in its December 2010 Research Report and largely adopted by the April 2011 'Gillard Government Trade Policy Statement'.[6] Concerned about trade

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block/. Trade diversion effects may be less for smaller economies in the region, such as Australia and New Zealand, and where tariff levels are already low: Robert Scollay and Ray Trewin, 'Australia and New Zealand Bilateral CEPs/FTAs with the ASEAN countries and their Implication on the AANZFTA' (2006) (No. 05/003) *REPSF Project - Final Report*, http://www.asean.org/aadcp/repsf/docs/05, p. 25. But trade diversion can also arise unless there are uniform and transparent non-tariff measures, and this paper already reveals considerable disparities within bilateral and even regional FTA regimes. Recent business surveys in major Asian economies also already report 'competitive disadvantage' (created by competitors enjoying their own preferential access through other FTAs) to be a significant perceived problem with their home country's FTAs, although other disadvantages are greater (e.g., documentation required to benefit from their own country's FTAs) and firms report many benefits from FTAs as well. See Masahiro Kawai and Ganeshan Wignaraja, 'Main Findings and Policy Implications' in Masahiro Kawai and Ganeshan Wignaraj (eds) *Asia's Free Trade Agreements: How is Business Responding?* (Cheltenham: Edward Elgar Publishing, 2011) p. 33 at pp. 43-44.

[4] Andrew Elek, 'The Crisis and Reinventing WTO Negotiations', East Asia Forum, 15 April 2009, http://www.eastasiaforum.org/2009/04/15/the-crisis-and-reinventing-wto-negotiations/.

[5] See, e.g., my blog, Luke Nottage, 'Neoclassical and Chicago School Economics Keeps Coming to Japan(ese Law)', Japanese Law and the Asia-Pacific, 6 June 2009, http://blogs.usyd.edu.au/japaneselaw/2009/06/neoclassical_and_chicago_schoo.html, edited and updated in: Luke Nottage, 'Law, Public Policy and Economics in Japan and Australia: Reviewing Bilateral Relations and Commercial Regulation in 2009' (2009) 09/71 *Sydney Law School Research Paper* ssrn.com/abstract=1446523; John Quiggin, *Zombie Economics: How Dead Ideas Still Walk Among Us* (Princeton: Princeton University Press, 2010); Martin Feil, *The Failure of Free-Market Economics* (Melbourne: Scribe Publications, 2010); Tony Judt, *Ill Fares the Land* (London: Penguin Press, 2010); Paul Mattick, *Business as Usual: The Economic Crisis and the Failure of Capitalism* (London: Reaktion Books, 2011).

[6] PC Report; and Department of Foreign Affairs and Trade, 'Gillard Government Trade Policy Statement: Trading Our Way to More Jobs and Prosperity', http://www.dfat.gov.au/publications/trade/trading-our-way-to-more-jobs-and-prosperity.html.

diversion, domestic interest group lobbying and other inefficiencies resulting from the negotiation of bilateral and regional FTAs, this approach urges much greater emphasis on multilateral or even unilateral liberalization initiatives. It is also skeptical about attempts to build into FTAs greater protections for labour standards or environmental protection, preferring that these be dealt by governments through separate mechanisms. But this approach is can be criticized as unrealistic both by free trade advocates, given the persistent blockage in the WTO Doha Round,[7] and by those harbouring grave doubts about laissez-faire approaches to economic affairs particularly in the wake of the GFC.

A second approach involves blowing cold on FTAs as well, but also the entire free trade regime epitomized by the existing WTO system. On this view, trade agreements should not incorporate protections for workers, the environment, consumers or indigenous people because those protections instead should prevail over the economic rights promoted by trade agreements. In other words, the discourse and values of human rights simply cannot be reconciled with – and should not be subjected to – the discourse and values of economics and free trade.[8]

Yet there exists a plausible 'third way' forward. A starting point is to accept that many FTAs may indeed be sub-optimal from an narrow economic perspective, but to view that as a price to pay to secure some further expansion in 'free trade'. The next step is to consider the incorporation of more protections and safeguards into future trade agreements, or other measures to promote elements of 'fair trade' in parallel with FTAs, as involving a different trade-off. That is, even if this risks further diminishing economic gains from free trade, such innovations can help enhance the acceptability and legitimacy of FTAs or other instruments for economic integration, particularly in a post-GFC era characterized by growing concern to effect simultaneous improvements in transnational governance mechanisms.[9]

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[7] See, e.g., the dissenting opinions of Associate Commissioner Andrew Stoler, PC Report, Appendix A.

[8] Jane Kelsey, 'Will The 'Rights' Debate Derail the Trans-Pacific Partnership Agreement', paper presented at the NZ Centre of International Economic Law conference, 'Enhancing Stability in the International Economic Order', Wellington, 7-8 July 2011 (rejecting the attempted reconciliation of economic liberalization and human rights suggested by Ernst-Ulrich Petersmann, 'The WTO Constitution and Human Rights', 3 (2000) *Journal of International Economic Law* 19.)

[9] See generally, e.g., Michael Spence, *The Next Convergence: The Future of Economic Growth in a Multispeed World* (Perth: UWA Publishing, 2011) at p. 245 ('economic integration has its limits without a parallel process of building effective and legitimate supranational political institutions'). Compare also Frank Vibert, *Democracy and Dissent: The Challenge of International Rule-Making* (Cheltenham: Edward Elgar Pubishing, 2011) at pp. 12-13 (arguing that restoring the international order after the GFC by redesigning international rule-making processes does not even necessarily involve a 'trade-off': both efficiency or effectiveness *and* democracy can be adding more rules that

THE UNIVERSITY OF SYDNEY

Indeed, many economists might well agree that if politicians, government officials and an increasingly broad array of stakeholders are increasingly investing so much time and resources in negotiating various FTAs anyway, the additional marginal costs involved in agreeing on some further matters – not hitherto found within or alongside conventional FTAs – may be quite minimal. Those costs anyway could be outweighed by marginal benefits, in the form of reductions in a variety of transaction costs currently incurred in managing risks in cross-border trade and investment.[10] Legal practitioners do tend to be more aware of those costs and risks than governments and businesspeople. But they also generally recognise many values other than those reflected in cost-benefit analysis, such as participation rights or maintaining the coherence and overall integrity of a regulatory system. Such considerations provide another justification for expanding the scope of FTAs in novel ways, or for enhancing governance mechanisms alongside them.

In striving to balance free and fair trade nowadays, a rough analogy would be the ways in which the European Union (EU) has evolved so it is not just an economic community. Despite – or perhaps because of – the steady expansion of EU membership, it has addressed 'fair trade' concerns about regulatory safeguards, democratic legitimacy and accountability, alongside its original core objectives of 'free movement' in people, capital, goods and services.[11] The EU has achieved this over many decades, often by trial-and-

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entrench opportunities for dissent or organized challenge to the conventional wisdom promoted by elite policy-makers) and similarly David Kinley, *Civilising Globalisation. Human Rights and the Global Economy* (Cambridge: Cambridge University Press, 2009). For perspectives from international trade lawyers both before and after the GFC, see, e.g., Daniel Kalderimis, 'Problems of WTO Harmonization and the Virtues of Shields over Swords' (2004) 13 *Minnesota Journal of Global Trade* 305; and Debra Steger, 'The Future of the WTO: The Case for Institutional Reform' (2009) 12(4) *Journal of International Economic Law* 803.

[10] See, e.g., J J Spigelman, 'Transaction Costs and International Litigation', Supreme Court of New South Wales, http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/pages/SCO_spigelman020506 - then in (2006) 80 *Aust LJ* 35.

[11] See, e.g., Christian Joerges and Ernst-Ulrich Petersmann (eds), *Constitutionalism, Multilevel Trade Governance and Social Regulation*, (Oxford and Portland, Oregon: Hart Publishing, 2006); Grainne De Burca and Joanne Scott, *Law and New Governance in the EU and the US* (Oxford and Portland, Oregon: Hart Publishing, 2006); Simon Hix, 'Institutional Design of Regional Integration: Balancing Delegation and Representation' (2010) 64 *ADB Working Paper Series on Regional Economic Integration*, http://ideas.repec.org/s/ris/adbrei.html. More generally, national systems are effective in implementation but can be captured by venal interests, while the multilateral WTO system may less open to capture but at the cost of less effectiveness. Bilateral or regional mechanisms may offer good compromises, as suggested for example by the 'mad cow disease' debacle: Luke Nottage and Melanie Trezise, 'Mad Cows and Japanese Consumers' (2003)

error and in a variety of ways, ranging from core or additional treaties, diverse European law harmonisation measures, through to 'soft law' initiatives.

This analogy is starting to seem more plausible for the Asia-Pacific region, for three main reasons.[12] First, although our region does remain very diverse in terms of social and legal or political systems,[13] economic integration has burgeoned since the 1980s and will intensify even further as pan-Asian production networks have been forced to turn away from European and US markets, harder hit by the GFC than major Asian economies.[14] The 'diversity gap' is narrowing significantly as the EU itself expands and becomes more diverse, at least when compared to the more developed democracies of East Asia, Australia and New Zealand. The EU itself has developed various mechanisms to preserve degrees of national sovereignty and to acknowledge the interests of sub-groups within Europe. Political, economic and ideological convergence does remain higher in East Asia compared to even the expanded EU, but convergence has been growing in parallel with longer-standing economic 'regionalisation'. Even large differences can also be addressed through careful institutional design of representation in common institutions, for example, and it can also be argued that such initiatives would feed back into further convergence in Asia – as seems to have occurred in Europe.[15]

14(9) *Australian Product Liability Reporter* 125 . But see, in the Australia-US FTA context, the skeptical view of Linda Weiss, Elizabeth Thurbon and John Mathews, 'Free Trade in Mad Cows: How to Kill A Beef Industry' (2006) 60(3) *Australian Journal of International Affairs* 376.

[12] For more details, see my longer paper, Luke Nottage, 'Asia-Pacific Regional Architecture and Consumer Product Safety Regulation for a Post-FTA Era', Sydney Law School Research Paper No. 09/125, at http://ssrn.com/abstract=1509810.

[13] See, e.g., Veronica Taylor and Michael Pryles, 'The Cultures of Dispute Resolution in Asia', in Michael Pryles (ed), *Dispute Resolution in Asia* (The Hague: Kluwer Law International, 3rd ed 2006) p. 1; Vivienne Bath and Luke Nottage, 'Foreign Investment and Dispute Resolution Law and Practice in Asia: An Overview' in Vivienne Bath and Luke Nottage (eds) *Foreign Investment and Dispute Resolution Law and Practice in Asia* (London, Routledge, 2011) 1 at pp 4-14.

[14] See Peter Drysdale's report for Austrade, emphasising the importance of Japan's trade and investment links built up first in South-East Asia, then China and now increasingly in South Asia: Peter Drysdale, 'Time to Re-thing the Economic Partnership with Japan in Asia', 13 September 2009, East Asia Forum, http://www.eastasiaforum.org/2009/09/13/time-to-re-think-the-economic-partnership-with-japan-in-asia/. See also Gemma Estrada, Donghyun Park, Inwon Park and Soonchan Park, 'ASEAN's Free Trade Agreements with the People's Republic of China, Japan, and the Republic of Korea: A Qualitative and Quantitative Analysis' (2011) 75 *ADB Working Paper Series on Regional Economic Integration,* http://ideas.repec.org/s/ris/adbrei.html at p. 5.

[15] In other words, different political and other systems should not be seen simply as exogenous variables that determine scope for institutional innovations, but rather as at least partly endogenous. See Hix, 'Institutional Design of Regional Integration', especially at pp. 12-19.

THE UNIVERSITY OF SYDNEY

Secondly, the GFC has intensified debate about the pros and cons of more limited political 'regionalism' in Asia compared to other parts of the world. The then Prime Ministers of Australia and Japan have called, respectively, for a new 'Asia Pacific Community' (2008) or 'East Asian Community' (2009) that would go beyond existing regional architecture. Former PM Hatoyama was also more forthright about the potential for at least some institutional innovation based on the EU experience.[16] Former PM Kevin Rudd, now serving as Australia's Foreign Minister, argues that his own proposals continue to find resonance among regional leaders. He points to the strengthening of the 'G-20' forum for (mostly macro-) economic policy coordination, with its strong representation from Asia-Pacific states compared to the earlier 'G-7' forum. Rudd also welcomes the USA and Russia becoming members of the East Asia Summit. Nonetheless, the roles of these forums and other regional institutions or arrangements remain a major topic of discussion.[17]

Thirdly, throughout the region following the GFC, considerable distrust has re-emerged about leaving socio-economic ordering to outright market fundamentalism. Former PM Rudd consistently protested about the excesses of market fundamentalism, although for example this did not seem to directly influence the reforms to consumer protection legislation enacted in Australia over 2009-2010 – aspects of which are also likely to be followed in New Zealand.[18] Such views underpinned his electoral victory in 2007 (although a wind-back of labour market deregulation was a much higher profile issue), but also former PM Hatoyama's election victory in Japan in 2008. The latter's administration and its successor intensified measures to promote consumer rights and product safety

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[16] See Philomena Murray, 'Regionalism and Community: Australia's Options in the Asia-Pacific', 23 November 2010, http://www.aspi.org.au/publications/publication_details.aspx?ContentID=273&pubtype=; and generally East Asia Forum, Asia Pacific Community, http://www.eastasiaforum.org/tag/asia-pacific-community/.

[17] Daniel Flitton, 'My Dream of Asia is Here Now, says Rudd', Sun-Herald, 24 July 2011, http://www.smh.com.au/world/my-dream-of-asia-is-here-now-says-rudd-20110723-1hu3i.html. For a helpful historical and comparative overview of existing and emerging regional economic institutions, see Christopher Dent, 'Organizing the Wider East Asia Region' (2010) 62 *ADB Working Paper Series on Regional Economic Integration* via http://ideas.repec.org/s/ris/adbrei.html.

[18] Luke Nottage, '"Pain on the Road to Recovery" – So What, For Consumer (Credit) Law Reform for Australia (and Beyond)'?, East Asia Forum, 28 July 2009, http://www.eastasiaforum.org/2009/07/28/pain-on-the-road-to-recovery-so-what-for-consumer-credit-law-reform-for-australia-and-beyond/ updated in: 'Law, Public Policy and Economics in Japan and Australia: Reviewing Bilateral Relations and Commercial Regulation in 2009' (2010) 27(1) *Ritsumeikan University Law Review* 1, http://ssrn.com/abstract=1446523.

THE UNIVERSITY OF SYDNEY

regulation, while continuing to actively promote both the WTO system and bilateral or regional FTAs.[19]

More generally, the former EU Commissioner and now WTO Director-General, Pascal Lamy, has long pointed out that both East Asia and the EU share an appreciation not only of diversity, but also the need to balance free markets with other social and political values.[20] This approach is most obvious and expressly stated within the foundational documents and actual practices of ASEAN, the 'Association of South East Asian Nations' established in 1967 and formalized by a Charter in 2003. It is reflected, for example, in the 'regionalized governance' approach of the ASEAN Comprehensive Investment Agreement signed in 2009.[21] Alongside a commitment to establish an 'ASEAN Economic Community' by 2015 involving liberalization of capital, goods and services, and (skilled) labour – albeit at differential rates for member states – ASEAN has also established a human rights mechanism to promote its 'political' and 'socio-economic' community aspects pursuant to the Charter.[22] With ASEAN as one catalyst, a similar hybrid or multi-

[19] Luke Nottage, 'The New DPJ Government in Japan: Implications for Law Reform', Japanese Law and the Asia-Pacific, 1 September 2009, http://blogs.usyd.edu.au/japaneselaw/2009/09/the_new_dpj_government.html (with many Comments from others), and more specifically Luke Nottage and Michelle Tan, 'Lessons for Australia – How (Japan and) Other Countries Are Dealing with Current Consumer Issues', Japanese Law and the Asia-Pacific, 2 September 2009, http://blogs.usyd.edu.au/japaneselaw/2009/09/lessons_for_australia.html updated in ibid.

[20] Philomenia Murray, 'Towards a Research Agenda on the European Union as a Model of Regional Integration' (2004) 2(1) *Asia-Pacific Journal of EU Studies* 33 p. 44 (referring to Lamy's discussion of the 'European social model' in 2001, echoed a year later by then Commission President Prodi). See also more generally Philomena Murray 'Europe and Asia: Two Regions in Flux?' in P Murray (ed), *Europe and Asia: Regions in Flux* (Basingstoke [England]; New York: Palgrave Macmillan, 2007) p. 1.

[21] See, e.g., Lawan Thanadsillapakul, 'Legal and Institutional Frameworks for Open Regionalism in Asia: A Case Study of ASEAN' in Tamio Nakamura (ed) *East Asian Regionalism From a Legal Perspective* (London: Routledge, 2009) p. 125; and Zewei Zhong, 'The ASEAN Comprehensive Investment Agreement: Realizing a Regional Community' 6(1) *Asian Journal of Comparative Law* 1 (showing, for example, how this Agreement integrates investment and non-investment objectives – in contrast to the 'multilateralized protection' approach to investment agreements that prioritises investment-related objectives).

[22] Compare, e.g., Hal Hill and Jayant Menon, 'ASEAN Economic Integration: Features, Fulfillments, Failures and the Future' (2010) 69 *ADB Working Paper Series on Regional Economic Integration,* http://ideas.repec.org/s/ris/adbrei.html; with Ben Saul et al, 'Human Rights Cooperation in the Asia-Pacific: Demythologising Regional Exceptionalism by Learning from the Americas, Europe and Africa' in Hitoshi Nasu and Ben Saul (eds) *Human Rights in the Asia-Pacific: Toward Institution-Building* (London: Routledge, 2011). ASEAN's new human rights

track approach to enhancing regional integration may well emerge in North-East Asia as well, with over four times the economic scope of South-East Asia but traditionally a greater 'organization gap' in terms of formal inter-state . China itself has combined economic liberalisation with distinctly socialist socio-political ideology, while developing increasingly strong and varied 'transgovernmentalist' links alongside burgeoning economic relations with Korea and Japan.[23]

This chapter therefore outlines some possibilities for deeper and broader economic integration in the Asia-Pacific that simultaneously incorporates regulatory safeguards and other governance mechanisms aimed at meeting the new expectations about sustainability and legitimacy characterizing our brave new 'post-GFC' world. These innovations may be built into FTAs or negotiated out alongside them, but this needs to be done in a more concerted and comprehensive manner. The EU can provide important pointers even though it cannot offer a precise 'model', and despite the fact that Europe is itself facing another round of serious economic and governance problems in 2011.[24] Asian (and indeed Australian) leaders and commentators have traditionally been reluctant to compare and examine developments in European integration; but this attitude has been diminishing in recent years, as illustrated by the ASEAN initiatives and proposals for an Asia-Pacific or East Asian Community.[25]

Particularly suggestive are integration mechanisms that involve greater 'inter-governmentalism', rather than the 'supranationalism' associated with the EU nowadays, as the former permits more scope to preserve the national sovereignty interests long emphasised in the Asian region.[26] Interestingly, in the Trans-Tasman context discussed

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mechanism remains comparatively weak, yet it represents a path-breaking initiative for an organization traditionally loath to interfere in member states' 'internal politics'. This development illustrates the emergence of strengthened governance mechanisms alongside economic liberalization even in the Asian region.

[23] On the latter phenomenon, during the recent 'critical juncture' prompted especially by the Asian Financial Crisis of 1997, see especially Kent Calder and Min Ye, *The Making of Northeast Asia* (Stanford: Stanford University Press, 2010).

[24] Murray, 'Regionalism and Community', p. 20; and Murray, 'Towards a Research Agenda'.

[25] Compare, e.g., Murray, 'Europe and Asia'; with Tamio Nakamura (ed) *East Asian Regionalism From a Legal Perspective* (London: Routledge, 2009).

[26] See, e.g., Richard Baldwin, 'Sequencing Regionalism: Theory, European Practice, and Lessons for Asia' (2011) 80 *ADB Working Paper Series on Regional Economic Integration,* http://ideas.repec.org/s/ris/adbrei.html (showing how the more supranationalist EU regime gradually overtook the inter-governmentalist European Free Trade Agreement (EFTA) scheme, and comparing developments in Asia); and Hix, 'Institutional Design of Regional Integration' (showing how voting rules developed in the EU, and can be extended to other international decision-making bodies, to preserve fair representation while delegating powers to such bodies,

further below, free movement in goods, services and capital has been promoted by FTAs, but additional economic integration between Australia and New Zealand has been achieved through mutual recognition regimes and arrangements for the free movement of people that rely on an even softer inter-governmentalist mechanism – parallel legislation in both countries. These and other aspects of this bilateral relationship may well come to influence other Asia-Pacific states,[27] by illustrating alternative pathways towards more sustainable economic integration that could seem less threatening to 'Euro-skeptics' in this region.

Part II below therefore explains existing and potential options for promoting 'free but fair' movements of capital, people and services in the Asia-Pacific region, including a focus on recent relations between Australia and New Zealand. Part III addresses free movement of consumer goods combined with 'fair' safety regulation: the WTO backdrop, the European approach, and some Trans-Tasman and Asia-Pacific developments.[28] Part IV concludes that such initiatives to marry liberalisation with contemporary public interest concerns are essential to sustainable development in the Asia-Pacific region – and hence, potentially, to reinvigorating the multilateral order.

II. Free but Fair Movement of Capital, People and Services

Measures to facilitate free movement of capital and people per se, as opposed to services more generally, are not covered extensively by the WTO regime itself. However, all these matters are increasingly being folded into FTAs or can emerge alongside or out of them, although states need to respond to growing citizen concern that diverse public interests are reflected in these treaty regimes.

II.A Investment Treaties

Bilateral Investment Treaties (BITs), for example, are already increasingly being transformed into Investment Chapters within FTAs.[29] On a preferential basis, going

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and noting the recent shift away from consensus voting even within the Chiang Mai Initiative on currency swaps).

[27] Compare generally, e.g., Shintaro Hamanaka 'Institutional Parameters of a Region-Wide Economic Agreement in Asia: Examination of the Trans-Pacific Partnership and ASEAN+ FTA Approaches' (2010) 67 *ADB Working Paper Series on Regional Economic Integration*, http://ideas.repec.org/s/ris/adbrei.html.

[28] See also, e.g., Emily Reid, 'Regulatory Autonomy in the EU and WTO: Defining and Defending Its Limits' (2010) 44 *Journal of World Trade* 877.

[29] This field is the subject of an even larger international conference, held at Sydney Law School over 19-20 February 2010: 'International Investment Treaty Law and Arbitration Conference', Sydney Law School,

THE UNIVERSITY OF SYDNEY

beyond commitments that may be more widely available under the WTO's General Agreement on Trade in Services (GATS), these Investment Chapters often introduce substantive liberalisations (for example, better access to certain sectors for foreign investors from FTA partner states, or higher investment thresholds before their investments need to be approved or reviewed). Investment Chapters also fold in substantive protections (such as the host state's obligations to extend 'fair and equitable treatment' and not to expropriate without adequate compensation), traditionally derived instead from separate BITs.

In addition, Investment Chapters (and BITs) increasingly provide for consent by the host state to direct arbitration claims by foreign investors, instead of them having to ask their home states to attempt a 'diplomatic protection' claim against the host state for interfering with the foreign investment. For many years, but highlighted in 2008 by its FTA with New Zealand, China has negotiated such full investor-state arbitration provisions in its treaties.[30]

This development creates some actual or potential backlashes. For example, one logical consequence of greater constraint on host state discretion once the foreign investment has been allowed in, due to the higher risk of being subjected to claims directly by foreign investors, is that host states will scrutinise more carefully the investment in the first place. Treaties often preserve, for example, broad discretion for rejecting foreign investments (prior to entry or establishment) on 'national interest' grounds. We may already be witnessing greater invocation of such sovereign powers, for example in 2009 by Australia vis-à-vis China (although they are still negotiating an FTA and their existing BIT does not provide for investor-state arbitration). The risk then is that the home state will 'retaliate' after its investors are rebuffed, to send a message that it disapproves of such exercise of host state discretion. It might rebuff potential investors from the other state by invoking the same type of reserved discretion (direct 'tit-for-tat'). Alternatively, it might find some other means to 'punish' the other state. That remains one possible interpretation of China's detention of Stern Hu, an Australian citizen, after Chinese investors failed in bids for Rio Tinto and OZ Minerals earlier in 2009.[31]

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http://www.usyd.edu.au/news/law/457.html?eventcategoryid=37&eventid=4307. See also Part II.C below on possible overlaps between investment and services chapters in FTAs.

[30] Indeed, some arbitrators are now (re)interpreting Chinese investment treaties from an earlier era as allowing arbitration not only of the quantum of compensation, but also the fact of expropriation. See Luke Nottage and Romesh Weeramantry, 'Investment Arbitration for Japan and Asia: Five Perspectives on Law and Practice' (2009) 21 *Sydney Centre for International Law Working Paper* http://www.law.usyd.edu.au/scil/pdf/2009/SCILWP21_NottageWeeramantry.pdf .

[31] Luke Nottage, 'China, National Security, and Investment Treaties', Japanese Law and the Asia-Pacific, 24 July 2009, http://blogs.usyd.edu.au/japaneselaw/2009/07/china_national_security_and_in.html; and more

THE UNIVERSITY OF SYDNEY

One way to avoid such escalation would be to elaborate criteria for 'national interest' and entrench them through FTAs. Yet states traditionally guard their discretion jealously in this respect, partly for domestic political reasons.[32] Particularly in the aftermath of the GFC, pressures have re-emerged to fend off foreign investors.[33] New Zealand's amendment in 2008 to its FDI legislation added extra criteria for 'public interest', but to thwart a Canadian pension fund's bid for Auckland Airport.[34] Yet for most countries the overall long-term trajectory is likely to remain competition for FDI, albeit in more healthy and balanced form. A compromise may be restrictions on 'national interest' discretion extended on a bilateral basis, to preserve broader long-term relations. And regional FTAs containing such clearer criteria may allow those member states not party to a bilateral dispute to intervene at least informally, defusing tensions to preserve overall mutual benefits.[35]

A second backlash is evident in growing concerns about investor-state arbitration provisions themselves, particularly among South American countries but also in Africa, and even now in Australia.[36] Again, a new generation of investment treaties will probably

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generally Vivienne Bath, 'China, International Business and the Criminal Law', *Asian-Pacific Law and Policy Journal,* forthcoming.

[32]Christopher Pokarier, 'Open to Being Closed? Foreign Control and Adaptive Efficiency in Japanese Corporate Governance', in Luke Nottage, Leon Wolff and Kent Anderson (eds), *Corporate Governance in the 21st Century: Japan's Gradual Transformation* (Cheltenham: Edward Elgar Publishing, 2008) p. 197.

[33] See, e.g., United Nations Conference on Trade and Development, *Investment Policy Development in G-20 Countries*, http://www.unctad.org/Templates/Download.asp?docid=11749&lang=1&intItemID=2983.

[34] Daniel Kalderimis, 'Changes to Australia's and New Zealand's Overseas Investment Regimes', Chapman Tripp, 16 August 2009, http://www.chapmantripp.com/Pages/Publication.aspx?ItemID=619.

[35] Some guidance may emerge from a joint APEC-UNCTAD 'Study of the Core Elements in Existing RTAs/FTAs and Bilateral Trade Agreements' underway in 2009 by the APEC Investment Experts' Group: APEC, 'Investment Experts' Group', http://apec.org/Groups/Committee-on-Trade-and-Investment/Investment-Experts-Group.aspx. However, most treaties retain broad provisions which, furthermore, apply mostly to the post-establishment phase. Similarly, at a multilateral level, the OECD Council's Recommendation on 'Guidelines for Recipient Country Investment Policies Relating to National Security' (adopted on 25 May 2009) deal very broadly with non-discrimination, transparency, regulatory proportionality, and accountability or oversight possibilities. See OECD, 'Guidelines for Recipient Country Investment Policies Relating to National Security', http://www.oecd.org/dataoecd/11/35/43384486.pdf.

[36] See Laurence Boulle, 'Developing Counties, BITs and ICSID Arbitration: Views from Africa' (2009) *Paper presented at the NZCIEL conference, "Trade Agreements: Where Do We Go From*

THE UNIVERSITY OF SYDNEY

need to recalibrate the balance between foreign investors and host states, to reflect contemporary trends and conceptions concerning the public interests involved. One way to achieve this is through provisions negotiated in each treaty, as in the 2008 Australia-Chile FTA.[37] But another option is for arbitral institutions (in the relevant countries but also potentially further afield, for example, the International Chamber of Commerce) to elaborate more balanced Investment Arbitration Rules, and then get states to include them in treaties as at least one more option for foreign investors to invoke when claiming against the host state. At a micro-level, one major attraction would be the expectation of fewer disputes when the foreign investor seeks execution of the arbitral award. At the macro-level, such Investment Arbitration Rules would offer quite harmonised sets of up-to-date provisions tailored to the needs and expectations of a broader range of stakeholders.[38]

Beyond the FTA or BIT itself, through side agreements it may also be possible to address specific contemporary concerns, such as restrictions on arguably legitimate environmental protection measures imposed by host states that might impact on foreign investors and hence generate arbitration claims. Similar side agreements might also be developed to enhance consumer protection and public health measures.

Already, the North American Commission for Environmental Cooperation (NACEC), established alongside the North American Free Trade Agreement (NAFTA) among Canada, Mexico and the US, points the way to resolving such tensions in the field of environmental protection. Admittedly, the NACEC does not protect domestic environmental laws from all challenges under NAFTA and its Investment Chapter. However, it includes mechanisms encouraging effective enforcement of domestic laws, at a time when nations remain reluctant to allow international institutions to scrutinise such regimes. As one analysis concludes:[39]

Here?", Wellington, 22-23 October 2009; and Luke Nottage, 'The Rise and Possible Fall of Investor-State Arbitration in Asia: A Skeptic's View of Australia's "Gillard Government Trade Policy Statement"' (2011) *Transnational Dispute Management*, forthcoming: http://ssrn.com/abstract=1860505.

[37] For example, the Annex on Expropriation (10-B) states that: "Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute indirect expropriations" (Art 3(b)). More generally, see Suzanne Spears, 'The Quest for Policy Space in a New Generation of International Investment Agreements' (2010) 13 *Journal of International Economic Law* 1037.

[38] Luke Nottage and Kate Miles, ''Back to the Future' for Investor-State Arbitrations: Revising Rules in Australia and Japan for Public Interests' (2009) 26(1) *Journal of International Arbitration* 25.

[39] David L. Markell and John H. Knox, 'The Innovative North American Commission for

THE UNIVERSITY OF SYDNEY

> The NACEC establishes the first regional environmental organisation in North America and gives it interesting, innovative mandates; it addresses environmental issues related to economic integration in more detail than any other agreement outside the European Union; and it provides new opportunities for direct public participation in its implementation. In all of these respects, the NAAEC offers lessons for other countries seeking to address shared environmental problems against a backlog of increasing economic integration – which is to say, all countries.

The NACEC has already been used as a model for bilateral agreements between Canada and Chile and between Jordan and the US, as well as a regional agreement among the US and Central American states.

Regrettably, however, Australasia so far has lacked even this sort of first step towards a new institutionalised solution for balancing foreign investment with evolving environmental concerns. A Commission was not included in the Australia-US FTA concluded in 2004, for example. The need may have been less because both countries enforce their respective environmental laws reasonably well, compared to developing countries, and because trans-border pollution issues are minimal simply due to geography. But some features of the NACEC, such as resources to initiate reviews and monitoring or NGO participation rights, could have been usefully institutionalised even in this bilateral relationship.[40]

A much softer regional framework was created through an Environment Cooperation Agreement ('ECA') in conjunction with the Trans-Pacific Strategic Economic Partnership agreement (the 'TPPA' or 'P4' FTA, signed in 2005 by New Zealand, Singapore, Brunei and Chile), although this FTA does not yet include an Investment Chapter.[41] The side-agreement was included consistently with the 'Framework for Integrating Environment

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Environmental Cooperation' (2003) 91 *Florida State University College of Law Public Law and Legal Theory Working Paper*, http://ssrn.com/paper=453180 <http://ssrn.com/paper=453180 at p. 13.

[40] See Rebecca Connelly, 'Is There a Need for a Commission on Environmental Cooperation for Managing AUSFTA?' (2005) 22 *Environmental and Planning Law Journal* 409. The limited Chapter 19 of the AUSFTA is supplemented by a further 'joint statement on environmental cooperation' (at http://www.environment.gov.au/about/international/publications/statement.html), which is also couched in general terms although it does refer e.g. to considering 'bilateral collaborative efforts to assist third countries build capacity'.

[41] Available via New Zealand Ministry of Foreign Affairs & Trade, 'Trans-Pacific Strategic Economic Partnership Agreement', http://www.mfat.govt.nz/Trade-and-Economic-Relations/2-Trade-Relationships-and-Agreements/Trans-Pacific/4-P4-Text-of-Agreement.php

THE UNIVERSITY OF SYDNEY

Issues into Free Trade Agreements' announced by the New Zealand government in 2001.[42] Australia will come under pressure to commit to such a side-agreement now that it is negotiating to join the TPPA – along with the US, Malaysia, Peru and possibly Japan.[43] That renegotiation allows scope for further regional institutionalisation of environmental protection policy, along the lines of the NACEC.

In the context of the AANZFTA and Australia's relationship with ASEAN, two Parliamentary Committees in Australia recommended in June 2009 that the government pursue environmental protection objectives within its FTAs.[44] The Productivity Commission's December 2010 report to the Australian Treasurer on future policy directions regarding FTAs recommending 'a cautious approach to referencing core labour standards' in trade (and investment) agreements, adopting reasoning that suggested that the Commission was also reluctant to see environmental protections built into future FTAs.[45] Yet the April 2011 Gillard Government Trade Policy Statement agreed with the Commission's Recommendation 4(a) to the extent 'consistent with [the] approach articulated in the Statement'. The latter noted that it was continuing FTA negotiations involving Korea, Malaysia and the TPPA 'where the inclusion of labour and environment provisions is under active consideration', suggesting that the present Australian government is open to their inclusion provided they do not 'constitute disguised protectionism'.[46]

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[42] See New Zealand Ministry of Foreign Affairs & Trade, 'New Zealand and the World Trade Organisation', http://www.mfat.govt.nz/Trade-and-Economic-Relations/NZ-and-the-WTO/Trade-Issues/0-environment-framework.php. See also, in the NZ-China FTA, the inclusion (apparently, at the final stages of negotiation) of loose commitments on sustainable development: see the Preamble, available via New Zealand Ministry of Foreign Affairs & Trade, 'New Zealand China Free Trade Agreement', http://chinafta.govt.nz/1-The-agreement/2-Text-of-the-agreement/index.php.

[43] See generally Hamanaka, 'Institutional Parameters'; and East Asia Forum, Trans-Pacific Partnership, http://www.eastasiaforum.org/tag/trans-pacific-partnership/.

[44] See David Brightling and Jo Feldman, 'Environment Chapters and Trade Agreements: A Passing Fad or Here to Stay?', *Paper presented at the NZCIER conference, "Trade Agreements: Where Do We Go From Here?", Wellington, 22-23 October 2009* (contrasting the EU and the US). But they go on to review the quite limited types of provisions found in all US FTAs (without examining, however, the NAFTA side agreement creating the NACEC) and suggest that separate multilateral environmental agreements remain the best way forward.

[45] PC Report, chapter 14.3.

[46] See Department of Foreign Affairs and Trade, 'Gillard Government Trade Policy Statement', http://www.dfat.gov.au/publications/trade/trading-our-way-to-more-jobs-and-prosperity.html#non-trade.

Unfortunately, the impetus and opportunity for Australia to incorporate even the softer mechanisms for inter-governmental cooperation in setting or reviewing environmental and public health protection measures is diminished by its recent policy shift regarding investor-state arbitration. The Productivity Commission had recommended that future FTAs not include such provisions if they would afford foreign investors greater rights than local investors. This left some scope to tailor and cap provisions so they could still be included in FTAs with developing countries that provided only low levels of protection to Australian investors, and the one reading of the Trade Policy Statement also seemed to allow for this policy. But recent indications are that the Gillard Government, subjected in June 2011 to its first-ever claim under an investment treaty (brought by the Hong Kong subsidiary of a tobacco company), wishes to exclude investor-state arbitration in all future treaties.[47] A more balanced approach could have included, in future treaties, express exclusions for genuine public health measures adopted by the host state and/or mechanisms for joint standard-setting, along the lines of NACEC in the field of environmental protection. It may emerge given the strong push by countries like the US to include investor-state arbitration provisions in the TPPA, or if the Gillard Government loses power and a new regime reverts to Australia's longstanding policy of including such provisions at least in treaties with developing countries.[48]

II.B Movement of People

As for free movement of people in our region, developments have been much slower and more uneven compared to free movement of capital or trade in goods and services. In particular, Australia and New Zealand have been pioneers in many respects:[49]

> There is a long history of arrangements, collectively known as the Trans-Tasman Travel Arrangement (TTTA), which allow New Zealand citizens to enter, reside and work in Australia, and Australian permanent residents to receive reciprocal access to New Zealand. These arrangements have been supplemented by the Social Security Agreement, the Reciprocal Health Agreement and the Child Support Agreement.

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[47] Nottage, 'The Rise and Possible Fall of Investor-State Arbitration in Asia'; Luke Nottage 'Consumer Product Safety Regulation and Investor-State Arbitration Policy and Practice after *Philip Morris Asia v Australia*' (2011) 22(1-2) *Australian Product Liability Reporter* pp. 154-8.

[48] See generally Mark Mangan 'Australia's Investment Treaty Program and Investor-State Arbitration' in Luke Nottage and Richard Garnett (eds) *International Arbitration in Australia* (Sydney: Federation Press, 2010) p. 191. The only investment treaties where Australia had excluded such full arbitration provisions were in those with China (in force from 1988), the US (2005), and New Zealand (AANZFTA, 2010; and the CER Investment Protocol signed on 16 February 2011).

[49] See http://www.mfat.govt.nz/Foreign-Relations/Australia/1-CER/index.php.

THE UNIVERSITY OF SYDNEY

More recently, for example, Australia and Japan have also concluded a Social Security Agreement (in 2007).[50] Experience in other regions show how important such arrangements are to promote cross-border mobility, even with FTAs or other agreements exist aimed at liberalising labour market access. Even within the EU, for example, labour mobility has remained comparatively low, despite treaty-based freedom of movement including rights of residence. But the EU has been promoting various policies to improve the situation particularly since the mid-1990s. Part of the problem recognised in Europe has been with portability of social security, health benefits and supplementary pensions.[51] Another impediment has been recognition of qualifications. Only a few occupations (architects and various health care professionals) gain automatic recognition; workers in others have to apply to the host country to assess the equivalence of their qualifications.[52] Interestingly, the Trans-Tasman Mutual Recognition Arrangement (TTMRA) is *more* ambitious, declaring mechanisms for all occupations to be equivalent so as to 'sort out the problems after the event'.[53]

By contrast, like the WTO's General Agreement on Trade in Services (GATS), conventional FTAs themselves generally commit to very limited liberalisation regarding foreigners being able to provide services in the other jurisdiction(s). There are even fewer binding commitments to promote deeper integration through recognition of qualifications. Out of 25 East Asian FTAs signed by January 2007, for example, mutual recognition was only given within ASEAN (engineers and nurses, subject to minimum qualification requirements), under the Korea-Singapore FTA (engineers qualified from 20 Korean universities or two Singaporean universities), and the Singapore-US FTA (for graduates of four US law schools, if Singaporean citizens or permanent residents). Under China's agreements with Hong Kong and Macau, the latter's permanent residents can sit the mainland's qualifying exams for law and health care.[54]

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[50] See Department of Foreign Affairs and Trade, 'Japan Country Brief', http://www.dfat.gov.au/GEO/japan/japan_brief.html.

[51] Chandra Shah and Michael Long, 'Labour Mobility and Mutual Recognition of Skills and Qualifications:The European Union and Australia/New Zealand' in Rupert Maclean and David Wilson (eds), *International Handbook of Education for the Changing World of Work* (Dordrecht: Springer, 2009) p. 2935.

[52] Chandra Shah and Michael Long, 'Global labour mobility and mutual recognition of skills and qualifications: European Union and Australia/New Zealand perspectives' (2004) 56 *Working Paper, Monash University*, http://www.education.monash.edu.au/centres/ceet/docs/workingpapers/WP56oct04shah.pdf .

[53] Shah and Long, 'Labour Mobility and Mutual Recognition', p. 2948.

[54] Carsten Fink and Martín Molinuevo, 'East Asian Free Trade Agreements in Services: Key Architectural Elements' (2008) 11(2) *Journal of International Economic Law* 263 at pp. 304-5.

THE UNIVERSITY OF SYDNEY

As well as such exceptional provisions in some cross-border arrangements in Asia, some limited immigration-related measures have already been included in the 2005 Japan-Philippines Economic Partnership Agreement ('JPEPA'). They aim especially to facilitate access by Filipino nurses and caregivers to Japan's burgeoning aged-care sector.[55] Nurses will need six months' Japanese language training, for example, and have three years to pass a government exam during employment. Article 103 requires adherence to listed 'internationally recognised labor rights', which even seems to commit Japan to adhere to two core conventions (Nos 29 and 111) of the International Labour Organization (ILO) that the country (unlike the Philippines) has not yet ratified.[56]

Initiatives like those found in JPEPA point the way for other states to build in labour law or human rights protections that may go beyond international (ILO or UN) obligations, which even developed countries may be unwilling to assume on a multilateral basis. The JPEPA provisions were apparently included at the insistence of the Philippines, an interesting development given that it has often been the developed country partners to FTAs which press for labour protections. For example, NAFTA ushered in another side-agreement on labour protections, primarily at the insistence of trade unions in the US (and Canada) concerned primarily about production capacity relocating to Mexico and enjoying low-cost advantages due to reduced labour standards there.[57] If other regional FTAs liberalise labour mobility, as well as movement of capital, goods and services, pressure for labour protections may well emerge from both developing and developed country partners, albeit for different reasons. US union representatives are already pressing their government to include in the TPPA a stronger labour agreement than the P4's 'Memorandum of Understanding on Labour Cooperation'.[58]

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[55] See, e.g., Akira Kotera, 'Economic Partnership Agreements and the "East Asian Community" - The Meaning of the Japan-Philippines EPA', RIETI, 8 February 2005, http://www.rieti.go.jp/en/columns/a01_0160.html; cf. Jeremaiah M. Opiniano, 'Recruiters Seek Relaxed Immigration Law in RP-Japan Trade Deal', Philippines Today, 11 June 2007, http://www.philippinestoday.net/index.php?module=article&view=696.

[56] Antonio Formacion, 'Philippines and Japan: Moving Forward with an Economic Partnership Agreement - A Legal Analysis on Labor Standards' (2008) *Faculty of Law, Kyushu University, Working Paper* http://asia.kyushu, pp. 31-33.

[57] See Lance Compa, 'NAFTA's Labour Side Agreement and International Labour Solidarity' in Peter Waterman and Jane Wills (eds), *Place, Space and the New Labour Internationalisms* (Oxford and Malden, Massachusetts: Blackwell Publishers, 2001), http://digitalcommons.ilr.cornell.edu/articles/175/ and more generally Karen Bravo, 'Regional Trade Agreements and Labor Liberalization: (Lost) Opportunities for Experimentation?' (2008) 29 *Saint Louis University Public Law Review* http://ssrn.com/abstract=1224306 .

[58] Deborah Kay Elms, 'Trade Expansion in a Time of Economic Crisis? Following the Trans-Pacific Partnership Talks' (2009) *Paper presented at the NZCIER conference, "Trade Agreements: Where Do We Go From Here?", Wellington, 22-23 October 2009*, p. 21; Lori Wallach & Todd

Already, immigration from the Philippines and other South-East Asian countries into Japan has highlighted broader problems with the latter's Nationality Law. That had to be revised after the Supreme Court ruled in 2008 that certain aspects were unconstitutional in light of the rights of children from certain mixed marriages. There remains another inconsistency in the Nationality Law, which could be remedied by extending dual nationality to children of other types of mixed marriages. But this inconsistency may not be unconstitutional, so purely legal arguments are unlikely to prompt an amendment that will apply to all such children. Nonetheless, it might be possible to fold such an amendment into a bilateral (or even regional) FTA that would apply to children of nationals from Japan and those specified countries.[59]

II.C Services (and Judicial Cooperation)

Free movement in services accelerated world-wide after GATS took effect within the WTO framework from 1995. It has expanded through subsequent multilateral negotiations, notably through agreements on financial services and on telecommunications, and more recently through FTAs. Many FTAs adopt a GATS-style hybrid positive list approach in which commitments are made by parties expressly identifying market access undertakings for specific service sectors, subject to any restrictions on access (for example, national treatment) and distinguishing between cross-border trade in services ('mode 1', for example, e-commerce), consumption abroad (mode 2, for example, tourism), commercial presence (mode 3) and movement of natural persons (mode 4).[60] Others adopt the 'negative list' approach, allowing free trade in all service sectors unless expressly limited. This model in effect covers the GATS equivalent

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Tucker, 'US Politics and the TPPA' in Jane Kelsey (ed) *No Ordinary Deal: Unmasking the Trans-Pacific Partnership* (Crows Nest: Allen and Unwin, 2010) 52. The present MoU can be found at http://www.mfat.govt.nz/Trade-and-Economic-Relations/2-Trade-Relationships-and-Agreements/Trans-Pacific/3-Understanding-P4.php, and was negotiated in the context of the NZ government's policy on labour issues in FTAs (http://www.mfat.govt.nz/Trade-and-Economic-Relations/NZ-and-the-WTO/Trade-Issues/0-labour-framework.php). But see now chapter 14.3 of the PC Report, above n 1, outlined in Parts I and II.A above.

[59] Luke Nottage, 'Possibilities and Pitfalls in Laws Affecting Children of Australian and Japanese Parents', Japanese Law and the Asia Pacific, 12 June 2009, http://blogs.usyd.edu.au/japaneselaw/2009/06/possibilities_and_pitfalls_in.html.

[60] This approach occurs in 12 out of 25 East Asian FTAs, signed as of January 2007, analysed by Fink and Molinuevo, East Asian Free Trade Agreements in Services, pp. 269-70, except that the Australia-Thailand FTA does not distinguish modes of supply. China's FTAs with Hong Kong and Macau adopt a 'pure positive list' approach.

of modes 1, 2 and 4, with mode 3 instead usually covered (and indeed amplified) by a horizontal investment chapter applicable to both goods and services.[61]

In such negative list FTAs, trade in financial services often remains more restricted, for example by carving out those services completely or reverting to some form of positive list approach.[62] Investment chapters usually now include investor-state arbitration provisions (as outlined in Part II.A above). However, these sometimes restrict this option regarding financial services.[63] The possibility of building such flexibility into FTAs in sensitive sectors, especially after the GFC disaster, should offer some hope for those concerned about extending financial market deregulation through future agreements like the expanded TPPA presently under negotiation.[64] Admittedly, however, considerable deregulation remains entrenched through many existing FTAs, which in turn draw on the GATS regime – surely ripe for reassessment in the wake of the GFC.[65]

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[61] This was found in ten East Asian FTAs, except that the P4 omits an investment chapter (reverting solely to more limited disciplines under an equivalent to mode 3 for commercial presences) and the Australia-Singapore FTA covers commercial presences both in its services chapter and also an investment chapter. Ibid, p. 272.

[62] Each occurred in four East Asian FTAs, leaving only the Australia-Singapore FTA and the Panama-Taiwan FTA with a negative list approach to financial services. For further measures relating to services in all sectors, see ibid, pp. 272-6, noting also that the Australia-Singapore FTA includes scheduling by Singapore regarding several broad 'future measures' – preserving its regulatory freedom in those respects.

[63] Out of the East Asian FTAs reviewed in 2007 that had an investment chapter, only the Japan-Philippines FTA omitted such arbitration provisions. The New Zealand-Singapore FTA largely eviscerated them by allowing parties to block initiation of arbitration claims (but the AANZFTA of 2009 now allows investors the right to proceed). Three FTAs limit financial services investor claims to expropriation, denial of benefit or transfer of funds; five require joint FTA committee clearance to proceed, if the host government invokes defences such as prudential measures (although the EFTA – Korea FTA allows investors nonetheless to proceed if the committee does not reach a conclusion). Ibid, pp. 301-303. See also Shotaro Hamamoto and Luke Nottage, 'Foreign Investment In and Out of Japan: Economic Backdrop, Domestic Law, and International Treaty-Based Investor-State Dispute Resolution' (2010) Transnational Dispute Management, forthcoming: http://ssrn.com/abstract=1724999.

[64] Cf. Jane Kelsey, 'Embedding a Failed Model of Financial Services Regulation Through the Trans-Pacific Partnership Agreement' (2009) *Paper presented at the NZCIER conference, "Trade Agreements: Where Do We Go From Here?", Wellington, 22-23 October 2009*; and Jane Kelsey, 'The TPPA and Financial Sector Deregulation' in Jane Kelsey (ed) *No Ordinary Deal: Unmasking the Trans-Pacific Partnership* (Crows Nest: Allen and Unwin, 2010) p. 214.

[65] See, e.g., Panagiotis Delimatsis and Pierre Sauvé, 'Financial Services Trade after the Crisis: Policy and Legal Conjectures' (2010) 13(3) *Journal of International Economic Law* 837. For a broader critique, see Jane Kelsey, *Serving Whose Interests? The Political Economy of Trade in*

As mentioned also above (Part II.B), GATS and FTAs usually provide more limited commitments pertaining to 'mode 3' type movement of natural persons involved in supplying services. Anyway, labour mobility appears to depend largely on other specific arrangements regarding for example social security protection and recognition of occupational qualifications. In the latter respect, the TTMRA goes much further than any other development found within or alongside FTAs in the Asia-Pacific. The arrangement is often overlooked, yet it seems particularly timely to revisit the TTMRA because one express understanding was that it was 'intended that this Arrangement will contribute to the development of the Asia Pacific region by providing a possible model of cooperation with other economies, including those in the South Pacific and APEC'.[66] In sum:[67]

> The [TTMRA], which came into effect on 1 May 1998, is a non-treaty arrangement between the Commonwealth, State and Territory Governments of Australia and the Government of New Zealand. It is a cornerstone of a single economic market and a powerful driver of regulatory coordination and integration. Further, the Arrangement is a key instrument in developing an integrated trans-Tasman economy and a seamless market place as envisioned by the Australia and New Zealand Closer Economic Relations Trade Agreement (CER) signed in 1983.
>
> The TTMRA is implemented in New Zealand through the Trans-Tasman Mutual Recognition Act 1997 (the Act), which is overarching legislation. This means that all laws are subject to it unless specifically excluded or exempted. In particular, the TTMRA has implications for the sale of goods and the registration of occupations.

Because this – like the TTTA described above (Part II.B) – is not a treaty, each country enacts parallel legislation (and for example, Western Australia has delayed in doing so). There are also elaborate provisions regarding permanent and temporary exemptions, and referrals to a Ministerial Council for determination if a dispute arises after a country implements measures to protect public health, safety or the environment.[68] Those with a

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Services Agreements (London: Routledge, 2008).

[66] Recital E, at Ministry of Economic Development, 'Recitals', http://www.med.govt.nz/templates/MultipageDocumentPage____2363.aspx.

[67] Reproduced from Ministry of Economic Development, 'Trans-Tasman Mutual Recognition Arrangement', http://www.med.govt.nz/templates/StandardSummary____334.aspx.

[68] For more details, including the Australian counterpart legislation, see the *Users' Guide* (2006) at Department of Innovation, Industry, Science and Research, 'Trans-Tasman Mutual Recognition Arrangement', http://www.innovation.gov.au/Industry/TradePolicies/MRA/Pages/Trans-TasmanMRA.aspx and Part III.C below.

THE UNIVERSITY OF SYDNEY

sense of European history will remember, as explained further in Part III.B below, that the EU developed mutual recognition principles (negative harmonisation) but also continues joint attempts to minimise disputes about public health exceptions and so on (positive harmonisation).[69] Admittedly, that protracted process has been underpinned by treaties, supra-national law-making bodies (especially the European Commission or EC), and a permanent supra-national dispute resolution body (the European Court of Justice or ECJ). But the incipient softer model from the Trans-Tasman context seems to be bearing fruit and should appeal to other Australasian economies.[70]

Implications for free trade in goods are discussed in Part III.C below, but one example of services in which the TTMRA has already made a major difference - albeit after some teething problems[71] - has been in the mutual recognition of lawyers' qualifications. Since 2006 it has also formalised mutual recognition for issues of securities and other financial products.[72] Because that is partly designed to promote investment, and inspired by developments in the EU, some now call for Trans-Tasman mutual recognition of imputation credits in order to eliminate double taxation of dividends.[73] In 2003, Australia's Productivity Commission and a further review confirmed many other gains from mutual recognition.[74] It is therefore surprising that neither Australia nor New Zealand, at least, has explored incorporating some variant of the comprehensive TTMRA into its FTAs with

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[69] See Luke Nottage, 'Legal Harmonization' in David Clark (ed), *International Encyclopedia of Law and the Social Sciences: American and Global Perspectives* (2007) p. 686.

[70] See, e.g., Michael Kirby, 'Trans-Tasman Federation - Achievable, Impossible, Unnecessary?' (2010) *Canterbury Law Journal* <http://www.michaelkirby.com.au/images/stories/speeches/2000s/2486>at pp. 30-36.

[71] See Robert S. Chambers, 'MRA and the profession' (1999) (February 1999) *New Zealand Law Journal* 33.

[72] For background, see Nigel Stranaghan, 'Trans-Tasman Mutual Recognition of Offers of Securities' (2004) 118(4) *Journal of Banking and Financial Services* 84, http://search.informit.com.au/fullText;res=AGISPT;dn=20043568 and Gordon Walker, 'The CER Agreement and Trans-Tasman Business Law Coordination: From 'Soft Law' Approach to 'Hard Law' Outcome' (2004) 21 *Law in Context* 75 . See also now Bryony McCormack, Robert Pick and Sladjana Subotic, 'Trans-Tasman Mutual Recognition of Securities Offerings: NZ Closer Economic Relations Act' (2008) 11(6) *Inhouse Counsel* 69 .

[73] Sabrina Muck, 'Trans-Tasman Imputation and the Need for Mutual Recognition: A Comparative Analysis with the European Union Taxation of Cross-Border Investment' (2009) 15 *New Zealand Journal of Taxation Law and Policy* 49 .

[74] See Ministry of Economic Development, 'The 2003 Review of the Trans-Tasman Mutual Recognition Arrangement', http://www.med.govt.nz/templates/ContentTopicSummary____25024.aspx. (There should have been a second five-yearly review in 2008, but results do not yet appear to be public.)

new partner countries, or at least through parallel legislation as in the Trans-Tasman context.

Nor has either Australia or New Zealand offered yet to other countries an equivalent to the Trans-Tasman Court Proceedings and Regulatory Enforcement Agreement (TTCPREA), signed last year but not yet in force.[75] One important feature is that a court in one country is treated like a court in the other regarding civil proceedings, significantly expanding chances of enforcing judgments.[76] For example, a New Zealand company can commence litigation in a local court and enforce its judgment in Australia even if the Australian defendant did not consent to the New Zealand court's jurisdiction or have a sufficient commercial presence in New Zealand.[77] However, it can still resist enforcement on the basis that the judgment is contrary to Australian public policy. The TTCPREA also preserves the right for the Australian defendant to object that the New Zealand court is *forum non conveniens* (ie Australia is the more appropriate forum – thus applying the Anglo-New Zealand test, rather than the recent Australian test of whether the seized court is 'clearly inappropriate').[78]

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[75] See Agreement with the Government of New Zealand on trans-Tasman Court Proceedings and Regulatory Enforcement [2008] ATNIF 12 at http://www.austlii.edu.au/au/other/dfat/treaties/notinforce/2008/12.html (linked via http://www.info.dfat.gov.au/treaties/).

[76] See Attorney-General for Australia, 'Treaty to Improve Trans-Tasman Legal Cooperation, 23 July 2008, http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/MediaReleases_2008_ThirdQuarter_23July2008-Treatytoimprovetrans-Tasmanlegalcooperation. Article 6 of the TTCPREA also allows the countries to agree on a list of tribunals whose decisions can also be enforced via Article 5, but such a tribunal 'must exercise an adjudicative function and its decisions must be capable of enforcement without an order of a court'. The latter requirement would seem to exclude consumer claims tribunals in NSW (see Consumer, Trader & Tenancy Tribunal 'Enforcing CTTT Orders', http://www.cttt.nsw.gov.au/Orders/Enforcing_CTTT_orders.html) but allow for listing of New Zealand's counterparts (see ss. 45-6 of the Disputes Tribunals Act 1988 at http://www.legislation.govt.nz/act/public/1988/0110/latest/DLM133282.html).

[77] Cf. s. 7 of the existing Foreign Judgments Act 1992 (Cth) and Part IA of the Reciprocal Enforcement of Judgments Act 1934 (NZ).

[78] By contrast, the 2005 Hague Convention on Choice of Court Agreements does not include *forum non conveniens*, but it is premised on the parties having consented to a court's jurisdiction. See generally Reid Mortensen, 'The Hague and the Ditch: The Trans-Tasman Judicial Area and the Choice of Court Convention' (2009) 5(2) *Journal of Private International Law* 213 , describing the Trans-Tasman treaty as 'arguably the world's most liberal scheme for the transnational enforcement of judgments' (at p. 222).

THE UNIVERSITY OF SYDNEY

The model is similar to the legislation providing for enforcement of judgments within Australia, just as the TTMRA draws on the mutual recognition regime within Australia enacted in 1992. But the TTCPREA was also inspired by the 'Brussels I Regulation' of 2001 (superseding the Brussels Convention of 1968), which had also dramatically improved enforcement of judgments within the EU.[79] Yet no efforts have ever been made public by the Australian government, for example, to extend similar treatment to other FTA partners.[80] A prime candidate in Australasia would be Singapore, which shares an English law heritage.[81] In the Asia-Pacific more generally, the US is another possibility, especially as the Australian and US governments gave 'trust in each other's highly developed legal system' as one ostensible reason for not including investor-state arbitration provisions in their 2004 FTA.[82] But then why not also extend a judgments enforcement regime like the Trans-Tasman one to Australia and Japan, within or

[79] See Europa, 'Jurisdiction, Recognition and Enforcement of Judgments in Civil and Commercial Matters ("Brussels I")', http://europa.eu/legislation_summaries/justice_freedom_security/judicial_cooperation_in_civil_matters/l33054_en.htm.

[80] Cf., e.g., art. 14.6 of the AUSFTA: 'The Parties shall work together to examine the scope for establishing greater bilateral recognition of foreign judgments of their respective judicial authorities obtained for the benefit of consumers, investors, or customers who have suffered economic harm as a result of being deceived, defrauded, or misled…'. This consultation requirement, found in Chapter 14 on 'Competition-related Matters', rounds out provisions aimed more specifically at facilitating enforcement of judgments obtained by each other's competition regulators.

[81] In September 2010, the Supreme Court of New South concluded a Memorandum of Understanding allowing it to consider referring a question governed by Singaporean law to the Supreme Court of Singapore, to be determined there as expeditiously as possible, and vice versa. See Paul Brereton, 'Proof of Foreign Law: Problems and Initiatives', http://sydney.edu.au/law/events/2011/May/Justice_Brereton.pdf.

[82] A more substantial reason appears to be concern among some Australian interests about allowing arbitration provisions in an agreement with a net capital exporter like the US: see Nottage and Miles (above n 38). Nonetheless, allowing broader recognition of US court judgments would also be more problematic than under the TTCPREA for various reasons. For example, US courts traditionally take jurisdiction in broader circumstances than Anglo-Commonwealth courts (one reason, indeed, for the ultimately narrow scope of application of the 2005 Hague Convention). There are also significant differences in substantive US law that might be applied quite often by US courts, such as the possibility of awarding punitive damages for breach of contract, which would lead to Australian courts refusing enforcement on public policy grounds. See generally Luke Nottage, 'Form, Substance and Neo-Proceduralism in Comparative Contract Law: The Law in Books and the Law in Action in England, New Zealand, Japan and the U.S.', PhD thesis, Victoria University of Wellington, (2002) http://researcharchive.vuw.ac.nz/handle/10063/778?show=full.

alongside the FTA they are now negotiating, in light of the trust now built up between their judiciaries?[83]

At the least, countries in the Asia-Pacific should be considering developing a network of treaties covering other aspects of cross-border judicial cooperation, focusing on actual and potential FTA partners. Australia already has bilateral treaties with Thailand (1998) and Korea (2000). But these seem to have arisen quite serendipitously,[84] before Australia embarked on an active FTA program, and government officials do not seem to have realised that judicial cooperation treaties fit quite naturally with contemporary FTAs. If both could be negotiated in tandem, greater attention to judicial cooperation treaties could also help countries gain a better appreciation of each others' traditions in court and civil procedure.[85] Such harmonising measures would also complement mutual recognition of lawyers' qualifications, as already in the Trans-Tasman context.[86]

Over the long term, such efforts to establish closer relations among the courts and legal professions in the Asia-Pacific region, even in a core group of countries, should make it easier to establish at least some elements of a supranational judicial system. Again, this does not need to be full-blown ECJ. An initial step could be a 'preliminary reference' procedure allowing national courts to seek non-binding opinions interpreting harmonized law, especially parallel legislation or law derived from a common source (like 'model laws' from the United Nations), from a panel of eminent jurists appointed by respective states. This would represent a softer approach than the EU's reference system, which in addition often gives 'direct effect' to EU law by allowing affected firms and individuals to claim

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[83] See generally James Jacob Spigelman, 'Judicial Exchange Between Australia and Japan', Supreme Court of New South Wales, http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/pages/SCO_spigelman280206 (also in (2006) 22 *Journal of Japanese Law* 225, http://sydney.edu.au/law/anjel/documents/ResearchPublications/Spigelman2006.pdf).

[84] See James Jacob Spigelman, 'International Commercial Litigation: An Asian Perspective', Supreme Court of New South Wales, http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/pages/SCO_spigelman070607.

[85] Cf., e.g., some tensions identified by then Chief Justice Murray Gleeson regarding the Australia-Korea treaty: Murray Gleeson, 'The State of the Judicature', High Court of Australia, http://www.hcourt.gov.au/assets/publications/speeches/former-justices/gleesoncj/cj_sta10oct.htm. Not even the EU, however, has yet succeeded in harmonising civil procedure regimes generally within member states; its role is limited primarily to cross-border civil procedure issues.

[86] See Part II.C above. In addition, following commitments by the Australia and New Zealand governments to bring the Judgments Treaty into effect as soon as possible, ADR institutions in both countries have signed a mutual collaboration agreement: see http://www.lawsociety.org.nz/publications_and_submissions/lawtalk/2009_issues/lawtalk,_issue_737/trans-tasman_mediation_accord_signed.

violations in national courts. Yet economists have recently illustrated how other institutions with advisory powers, for example within APEC, have registered significant successes in influencing market integration policy outcomes.[87]

III. Free Movement of Consumer Goods, but with Better Safety Regulation[88]

III.A The WTO Backdrop

The WTO system contains important Agreements on Technical Barriers to Trade (TBT) and Sanitary and Phytosanitary Measures (SPS), underpinned by a Dispute Settlement Understanding (DSU) institutionalising claims among member states. This has a significant harmonising effect, although the WTO does not impose a generic 'negative harmonisation' agenda like that in the EU based on the 1979 *Cassis de Dijon* decision by the ECJ (Part III.B below). The TBT and SPS Agreements similarly envisage a system whereby states can set regulations impeding trade only if justified by identifiable safety hazards, under the watchful eye of a supranational judiciary and the DSU. They expressly give considerable weight to standards from specified international bodies.[89] By contrast, the more venerable General Agreement on Tariffs and Trade (GATT, art. XX) provided no such overt guidance in promoting harmonisation.[90]

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[87] Philippa Dee (ed) *Institutions for Economic Reform in Asia* (London: Routledge, 2010); Philippa Dee and Anne McNaughton, 'Promoting Domestic Reforms through Regionalism' (manuscript of April 2011, earlier version presented at the ADBI annual conference, Tokyo, 3 December 2010). Compare, e.g., Stephen Haggard, 'The Organizational Architecture of the Asia-Pacific: Insights from the New Institutionalism', (2011) 71 *ADB Working Paper Series on Regional Economic Integration* via http://ideas.repec.org/s/ris/adbrei.html at pp. 22-24 and p. 27 (urging consideration of modalities for introducing private standing to claim violations of FTA commitments).

[88] For more on Part II.B and especially Part II.C, see the longer version at http://ssrn.com/abstract=1509810, in turn drawing on Luke Nottage, 'Product Safety' in Geraint Howells, Iain Ramsay and Thomas Wilhelmsson (eds), *Handbook of International Consumer Law and Policy* (Cheltenham: Edward Elgar Publishing, 2010).

[89] Michael Du, 'Reducing Product Standards Heterogeneity through International Standards in the WTO: How Far across the River?' (2010) 44 *Journal of World Trade* 295.

[90] Such general exception provisions are less suited to promoting harmonisation compared to the SBS and TBT agreements: see generally Kalderimis, 'Changes to Australia's and New Zealand's Overseas Investment Regimes', pp. 313-16. But in *Shrimp / Turtles* (WT/DS58/AB/R, 12 October 1998), for example, the Appellate Body did refer to the 1973 Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES) and required the US to try to negotiate an international agreement on appropriate environmental protection measures. I am grateful to Meredith Kolsky Lewis for this point.

The WTO system continues to generate debate regarding the ways it deals with scientific controversy, and more generally in balancing commercial and public interests.[91] One option is to formally amend the system to advance more politically acceptable but still trade-enhancing 'positive harmonisation' mechanisms, where member states or the WTO itself specifically agree on joint minimum standards.[92] A more realistic shorter-term alternative is to allow greater scope for democratic values to feed into the current 'negative harmonisation' regime.[93] This may be easier to achieve nowadays in an era of proliferating bilateral or regional FTAs, especially in Agreements involving the EU or its states on one side. It may also be possible with countries like Japan that have already experimented with novel forms of public-private governance, albeit within their borders rather than supra-nationally.[94] So far, however, such FTAs have focused on going beyond the WTO primarily in more market-opening ways. Even procedurally, they have not innovated by institutionalising novel dispute resolution processes or collaborations in standard-setting bodies among the nations involved.

III.B The European Approach

The EU suggests a way forward since, from small beginnings in 1957, the EU's primary agenda has also been economic liberalisation among its members. However, the mandate has slowly broadened, now encompassing a strong emphasis on consumer protection, and tensions have always been evident with more statist traditions particularly within certain continental European nations.

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[91] Christian Joerges, 'Conflict of Laws as Constitutional Form: Reflections on the International Trade law and the *Biotech* Panel Report' (2007) 2007/03 *RECON Online Working Paper* www.reconproject.eu , p. 12; Michael Ming Du, 'Autonomy in Setting Appropriate Level of Protection under the WTO Law: Rhetoric or Reality?' (2010) 13(4) *Journal of International Economic Law* 1077.

[92] Arie Reich, 'The WTO as a Law-Harmonizing Institution' (2004) 25 *University of Pennsylvania Journal of International Economic Law* 321, pp. 325-8, 336-8, 353-6.

[93] On the relationship between scientific controversy relating to appropriate regulatory measures and democratic values, see, e.g., Christian Joerges, 'Law, Science and the Management of Risks to Health at the National, European and International Level – Stories on Baby Dummies, Mad Cows and Hormones in Beef', 7 (2000) *Columbia Journal of European Law* 1; Christian Joerges and Jürgen Neyer, 'Politics, Risk Management, World Trade Organisation Governance and the Limits of Legalization', 30 (2003) *Science and Public Policy* 219; and Christian Joerges, 'Sound Science in the European and Global Market: Karl Polanyi in Geneva?', in Michelle Everson and Ellen Vos (eds.), *Uncertain Risks Regulated* (Oxford; New York: Routledge-Cavendish 2009) 415-426.

[94] Luke Nottage, 'Redirecting Japan's Multi-Level Governance', in Klaus Hopt, Eddy Wymeersch, Hideki Kanda and Harald Baum (eds), *Corporate Governance in Context: Corporations, State, and Markets in Europe, Japan, and the US* (Oxford: Oxford University Press, 2005), p. 571.

THE UNIVERSITY OF SYDNEY

The EU's liberalisation agenda has also, in fact, combined two different models.[95] A decentralised model of 'negative harmonisation', centred on national governments and the ECJ, has relied mainly on the principle of non-discrimination on the ground of nationality. A major development was the ECJ's judgment in *Cassis de Dijon*.[96] It held that goods produced to the standards set in a home (exporting) state will be presumed equivalent to goods produced to standards imposed – even without openly differentiating between home and foreign goods – by a host (importing) state, and therefore allowed entry. The exception was where the host state could justify its standards under a mandatory requirement (such as consumer protection) and the proportionality principle. This leaves states freedom to regulate, subject to non-discrimination, but free movement creates 'competitive federalism' or 'regulatory competition' between states. It is hoped that the outcome will be a 'race to the top', leading to an optimal regulatory framework.

The EC soon realised that this approach reduced the need for its Directives (whose norms states must incorporate into their domestic law, albeit with choice as to form and methods) aimed at the harmonisation or 'approximation' of states' standards or laws 'as directly affect' the establishment or functioning of an integrated market. Harmonisation initiatives could be restricted to areas where states legitimately invoked mandatory requirements or derogations from fundamental freedoms of movement. Such 'positive harmonisation', involving a centralised model (imposing convergent standards) premised largely on market failure (practical limits to free movement, and responsiveness of state regulators anyway) and the fear of a 'race to the bottom', thus started to become a less prominent approach to economic integration.

In 1985, the EC proclaimed a new deregulatory era. But it did not abandon product safety to free trade combined with the possibility of divergent national interpretations of mandatory limits. Instead, the EC finally obtained enactment of the 1985 Product Liability Directive.[97] It also announced a 'New Approach' to standard-setting.[98] Rather than proposing detailed (design) standards for legislative approval, which still at that time had to be unanimous, it brought in a faster harmonisation process allowing more scope for market forces. The legislature would enact broad 'essential safety requirements'. The

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[95] Nottage, 'Legal Harmonization'.
[96] Case 120/78 [1979] ECR 649.
[97] Compared in Luke Nottage, *Product Safety and Liability Law in Japan: From Minamata to Mad Cows* (London-NewYork: Routledge Curzon, 2004).
[98] Michelle Egan, *Constructing a European Market: Standards, Regulation and Governance* (Oxford: Oxford University Press, 2001). Baldwin, 'Sequencing Regionalism, pp. 15-16 and 32-34) also emphasises how the ECJ caselaw promoting mutual recognition led to a broader shift towards cooperation in adopting shared standards, epitomized by the Single European Act 1986 including qualified voting by member states.

preferred means to achieve these requirements would be elaborated by standard-setting organisations.[99]

This drew on a longer-standing tradition of the EC in effect delegating more technical matters to expert committees, especially for example in the field of food regulation, in a system of 'comitology'.[100] However, the New Approach seemed to envisage more input from industry interests, especially in national standardisation bodies, albeit with more financial and other support offered to consumers represented in an increasingly influential European body (CEN). Market forces were further engaged by providing that compliance with the technical standards provided a presumption of conformity with the essential safety requirements. Specifically, for many products, suppliers could then affix the 'CE' mark needed to trade goods across the EU, instead of having to go through tests to prove compliance with the essential requirements.[101]

New Approach Directives began to proliferate for many types of goods. Yet, because they were usually quite diverse 'maximal harmonisation' measures (pre-empting stricter safety requirements being set by national member states), pressure emerged to enact a Directive setting basic requirements for consumer goods not covered, or not fully covered, by New Approach Directives. The original GPSD of 1992, itself following the basic structure of New Approach Directives, was the result. It included a general safety provision (GSP) requiring suppliers to provide only safe consumer goods.

From the late 1990s, safety failures and governance issues created momentum for further reform. Strengthening the product liability regime was seen as insufficient. Instead, the GPSD was given more teeth in 2001.[102] The revised Directive clarified the powers of national regulators (delegated for enforcement) to order mandatory recalls of unsafe goods within the distribution chain, as well as those in the hands of consumers. Requirements to disclose information about product accidents became stricter, and improvements were made to the system for sharing cross-border the data on emergent risks – the RAPEX system described further below (Part III.C). Regulators also had to be guided by the precautionary principle. This much-debated principle has evolved from

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[99] Geraint G. Howells, 'The Relationship Between Product Liability and Product Safety: Understanding a Necessary Element in European Product Liability through a Comparison with the U.S. Position' (2000) 39 (Spring) *Washburn Law Journal* 305 .

[100] Christian Joerges and Ellen Vos (eds), *EU Committees: Social Regulation, Law and Politics* (Oxford and Portland, Oregon: Hart Publishing, 1999).

[101] Provision remained for 'safeguards' to be invoked if national authorities found CE-marked goods to be unsafe. But compare the *AGM* case (C-470/03, 17 April 2007) with the *Medicap* case (C-6/05, 14 June 2007).

[102] Duncan Fairgrieve and Geraint Howells, 'General Product Safety - A Revolution Through Reform?' (2006) 69(1) *Modern Law Review* 59.

earlier US law, and especially environmental regulation in the EU and world-wide, into a central 'constitutional' element for the EU more broadly pursuant to the 1992 Maastricht Treaty.[103]

Some have now called for a European Product Safety Agency,[104] concentrating on risk assessment recommendations like the new European Food Safety Authority. The latter works alongside the EU's Food Regulation (EC/178/2002), itself an outcome of Europe's BSE disaster and broader concerns about food safety. Amended in 2005 to strengthen traceability requirements, the Regulation also imposes risk disclosure obligations on suppliers and creates an information-sharing system (RASFF) similar to RAPEX for general consumer goods.[105] But some now urge closer assimilation of both regimes including the introduction of a CE-Mark system, allowing foods to be presumed safe rather than the opposite as under the current Regulation.[106]

III.C Asia-Pacific Developments

Already we can see analogies emerging particularly in the Trans-Tasman context, as mutual recognition rules have growin, although so far there has been less formal joint standard-setting by Australian and New Zealand bodies. The broader CER agenda generated the TTMRA, although as noted above (Part II.B) the latter is not a treaty, and it was not pushed along - nor now enforced - by a supranational court like the ECJ. The TTMRA applies mutual recognition principles to allow free movement of goods, except for:[107]

> 1. Exclusions: for legislation related to customs controls and tariffs, intellectual property, taxation and specific international obligations related to the sale of goods;

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[103] David Vogel, 'The Hare and the Tortoise Revisited: The New Politics of Consumer and Environmental Regulation in Europe' (2003) 33 *British Journal of Political Science* 557, at 566-7.

[104] Christopher J. S. Hodges, *European Regulation of Consumer Product Safety* (Oxford: Oxford University Press, 2005).

[105] Alberto Alemanno, 'Solving the Problem of Scale: The European Approach to Import Safety and Security Concerns' in Cary Coglianese, Adam Finkel and David Zaring (eds), *Import Safety: Regulatory Governance in the Global Economy* (Philadelphia, University of Pennsylvania Press, 2009)

[106] Antoni Brack, 'A Disadvantageous Dichotomy in Product Safety Law – Some Reflections on Sense and Nonsense of the Distinction Food–Nonfood in European Product Safety Law' (2009) 20(1) *European Business Law Review* 173 .

[107] See http://www.austlii.edu.au/au/legis/cth/consol_act/tmra1997350/, respectively Schedules 1, 2 and 3; and http://www.coag.gov.au regarding Temporary Exemptions (s. 46(3) of the Australian legislation).

THE UNIVERSITY OF SYDNEY

2. Permanent exemptions: currently applied to laws relating to (a) weapons, fireworks, film and other classifications, pornography and gaming machines (all these also exempted from the MRA within Australia); as well as (b) quarantine and endangered species; (c) ozone protection, agricultural and veterinary chemicals, and certain risk-categorised foods (scheduled for the next five-yearly Review);
3. Special exemptions (for up to 12 months, but open to roll-overs) combined with cooperation programs (to try to align relevant standards in both countries to extend mutual recognition): applied to (a) therapeutic goods, hazardous substances, radio communications standards, road vehicles and gas appliances, but no longer (b) most consumer product safety standards;
4. Temporary exemptions (for up to 12 months, 'substantially for the purpose of protecting the health and safety of persons or preventing, minimising or regulating environmental pollution'). [108]

Indeed, New Zealand has already gone one step further than envisaged under the TTRMA regime. Its 'permanent exemption' for mutual recognition of film (and computer game) classifications has been sidestepped by New Zealand *unilaterally* deciding to recognise non-restricted or non-banned classifications (G, PG or M) given in Australia (and indeed, if the item is not classified there, from the United Kingdom). [109] This system has been maintained even though Australia has no R restriction for games, making the strongest restriction there MA15+, in turn creating pressure on the Australian authorities to classify some games as M (unrestricted). By contrast, New Zealand retains not only an R18 classification for games as well as other mediums, but also many more R categories (R 16, RP 16, R13 and RP13). When in 2005 New Zealand authorities reviewed 11 games classified in Australia as M, they decided to ban two and reclassify seven as restricted. [110] Yet such tensions appear to be insufficient for the New Zealand government to abandon unilateral recognition, presumably because of the cost savings of deferring to Australian classification authorities. New Zealand authorities themselves now only classify around 15 percent of films and DVDs, and have been unsuccessful in obtaining

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[108] Compare also *Users' Guide* (2006), pp. 19-20, with most recently Trans-Tasman Mutual Recognition Amendment Regulations 2009 (No. 1) (SLI NO 65 of 2009), http://www.austlii.edu.au/au/legis/cth/num_reg_es/tmrar20091n65o2009649.html (a Special Exemption remains under the Trade Practices Act and state legislation regarding child restraints for automobiles; certain LPG appliances have become a Permanent Exemption).

[109] See, e.g., Regulations 4 and 12 of the Films, Videos, and Publications Classification Regulations 1994 (NZ), at http://www.legislation.govt.nz/regulation/public/1994/0189/latest/DLM194134.html.

[110] Office of Film & Literature Classification, *Annual Report* (2005) via http://www.censorship.govt.nz/downloads.html#corporatedocuments, at pp. 9-12.

mutual recognition by Australia.[111] This little-noted development provides a remarkable illustration of an Asia-Pacific country unilaterally liberalising a national regulatory regime in the context of a broader economic integration programme.

On the other hand, New Zealand seems reluctant to cede much sovereignty in relation to intellectual property, a major 'exclusion' under the TTMRA. As early as 1999, David Goddard and the New Zealand Institute for Economic Research suggested that a joint Patent Registry would be more efficient than greater exchange of information.[112] But other New Zealanders remain more skeptical.

Successive cooperation programs regarding 'special exemptions' have remained unsuccessful in establishing an 'Australia New Zealand Therapeutic Products Authority' (ANZTPA). Health ministers had first proposed harmonisation in 1991, the governments began exploring the possibility of a joint agency in 2001, and an agreement was reached in 2003. They achieved considerable preparatory work in 2005 and 2006, but New Zealand announced on 16 July 2007 that it would not proceed with the necessary legislation.[113] Despite the attraction of leveraging off the much larger and well-resourced drugs regulator in Australia, major sticking points for New Zealand proved to be its more liberal standards regarding the advertising of prescription drugs directly to consumers, as well as the regulation of complementary or traditional medicines. It is worth remembering, however, that it is only since 2004 that the EU has made it compulsory to use its centralised EMEA for licencing of certain drugs (for example, using recombinant biotech processes, or for AIDS or cancer) rather than using national regulators and then seeking mutual recognition within EU member states.[114]

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[111] Thus, for example, Peter Jackson's first two *Lord of the Rings* movies were classified in the UK and then Australia for their world premieres, with those classifications then recognised in New Zealand; but the third movie classified and premiered in Wellington had to be reclassified in Australia.

[112] Cited in Walker, 'The CER Agreement and Trans-Tasman Business Law Coordination', p. 89.

[113] Barbara Von Tigerstrom, 'Globalisation, Harmonisation and the Regulation of Therapeutic Products: the Australia New Zealand Therapeutic Products Authority Project in Global Context' (2007) 13 *Canterbury Law Review* 287, p. 302-5. However, by October 2009 legislation was back on the Order Paper in the New Zealand Parliament, led by a new (more conservative) government.

[114] Frances Miller, 'Consolidating pharmaceutical regulation down under: policy options and practical realities' (2006) 25(1) *University of Queensland Law Journal* 111, pp. at 121-5 and 127-8. It is also worth remembering that 2003 saw one of Australia's largest ever recalls, which happened to comprise mostly complementary medicines (produced by Pan Pharmaceuticals), resulting in further strengthening of Australia's regulatory regime and hence the gap with New Zealand. See generally Jocelyn Kellam and Carolyn Newman, 'Panic and Pandemonium and the Largest Recall in the World: the Australian Pan Pharmaceuticals Crisis' (2004) 15(1) *Australian Product Liability Reporter* 1 .

THE UNIVERSITY OF SYDNEY

The ANZTPA means going beyond not only the EMEA but also an existing Trans-Tasman standard-setting agency for foodstuffs, now known as Food Standards Australia New Zealand (FSANZ).[115] The latter develops standards for composition, labeling and contaminants for foodstuffs produced or imported for sale in Australia and New Zealand. It evolved out of Australian legislation and a small national body in 1991, and then the bilateral Agreement Concerning a Joint Food Standards System concluded in 1995 (and amended in 2002).[116] However FSANZ sets bi-national standards (through a Food Standards Code) primarily regarding labeling and composition of foods, only dealing with specified chemical and microbiological standards and pre-market assessments of novel foods (such as genetically modified or irradiated foods). There remains national development and implementation of food regulations for food safety, primary production and maximum residue levels for agricultural and veterinary chemicals. Each country also separately regulates the import and export of food, manages food emergencies, and implements the Code.[117]

Outside these areas of 'vertical' or product-specific product safety regulation, Australia and New Zealand have not yet superimposed joint frameworks on the mutual recognition regime to the same extent as the EU's New Approach Directives. Nor have the countries collaborated as closely in promoting a transnational standard-setting body like CEN.[118]

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[115] See von Tigerstrom, 'Globalisation, Harmonisation and the Regulation of Therapeutic Products', pp. 308-9, with further references.

[116] See *Users' Guide* (2006), p. 30; and Food Standards Australia New Zealand, 'A Short History of FSANZ', http://www.foodstandards.gov.au/aboutfsanz/historyoffsanz.cfm; and Agreement Between the Government of Australia and the Government of New Zealand concerning a Joint Food Standards System [2002] ATS 13 at http://www.austlii.edu.au/au/other/dfat/treaties/2002/13.html.

[117] In New Zealand, these activities are conducted by the New Zealand Food Safety Authority, recently established largely out of the Ministry of Agriculture. For a brief explanation of its relationship to FSANZ, see New Zealand Food Safety Autorhity, 'NZFSA and FSANZ', http://www.foodsafety.govt.nz/industry/general/labelling-requirements/fsanz/. In Australia, however, several of the country-specific activities (e.g. regulating primary production hygiene) are also carried out by FSANZ.

[118] More broadly, however, see http://www.mfat.govt.nz/Foreign-Relations/Australia/1-CER/index.php:

> The Joint Accreditation System of Australia and New Zealand (JAS-ANZ) was established under treaty between Australia and New Zealand in 1991. The organisation's key objective is the establishment of an internationally recognised accreditation system for quality management systems, product certification and personnel certification. This accreditation establishes confidence in, and recognition of, the producers and products of New Zealand and Australia. In 1996 a regulation was made under the Australian

THE UNIVERSITY OF SYDNEY

Both New Zealand and Australia retain their own peak standard-setting bodies, and indeed the Australian counterpart attracted considerable critical scrutiny during a Productivity Commission review in 2006. A particular concern is the limited scope for consumer input into standard-setting, compared for example with the EU.[119]

Australia and New Zealand also do not have an equivalent to the 'horizontal' GPSD, incorporating a GSP, and its CE mark system. Yet there already exists, for example, an Agreement on Mutual Recognition in Relation to Conformity Assessment between New Zealand and the European Community (EU/NZ MRA), in effect from 1999, which allows New Zealand exporters to Europe to apply CE marks.[120] New Zealand, Australia and Singapore also participate in all three aspects of an APEC scheme to promote mutual recognition of conformity assessment for regulated electrical equipment. However, all other APEC members so far participate only in the 'information exchange' aspect. [121] Bilaterally, for example, the 2008 China-New Zealand FTA includes Annex 14 on 'Cooperation in the Field of Conformity Assessment in Relation to Electrical and Electronic Equipment and Components'. This requires China Compulsory Certification (CCC) results to be recognised by New Zealand, for example, and allows for New Zealand certification bodies to receive accreditation.[122] More generally, New Zealand officials have long believed that 'standards and TBT issues must be addressed in FTAs' and that 'consultation between the relevant regulatory authorities in the partner countries is very important in resolving problems in this area'.[123]

Although not extending to an equivalent of the GPSD and concomitant improvements in joint standard-setting activities, Australia's Productivity Commission recommended some

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International Organisations (Privileges and Immunities) Act 1963 declaring JAS-ANZ to be an international organisation to which the Act applies.

[119] See Luke Nottage, 'Consumer Product Safety Regulation Reform in Australia: Ongoing Processes and Possible Outcomes' (2007) 2007 *Yearbook of Consumer Law* 222 .

[120] See Ministry of Economic Development, 'EU/NZ MRA', http://www.med.govt.nz/templates/StandardSummary____254.aspx and the text at Delegation of the European Union to New Zealand, EU Agreements with New Zealand, http://www.delaus.ec.europa.eu/newzealand/EU_NZ_relations/agreements_mra.htm.

[121] The last two aspects include mutual recognition of (a) test reports and (b) certification. See Ministry of Economic Development, 'APEC EE MRA', http://www.med.govt.nz/templates/StandardSummary____251.aspx.

[122] See New Zealand – China Free Trade Agreement, 'Annex 14: The Agreement between the Government of New Zealand and the Government of the People's Republic of China on Cooperation in the Field of Conformity Assessment in Relation to Electrical and Electronic Equipment and Components', http://chinafta.govt.nz/1-The-agreement/2-Text-of-the-agreement/20-Annexes/14-Annex-14.php.

[123] Scollay and Trewin, 'Australia and New Zealand Bilateral CEPs/FTAs', p. 24.

specific reforms in 2006 and then again in 2008 as part of a broader reform of consumer law nation-wide. These reforms were approved in principle by the Ministerial Council for Consumer Affairs (MCCA), which includes consumer affairs ministers from the federal and state governments as well as New Zealand, as well as by the Council of Australian Governments (CoAG). Accordingly, from 2009 the Australian Treasury (the federal government agency responsible for consumer policy) began working on revisiting federal legislation relating to product safety, which state governments would then re-enact or 'apply' nation-wide. This was eventually achieved by enacting the 'Australian Consumer Law' (Schedule 2 of the Australian Competition and Consumer Act 2010, Cth) in two main stages, in turn adopted by all Australian states and territories.[124]

The New Zealand government as not bound by the CoAG agreement. Nonetheless, given New Zealand's agreement in principle at the MCCA level and earlier history of revising consumer law in the light of Australian legislative reforms, pressure will we can expect the country largely to follow whatever legislative amendments emerge from Australia. However, it seems unlikely that New Zealand will give up to Australian regulators its current powers under the Fair Trading Act to impose bans or set safety standards for general consumer goods. Such standards would therefore remain subject to the TTMRA, meaning that in principle goods produced to Australian mandatory standards would have to be allowed into New Zealand. However, as mentioned above (Part III.C), the TTMRA allows a state like New Zealand temporarily to impose different standards to protect human health. The other state can then refer this situation to a Ministerial Council to try to resolve the dispute and generate a joint standard.[125]

By contrast, the EU minimises such disputes through its Directives, which also bring in European as well as national standard-setting bodies (such as CEN), and ultimately lets the ECJ rule on any remaining issues. Australia and New Zealand could now consider adopting more European law elements to their Trans-Tasman regime, such as supranational standard-setting bodies (with greater funding and participation rights for

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[124] See Australian Consumer Law, 'Other Consumer Laws, http://www.consumerlaw.gov.au/content/Content.aspx?doc=other_consumer_laws.htm; and more generally Luke Nottage, 'Consumer Law Reform in Australia: Contemporary and Comparative Constructive Criticism' (2009) 9(2) *QUT Law and Justice Journal* 111 .

[125] 'A Participating Party may, at any time and substantially for the purpose of protecting the health and safety of persons or preventing, minimising or regulating environmental pollution, refer the matter of the standard applicable to any Goods under the Jurisdiction of another Participating Party to the Ministerial Council having responsibility for such Goods. The Ministerial Council will endeavour to determine, within 12 months of receiving such a referral, whether or not a standard should be set with respect to the Good, and if so, that standard.' See art. 4.2.2 of the Agreement (at http://www.med.govt.nz/templates/MultipageDocumentPage____2369.aspx) and also s. 47 of the Australia legislation (at http://www.austlii.edu.au/au/legis/cth/consol_act/tmra1997350/s47.html).

consumers), a variant of the CE mark system, and a GSP (including the precautionary principle). A supranational court is not essential, but it has efficiency advantages and could well eventually emerge out of the mutual trust in the judiciaries of the two countries, evident from the recent TTCPREA. Meanwhile, aspects of the present Trans-Tasman compromise could indeed become an inspiration for other FTA partners in the Asia-Pacific region.

A second major set of product safety innovations for Australia and New Zealand, as well as the region more generally, also derives inspiration from recent developments particularly in Europe. As mentioned above (Part III.B), the GSPD regime was revised in 2001 to strengthen the system for suppliers to disclose serious product safety risks to regulators and therefore the general public. Japan added such requirements to its product safety legislation in 2006, regarding specified risks (currently, carbon monoxide leaks or fires caused by product failures) and accidents (requiring hospital treatment). China added similar regulations in 2007, Canada did so in 2011, and the US has had similar requirements since 1990 (albeit with less need or separate impact, given its uniquely high levels of highly-publicised product liability litigation).[126]

The Australian Consumer Law eventually followed the Productivity Commission's recommendations in 2006, repeated in 2008, for mandatory reporting requirements. (However, suppliers only need to disclose actual serious accidents or deaths caused by their consumer products, not risks thereof even in the event of a 'near-miss'.) If New Zealand decides also to amend its Fair Trading Act accordingly, the two countries should set up a central clearing-house for receiving notifications from suppliers. The institution would then analyse them (considering, for example, the need to ban unsafe goods more widely or to mandate new safety standards). It could then disseminate information quickly and appropriately to the public, although the Australian Consumer Law imposes comparatively strict confidentiality obligations on regulators receiving accident information via suppliers' mandatory reports.[127]

The EU's 'RAPEX' system provides a model that appears to be working well, according to a recent report reviewing implementation of the revised GSPD more generally.[128] Indeed,

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[126] David Harland and Luke Nottage, 'Conclusions' in Jocelyn Kellam (ed), *Product Liability in the Asia-Pacific* (Sydney: The Federation Press, 3rd ed, 2009).

[127] Luke Nottage, 'Suppliers' Duties to Report Product-Related Accidents under the New "Australian Consumer Law": A Comparative Critique (2010) 25(2) *Commercial Law Quarterly* 3-14 (also at http://ssrn.com/abstract=1600502).

[128] See Commission of the European Communities, 'Report from the Commission to the European Parliament and to the Council on the Implementation of Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on General Product Safety', http://ec.europa.eu/consumers/safety/prod_legis/docs/report_impl_gpsd_en.pdf.

the EC has already signed information-sharing agreements with the US Consumer Product Safety Commission (in 2005) and the Chinese Administration for Quality Supervision (in 2006). The 2008 Japan-EU Summit also agreed to explore similar information-sharing. Dangerous product notifications to RAPEX have risen significantly every year since the revised Directive came into effect from 2004, with about half resulting from mandatory action taken by national regulators. In 2008 these were twice the notifications to US regulators for comparable product categories. Consistently, around half of all notifications deal with Chinese products. As of 10 March 2009, 3338 reports were on the RAPEX-CHINA collaborative database; Chinese regulators had investigated 669 and action had been taken in China in 352.[129]

Surely there is scope to share data on risks or at least accidents on both bilateral and regional bases within the Asia-Pacific region. So, far all we have is some faltering steps via APEC regarding food safety particularly since 2007,[130] and an AusAID-funded capacity-building exercise from November 2008 regarding general consumer product safety.[131] But information cannot flow properly unless and until all major economies in the region begin to share information on product related accidents and risks obtained from suppliers themselves.

Indeed, recall already how in 2008 Fonterra (formerly the New Zealand Dairy Board) voluntarily disclosed to the New Zealand government its growing concerns about melamine-tainted milk products produced by its joint venture with Sanlu in China. The government's voluntary disclosure then to the Chinese government led the latter to chase up the local government, and resulted in the belated resolution of what indeed turned out to be major health risk.[132] But to minimise similar problems in the future, one way forward would be to:

> (a) require New Zealand manufacturers (and, indeed, parent companies) to disclose serious actual or likely injuries from products (including those of subsidiaries) – both in NZ and in FTA partners - to its home government; and

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[129] Rod Freeman, 'The General Product Safety Directive: A Five Year Review' (2009) 34 *European Product Liability Reporter (Lovells)* 2 .

[130] See Food Standards Australia New Zealand, APEC Food Safety Cooperation Forum (FSCF), http://www.foodstandards.gov.au/scienceandeducation/apec2011/.

[131] See APEC, 'Ensuring Product Safety for Consumers: APEC Capacity-Building Workshop', http://www.apec.org/~/media~/media/Files/Events/2008/08_scsc_PrdtSafetyConsWkshp_GI.ashx.

[132] Luke Nottage, 'Consequences of Melamine-laced Milk for China, NZ, Japan and Beyond', East Asia Forum, 14 October 2008, http://www.eastasiaforum.org/2008/10/14/melamine-laced-milk-in-china-nz-japan-and-beyond/ (updated in Luke Nottage, 'Economics, Politics, Public Policy and Law in Japan, Australasia and the Pacific: Corporate Governance, Financial Crisis, and Consumer Product Safety in 2008' (2009) 26 *Ritsumeikan Law Review* 1).

THE UNIVERSITY OF SYDNEY

(b) require the New Zealand government to disclose serious problems to a partner like China under an FTA.

The simpler alternative is for each country, as in Canada's Product Safety Act 2011, to require all manufacturers to disclose actual or likely serious injuries, *wherever they occur*, which the home government would then make publically available. This could be fed into a new central clearinghouse, which might indeed then be linked up with the EU (and therefore called for example, 'RAPEX-ASIA-PACIFIC').

Indeed, we can expect more and more countries to enact accident or risk disclosure requirements. This will occur partly for practical reasons, not just because these countries like to imitate others or protect consumer interests to the same extent. After all, exporters to Canada or Australia (for example, from New Zealand) are likely soon to find importers there insisting on contract terms requiring exporters to notify them of serious product-related accidents in their home countries. This will occur so that the Canadian or Australian importers can comply with the new legislative requirement to notify regulators there about serious accidents that occur overseas, as well as within domestically. Exporters therefore should be become more willing also to disclose such information to their own regulators, because their compliance costs will come down – they will increasingly be collecting and monitoring this information anyway, for their contracting partners abroad. Indeed, exporters may then join with consumer groups to press for national legislation imposing disclosure obligations on all manufacturers – not just exporters – in order to level the playing field for them domestically.

IV. Conclusions

We are likely therefore to witness more and more 'add-ons' to obligations traditionally found within the WTO and FTA agreements. However, varying constellations of interest groups domestically as well as internationally may generate some such innovations more quickly or pervasively, as with product safety risk information dissemination or joint standard-setting activities.

Another complication is that some of these innovations may tend to be built in within FTAs themselves, such as investment chapters or even mutual recognition arrangements like the TTMRA. Others may continue to be set out separately, as with a judgments enforcement mechanism and regulatory cooperation treaty like the TTCPREA. However, especially as governments and others increasingly devote so many resources to negotiating FTAs themselves, we should already be thinking about taking those opportunities to negotiate additional measures to facilitate free movement in goods,

services, capital and people.[133] For example, justice ministry officials from each country are likely to be on negotiating teams anyway; while their colleagues are talking about economic issues like tariff level reductions, they could take time out to negotiate a judgments enforcement mechanism. Or tax officials on the teams, during their own 'down time', might negotiate new tax or social security treaties.[134]

Even if broader agreements are not negotiated in parallel in quite this way, FTA negotiators and policy-makers still need to be thinking more holistically. They should anticipate that a 'classic' FTA nowadays is likely to be or become only one core treaty, to be fitted into a larger framework in a more transparent way. At present, even in the Trans-Tasman context, we face an increasingly complex set of arrangements that is difficult to perceive in a holistic fashion. Ironically, the picture risks becoming even more complicated since Australia and New Zealand agreed in 2004 to develop a long-term vision for a seamless trans-Tasman business environment: a Single Economic Market (SEM). Reportedly:[135]

> SEM is not about prescribing a particular set of institutional arrangements to govern trans-Tasman markets. Rather, it is about identifying innovative actions that could reduce discrimination and costs arising from different, conflicting or duplicate regulatory requirements. The aim is to ensure that trans-Tasman

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[133] See also Gary Hawke, 'Asian FTAs in Progress - An introduction to EAFTA, CEPEA and TPP', *Paper presented at the* JEF and RIS International symposium "Under Economic Crises, How Asia Should and Could Promote Further Economic Integration", Delhi, 23-25 September 2009, p.9.

[134] See Parts II.B and II.C above. Australia and Japan have recently negotiated a new bilateral treaty: see Department of Foreign Affairs and Trade, 'Japan Country Brief', http://www.dfat.gov.au/GEO/japan/japan_brief.html. However, the tax treaty does not provide for the distinctive arbitration mechanism in the 2005 OECD Model Tax Treaty, which has been incorporated in the revised Australia-New Zealand Tax Treaty (Chloe Burnett, 'International Tax Arbitration' (2007) 36 *Australian Tax Review* 173) or in two other treaties recently concluded by Japan (Micah Burch, 'Tax Treaty Arbitration: The Next Frontier in Asia-Pacific Commercial Dispute Resolution?', Japanese Law and the Asia-Pacific, 1 August 2011, http://blogs.usyd.edu.au/japaneselaw/2011/08/tax.html). Having a tax treaty actually folded into a broader (true) EPA has the wider benefit of making us reconsider the rationales and formats of various dispute settlement processes that involve the state nowadays in various areas of law. Disadvantages include the possibility of stalemates in one area, traditionally separated into a separate treaty, delaying conclusion of the broader treaty, as well as possible complications when one area needs to be renegotiated more frequently. More generally, see Hawke, 'Asian FTAs in Progress'.

[135] New Zealand Ministry of Foreign Affairs & Trade, Australia: CER and SEM, http://mfat.govt.nz/Foreign-Relations/Australia/0-CER-SEM.php.

THE UNIVERSITY OF SYDNEY

> markets for goods, services, labour and capital operate effectively and support economic growth in both countries. The SEM also provides an opportunity to work cooperatively to influence international trends and potentially work together to address external challenges facing our two economies.

Achievements recorded for 2005-6 include a Treaty on Mutual Recognition of Securities Offerings, a Review of the Trans-Tasman MoU for Business Law Harmonisation (including a new five-year Agenda),[136] and establishment of a Trans-Tasman Council for Banking Supervision. But these and many other developments towards a SEM are often very disparate and not readily apparent, especially as a whole or for those outside the highest levels of government. This creates additional challenges as both Australia and New Zealand venture into regional arrangements like AANZFTA and the TPPA.[137] Further, developing cooperation in what still appears to be quite an ad hoc fashion makes the Trans-Tasman model difficult to perceive, and hence to adopt for other countries in the Asia-Pacific region that are presently negotiating their own FTAs.

Accordingly, just as we have now 'Model BITs' and (de facto, for large economies like the US) some 'Model FTAs', perhaps we should be developing a true 'Model Economic Partnership Agreement' that goes well beyond what Japan is currently including in its own 'EPAs' nowadays.[138] This would make it easier to realise that even this part of our world is already beginning to institutionalise elements not so dissimilar to some basic building

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[136] For background on the 1988 and 2000 MoUs, which include consumer law as an area for (loose) cooperation, see Walker, 'The CER Agreement and Trans-Tasman Business Law Coordination'.

[137] See Department of Foreign Affairs and Trade, 'Trans-Pacific Partnership Agreement Negotiations', http://www.dfat.gov.au/fta/tpp/index.html and http://www.mfat.govt.nz/Trade-and-Economic-Relations/2-Trade-Relationships-and-Agreements/Trans-Pacific/index.php.

[138] Comparing the approach and features of Japanese EPAs, see generally Kenneth Heydon and Stephen Woolcock, *The Rise of Bilateralism* (Tokyo: United Nations University, 2009) pp. 187-95. It remains unclear when and precisely why Japan started referring to its FTAs as EPAs, but part of the inspiration may have come from the EU. In 1997 the EC issued policy guidelines regarding the strategy for the EU to create what eventually became the Cotonou 'Partnership Agreement' with African, Caribbean and Pacific Island states. The guidelines emphasised the need for the EU to promote social and democratic as well as economic dimensions to cooperation, including (sustainable) development objectives. See generally Alberto Costi, 'Assessing the "Post-Cotonou Process" in the Pacific: Does an Economic Partnership Agreement Really Benefit Pacific Island Countries?' (2009) *Paper presented at the NZCIER conference, "Trade Agreements: Where Do We Go From Here?", Wellington, 22-23 October 2009* at p. 10; and Henning Grosse Ruse-Khan, 'A Real Partnership for Development? Sustainable Development as Treaty Objective in European Economic Partnership Agreements and Beyond' (2010) 131(1) *Journal of International Law* 139.

blocks of the EU. Such an initiative would also highlight where we still differ, so we can have more fruitful discussions about possible justifications for such variation. This more ambitious 'post-FTA' agenda makes it more likely that we will identify – and indeed acclaim – areas where our partnerships do or can achieve a more sustainable balance of both economic efficiency and democratic legitimacy, particularly in the Asia-Pacific region.