

# Asia-Pacific Product Safety Regulation and Other Regional Architecture for our FTA Era

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**Abstract:** The Global Financial Crisis 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 consumer product safety regulation is only one of many possibilities. Comparing the European Union helps identify areas not usually incorporated into contemporary FTAs, yet also increasingly covered in the Trans-Tasman context. A more holistic, systematic and balanced approach to negotiating true “Economic Partnership Agreements” would assist not only Australia and New Zealand, but also partner countries in the Asia-Pacific also now actively pursuing bilateral and regional FTAs. The end result may well be a true “Asia Pacific Community”.

**Keywords:** International trade law, WTO, FTAs, Asia-Pacific, Australia, New Zealand, Japan, European Union law, consumer product safety, investment law, arbitration, immigration and nationality law, enforcement of judgments, judicial cooperation

## I. Introduction

More and more countries are entering into bilateral Free Trading Agreements (FTAs), including now throughout the Asia-Pacific region. 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 liberalization already achieved between bilateral FTA partners tends to be preserved under such regional agreements.<sup>1</sup> And burgeoning FTAs diminish the incentives for national governments to press for a new multilateral system.<sup>2</sup>

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<sup>1</sup> In other words, bilateral liberalisation is not necessarily extended to all partners under the regional FTA. See eg tariff rates in AANZFTA: <http://www.dfat.gov.au/trade/fta/asean/aanzfta/>. Note also that this regional agreement includes investor-state arbitration provisions (discussed in Part II below), but a side agreement between Australia and New Zealand agrees not to apply those bilaterally (as those countries now complete negotiations to add an Investment Chapter to their existing FTA). That aspect is overlooked eg by Lee Carroll, [http://www.claytonutz.com/publications/newsletters/international\\_arbitration\\_insights/20090922/investing\\_in\\_asia\\_the\\_asean-australia-nz\\_fta\\_is\\_relevant\\_to\\_you.page](http://www.claytonutz.com/publications/newsletters/international_arbitration_insights/20090922/investing_in_asia_the_asean-australia-nz_fta_is_relevant_to_you.page)

<sup>2</sup> Brett Williams, <http://www.eastasiaforum.org/2009/04/14/the-korea-australia-fta-obstacle-or-building-block/>

Some therefore call for a “crisis Round” to try to revive the system, but that seems unlikely.<sup>3</sup> Another impediment is that the persuasiveness of conventional economic models, and market forces as the best way to maximize socio-economic growth, are under broader threat in the wake of the Global Financial Crisis (GFC) and now the meltdown in most real economies.<sup>4</sup>

One way forward is to concede that FTAs, already mostly sub-optimal from an narrow economic perspective, should include elements of “fair trade” – not just “free trade”. Indeed, many economists might 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 may be quite minimal. Those costs are likely to 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.<sup>5</sup> 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.

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 no longer just an economic community. Despite – or perhaps because of – the steady expansion of EU membership, it has addressed concerns about democratic legitimacy and accountability, alongside its original core objectives of free movement in people, capital, goods and services.<sup>6</sup> The EU has achieved this over many decades, often by trial-and-error and in a variety of ways, ranging from core or additional treaties, diverse European law harmonization measures, through to “soft law” initiatives.

This analogy seems particularly timely for the Asia-Pacific region, for three main reasons. First, our region certainly remains diverse in terms of social and legal or political systems.<sup>7</sup> Yet economic integration has burgeoned since the 1980s, and will intensify even further as pan-Asian production networks turn away from European and US markets in the wake of the GFC.<sup>8</sup> The “diversity gap” is narrowing

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<sup>3</sup> Andrew Elek, <http://www.eastasiaforum.org/2009/04/15/the-crisis-and-reinventing-wto-negotiations/>

<sup>4</sup> See eg my [http://blogs.usyd.edu.au/japaneselaw/2009/06/neoclassical\\_and\\_chicago\\_schoo.html](http://blogs.usyd.edu.au/japaneselaw/2009/06/neoclassical_and_chicago_schoo.html), edited and updated in: {Nottage 2009} on SSRN.

<sup>5</sup> See eg J J Spigelman,

[http://www.lawlink.nsw.gov.au/lawlink/Supreme\\_Court/ll\\_sc.nsf/pages/SCO\\_spigelman020506](http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/pages/SCO_spigelman020506) - then in (2006) 80 *Aust LJ* 35.

<sup>6</sup> See eg {Joerges et al eds 2006}; {DeBurca and Scott 2006}. 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: {Nottage and Trezise 2003}. But see, in the Australia-US FTA context, the skeptical view of {Weiss et al 2006}.

<sup>7</sup> See eg {Taylor 2006}

<sup>8</sup> See Peter Drysdale’s recent report for Austrade, emphasizing the importance of Japan’s trade and investment links built up first in South-East Asia, then China and now increasingly in South Asia: <http://www.eastasiaforum.org/2009/09/13/time-to-re-think-the-economic-partnership-with-japan-in-asia/>

significantly as the EU itself expands and becomes more diverse,<sup>9</sup> at least when compared to East Asia, Australia and New Zealand.

Secondly, there remains considerable interest in Australian Prime Minister Kevin Rudd's for a new "Asia Pacific Community". Proposed last year in rather inchoate form, including whether and how this new concept might include any EU-like institutional features, in December it will be discussed by regional leaders in Sydney and probably then at the APEC meeting in Singapore.<sup>10</sup> Many remain skeptical.<sup>11</sup> But Yukio Hatoyama also wrote shortly before Japan's general election this year about the need now to strengthen institutions in Asia, ranging from financial system infrastructure to human rights institutions.<sup>12</sup> And his new government now appears to be pressing for some sort of East Asian Community (centred on Japan and China, initially without the US).<sup>13</sup>

Thirdly, throughout the region, considerable distrust has re-emerged about leaving socio-economic ordering to outright market fundamentalism. Although some assert that market forces have long prevailed in Japan, for example, most agree instead that post-War Japanese capitalism has maintained distinctive norms (such as close business-government relations) and institutions (such as "main banks") that help explain why even the far-reaching reforms to corporate governance since the 1990s still only amount to a "gradual transformation".<sup>14</sup> Rudd has consistently protested about the excesses of market fundamentalism, although it remains to be seen whether for example how far this will translate into reforms to consumer protection legislation in Australia – likely also to be followed in New Zealand.<sup>15</sup> Such views underpinned his electoral victory in 2007 (although a wind-back of labour market deregulation was a much higher profile issue), but also Hatoyama's election victory in Japan this August. The new Japanese government appears likely to intensify measures to

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<sup>9</sup> The EU now has 27 member states, encompassing countries as diverse as Latvia, Bulgaria, Cyprus and Portugal. Turkey, Macedonia and Croatia have formally applied for membership. Turkey and three other states are already part of the EU Customs Union, and Switzerland is also tightly integrated economically. Through the European Economic Area, Norway, Iceland and Lichtenstein extend the EU's four freedoms and adopt most EU law. See [http://europa.eu/about-eu/27-member-countries/index\\_en.htm](http://europa.eu/about-eu/27-member-countries/index_en.htm) (or even [http://en.wikipedia.org/wiki/Member\\_State\\_of\\_the\\_European\\_Union](http://en.wikipedia.org/wiki/Member_State_of_the_European_Union)).

<sup>10</sup> <http://www.theaustralian.news.com.au/story/0,,26059522-7583,00.html>. See my <http://www.eastasiaforum.org/2008/07/03/taking-the-australia-japan-fta-negotiations-to-new-levels/>, and many subsequent postings by myself and others on the East Asian Forum blog (especially under <http://www.eastasiaforum.org/tag/asia-pacific-community/>). Some are updated and edited in {Nottage 2009} Rits L Rev.

<sup>11</sup> See eg Gary Hawke, <http://www.asianz.org.nz/our-work/track-2/opinions-and-essays/rudd-idea-gary-hawke>; Colin Heseltine, [http://www.asialink.unimelb.edu.au/\\_data/assets/pdf\\_file/0004/23872/Heseltine\\_essay7.pdf](http://www.asialink.unimelb.edu.au/_data/assets/pdf_file/0004/23872/Heseltine_essay7.pdf)

<sup>12</sup> See Joel Ratus, <http://www.eastasiaforum.org/2009/08/11/japan-the-djp-and-regional-financial-arrangements/> (and my Comment posted on that). Prospects for institutionalizing human rights mechanisms in Asia (and the Pacific) will be discussed at a major international conference at Sydney Law School over 27-8 November 2009: see

<http://www.usyd.edu.au/news/law/457.html?eventcategoryid=39&eventid=4142>. Regarding seemingly greater controversy over prospects more specifically in Pacific Islands, see this year's special issue (40-1) of the VUWLR: <http://www.victoria.ac.nz/law/research/VUWLR/index.aspx>

<sup>13</sup> See Aurelia George Mulgan, <http://www.eastasiaforum.org/2009/09/28/7199/>.

<sup>14</sup> {Nottage et al eds 2008}. Similar patterns are found in Germany, for example. Indeed, the "re-regulatory paradigm" is a pervasive phenomenon: {Nottage 2005} OUP.

<sup>15</sup> See my <http://www.eastasiaforum.org/2009/07/28/pain-on-the-road-to-recovery-so-what-for-consumer-credit-law-reform-for-australia-and-beyond/>.

promote consumer rights and product safety, while simultaneously promoting actively both the WTO system and bilateral or regional FTAs.<sup>16</sup>

What is likely therefore to emerge – or, at least, what we should now be encouraging – is deeper and broader economic integration in the Asia-Pacific (or at least Australasia) that simultaneously incorporates regulatory safeguards to meet the challenges and expectations of our brave new post-GFC world. These innovations may be built into FTAs or negotiated out alongside them, but it needs to be done in a more concerted and comprehensive manner. Part II below therefore explains various options for promoting “free but fair” movements of capital, people and services. Part III addresses free movement of consumer goods combined with better safety regulation: the WTO backdrop, the European approach, and some Asia-Pacific developments (especially Trans-Tasman). 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, are not really covered by the WTO regime itself, but such topics are now being folded into FTAs or can emerge out of them.

### **II.A Investment Treaties**

Thus, Bilateral Investment Treaties (BITs) are already increasingly being transformed into Investment Chapters within FTAs.<sup>17</sup> On a preferential basis, going 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 (eg 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 last year by its FTA with New Zealand, China has negotiated such full investor-state arbitration provisions in its treaties.<sup>18</sup>

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<sup>16</sup> See my [http://blogs.usyd.edu.au/japaneselaw/2009/09/the\\_new\\_dpj\\_government.html](http://blogs.usyd.edu.au/japaneselaw/2009/09/the_new_dpj_government.html) (with many Comments from others), and more specifically (with Michelle Tan) [http://blogs.usyd.edu.au/japaneselaw/2009/09/lessons\\_for\\_australia.html](http://blogs.usyd.edu.au/japaneselaw/2009/09/lessons_for_australia.html).

<sup>17</sup> This field is the subject of an even larger international conference to be held at Sydney Law School over 18-19 February 2010: <http://www.usyd.edu.au/news/law/457.html?eventcategoryid=37&eventid=4307>

<sup>18</sup> 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 {Nottage and Weeramantry 2009} via [www.law.usyd.edu.au/scil](http://www.law.usyd.edu.au/scil).

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 scrutinize 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 this year 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 (one interpretation of China’s detention of Stern Hu, an Australian citizen, after Chinese investors failed in bids for Rio Tinto and OZ Minerals earlier this year).<sup>19</sup>

One way to avoid such escalation would be to elaborate criteria for “national interest” and entrench them through FTAs. States traditionally guard their discretion jealously in this respect, partly for domestic political reasons.<sup>20</sup> Particularly in the aftermath of the GFC, pressures have re-emerged to fend off foreign investors.<sup>21</sup> 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.<sup>22</sup> 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.

A second backlash is evident in growing concerns about investor-state arbitration provisions themselves, particularly among South American countries. Again, a new generation of investment treaties will probably 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. But another option is for arbitral institutions (in the relevant countries but also potentially further afield, eg 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 harmonized sets of up-to-date provisions tailored to the needs and expectations of a broader range of stakeholders.<sup>23</sup>

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<sup>19</sup> See my [http://blogs.usyd.edu.au/japaneselaw/2009/07/china\\_national\\_security\\_and\\_in.html](http://blogs.usyd.edu.au/japaneselaw/2009/07/china_national_security_and_in.html)

<sup>20</sup> Pokarier, in Nottage et al (eds), op cit.

<sup>21</sup> See eg <http://www.unctad.org/Templates/Download.asp?docid=11749&lang=1&intItemID=2983>

<sup>22</sup> Daniel Kalderimis, <http://www.chapmantripp.com/Pages/Publication.aspx?ItemID=619>

<sup>23</sup> {Nottage and Miles 2009}

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. 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. 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 scrutinize such regimes. As one analysis concludes:<sup>24</sup>

“The NACEC establishes the first regional environmental organization 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 institutionalized 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 institutionalized even in this bilateral relationship.<sup>25</sup>

## **II.B Movement of People**

As for free movement of people in our region, Australia and New Zealand have been pioneers in many respects.<sup>26</sup>

“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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<sup>24</sup> {Knox and Markell 2003} at p13.

<sup>25</sup> See {Connelly 2005}.

<sup>26</sup> See <http://www.mfat.govt.nz/Foreign-Relations/Australia/1-CER/index.php>

More recently, for example, Australia and Japan have also concluded a Social Security Agreement (in 2007).<sup>27</sup> In addition, some limited immigration-related measures have already been included in the 2005 Japan-Philippines Economic Partnership Agreement, for example. They aim especially to facilitate Filipino nurses' access to Japan's burgeoning aged-care sector.<sup>28</sup> Such initiatives present an opportunity to build in labour law or human rights protections that may go beyond the international (ILO or UN) obligations assumed on a multilateral basis by even developed countries. For example, NAFTA also ushered in another side-agreement on labour protections, although again primarily aimed at Mexico.<sup>29</sup> Developing country partners may be in a weak bargaining position to press for such protections on a bilateral basis, but they may move up the agenda when it comes to negotiating regional FTAs.

Already, immigration from the Philippines and other South-East Asian countries has highlighted broader problems with Japan'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. Elsewhere I have pointed out a remaining 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.<sup>30</sup>

## II.C Services

Turning to free movement in services, a goal found more readily within FTAs because it forms an ever-growing part of the WTO regime through GATS, an intriguing extension close to home is the Trans-Tasman Mutual Recognition Arrangement (TTMRA). This 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".<sup>31</sup> In sum:<sup>32</sup>

"The Trans-Tasman Mutual Recognition Arrangement (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.

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<sup>27</sup> See via [http://www.dfat.gov.au/GEO/japan/japan\\_brief.html](http://www.dfat.gov.au/GEO/japan/japan_brief.html)

<sup>28</sup> See eg Akira Kotera, [http://www.rieti.go.jp/en/columns/a01\\_0160.html](http://www.rieti.go.jp/en/columns/a01_0160.html); cf <http://www.philippinestoday.net/index.php?module=article&view=696>.

<sup>29</sup> See {Compa 2001} and more generally {Bravo 2008}

<sup>30</sup> See my [http://blogs.usyd.edu.au/japaneselaw/2009/06/possibilities\\_and\\_pitfalls\\_in.html](http://blogs.usyd.edu.au/japaneselaw/2009/06/possibilities_and_pitfalls_in.html).

<sup>31</sup> Recital E, at [http://www.med.govt.nz/templates/MultipageDocumentPage\\_2363.aspx](http://www.med.govt.nz/templates/MultipageDocumentPage_2363.aspx)

<sup>32</sup> Reproduced from: [http://www.med.govt.nz/templates/StandardSummary\\_334.aspx](http://www.med.govt.nz/templates/StandardSummary_334.aspx).

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 is not a treaty, however, each country enacts parallel legislation (and eg Western Australia has delayed in doing so).<sup>33</sup> 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.<sup>34</sup> Those with a sense of European history will remember, as explained further in Part III.B below, that the EU developed mutual recognition principles (negative harmonization) but also continues joint attempts to minimize disputes about public health exceptions and so on (positive harmonization).<sup>35</sup> 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.

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<sup>36</sup> - has been in the mutual recognition of lawyers' qualifications. Since 2007 it has also facilitated mutual recognition for issues of securities and other financial products.<sup>37</sup> In 2003, Australia's Productivity Commission and a further review confirmed many other gains from mutual recognition.<sup>38</sup> 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 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.<sup>39</sup> One important feature is that a court in one country is treated like a court in the other regarding civil proceedings,

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<sup>33</sup> This is also true of the TTTA, mentioned above at Part II.B.

<sup>34</sup> For more details, including the Australian counterpart legislation, see the *Users' Guide* (2006) at <http://www.innovation.gov.au/General/IndPol-SILS/Pages/AUsersGuidetotheTransTasmanMutualRecognitionArrangement.aspx> and Part III.C below.

<sup>35</sup> See {Nottage 2006} in Clark ed Encyclopedia.

<sup>36</sup> See {Chambers 1999}.

<sup>37</sup> For background, see {Stranaghan 2004}. See also now {McCormack 2008}.

<sup>38</sup> See [http://www.med.govt.nz/templates/ContentTopicSummary\\_25024.aspx](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.)

<sup>39</sup> 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/>).

significantly expanding chances of enforcing judgments.<sup>40</sup> 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.<sup>41</sup> 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”).<sup>42</sup>

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.<sup>43</sup> Yet no efforts have ever been made public by the Australian government, for example, to extend similar treatment to other FTA partners. A prime candidate in Australasia would be Singapore, which shares an English law heritage. 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.<sup>44</sup> But then why not also extend a judgments enforcement regime like the Trans-Tasman one to Australia and Japan, within or alongside the FTA they are now negotiating, in light of the trust now built up between their judiciaries?<sup>45</sup>

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

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<sup>40</sup> See

[http://www.attorneygeneral.gov.au/www/ministers/RobertMc.nsf/Page/MediaReleases\\_2008\\_ThirdQuarter\\_23July2008-Treatytoimprovetrans-Tasmanlegalcooperation](http://www.attorneygeneral.gov.au/www/ministers/RobertMc.nsf/Page/MediaReleases_2008_ThirdQuarter_23July2008-Treatytoimprovetrans-Tasmanlegalcooperation)

<sup>41</sup> Compare s7 of the existing Reciprocal Enforcement of Judgments Act (Cth).

<sup>42</sup> 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 {Mortensen 2009}.

<sup>43</sup> See

[http://europa.eu/legislation\\_summaries/justice\\_freedom\\_security/judicial\\_cooperation\\_in\\_civil\\_matters/133054\\_en.htm](http://europa.eu/legislation_summaries/justice_freedom_security/judicial_cooperation_in_civil_matters/133054_en.htm)

<sup>44</sup> 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 (op cit). 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 {Nottage 2002} PhD.

<sup>45</sup> See generally J J Spigelman,

[http://www.lawlink.nsw.gov.au/lawlink/Supreme\\_Court/ll\\_sc.nsf/pages/SCO\\_spigelman280206](http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/pages/SCO_spigelman280206) (also in *J Japanese Law* 2006 via [www.law.usyd.edu.au/anjel](http://www.law.usyd.edu.au/anjel))

serendipitously,<sup>46</sup> before Australia embarked on an active FTA program, and government officials do not seem to have realized 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.<sup>47</sup> Such harmonising measures would also complement mutual recognition of lawyers' qualifications, as already in the Trans-Tasman context.<sup>48</sup>

### **III. Free Movement of Consumer Goods, but with Better Safety Regulation**

As Part III.A explains, the WTO system contains important Agreements on Technical Barriers to Trade (TBT) and Sanitary and Phytosanitary Measures (SPS), underpinned by an Dispute Settlement Understanding (DSU) institutionalizing claims among member states. This has a significant harmonising effect, but the system is proving controversial in balancing commercial and public interests. The EU has developed a more elaborate regime, particularly in regard to joint standard-setting activities.<sup>49</sup> Part III.B shows how various aspects are suggestive for further institutionalization on a regional and bilateral basis in regions like the Asia-Pacific. Already this is occurring in the Trans-Tasman context for foodstuffs and through the TTMRA. Similar and more far-reaching innovations should be extended by Australia and New Zealand to their FTA partners, including new mechanisms to share information on serious consumer product-related accidents and risks. As already indicated by the following Table of consumer product safety regulation in different jurisdictions, and as I explain further below, major trading partners are already ahead of Australia (and New Zealand) particularly in regard to information disclosure obligations imposed on suppliers:<sup>50</sup>

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<sup>46</sup> See [http://www.lawlink.nsw.gov.au/lawlink/Supreme\\_Court/ll\\_sc.nsf/pages/SCO\\_spigelman070607](http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/pages/SCO_spigelman070607)

<sup>47</sup> Compare eg some tensions identified by then Chief Justice Murray Gleeson regarding the Australia-Korea treaty: [http://www.hcourt.gov.au/speeches/cj/cj\\_sta10oct.htm](http://www.hcourt.gov.au/speeches/cj/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.

<sup>48</sup> 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](http://www.lawsociety.org.nz/publications_and_submissions/lawtalk/2009_issues/lawtalk_issue_737/trans-tasman_mediation_accord_signed).

<sup>49</sup> {Schepel 2005}.

<sup>50</sup> Adapted/updated from {Nottage forthcoming}, containing further detailed comparisons.

<b>Feature / Jurisdiction</b>	<b>US</b>	<b>UK</b>	<b>EU</b>	<b>Japan</b>	<b>Australia [like NZ]</b>
<b>Legislation</b>	CPSA	Various	GPSD	CPSL	TPA (and Fair Trading Acts)
<b>Regulator</b>	CPSC	DTI [now BIS]	EC/states	METI [now CAA]	Treasury /ACCC
<b>Standards</b>	'72 (but '81)	'61	'92	'73	'74
<b>Bans</b>	'72	'78	'92	'73	'74
<b>Warnings</b>	'72	'78	'92	-	'74
<b>GSP</b>	-	('94)	'92	-	-
<b>Recalls</b>	'72	('06)	'92 and '01	'73	'86
<b>Information disclosure</b>	'72 (and '90)	('06)	'01	'06	-
<b>[cf: Strict-liability PL]</b>	'65 (but '98)	'87	'85	'94	'92 (and '86)

### III.A The WTO Backdrop<sup>51</sup>

Under the TBT Agreement, technical standards adopted by member states “shall not be more trade restrictive than necessary to fulfil a legitimate objective” such as human health (art. 2.2), arguably determined by applying a rough cost-benefit basis. When “international standards” exist or soon will, states must use them except when they are “an ineffective or inappropriate means” to fulfil the objective, “for instance because of fundamental climatic or geographical factors or fundamental problems” (art. 2.4). Using international standards creates a rebuttable presumption that regulations fulfil the legitimate objective. States shall also “give positive consideration” to accepting others’ regulations as equivalent if “satisfied that these regulations adequately fulfil the objectives of their own regulations”. Such regulations, “wherever appropriate”, must use performance rather than design standards. States must also “play a full part” in international standardisation activities for products they do or seek to regulate (arts 2.6-2.8). All national standard-setting bodies must abide by a Code of Good Practice (art. 4.1), and non-public bodies (such as standards bodies) can opt in. The Code similarly commits them to minimise unnecessary trade barriers and use international standards unless inappropriate.

A key issue therefore is what constitutes an “international standard”, with the Agreement not listing any international standardisation bodies. The US argues that its (much more industry-dominated) bodies and their standards should prevail over any conflicting standards from the ISO. The latter is increasingly closely linked to the CEN and has representation from among all EU states, whereas there is only one main body (ANSI) representing the entire US. The US also proclaims that its bodies adopt a less politicised process, founded more on technological excellence and market acceptance of the resultant standards. So far, for example in the *Sardines* decision,<sup>52</sup> the WTO’s Appellate Body has only confirmed that an international standard

<sup>51</sup> This Part III.A, along with Part III.B and the Table above, is based closely on {Nottage forthcoming}.

<sup>52</sup> WT/DS231/AB/R, 26 September 2002.

favoured under the TBT regime need not be approved by complete consensus, although that may be desirable.

The SPS Agreement adopts a rather similar system for foodstuffs and the like. However, it states positively the presumption of conformity: measures based on international standards are deemed “necessary to protect human, animal or plant life” (art. 3.2). This Agreement also directly requires states to base measures on “scientific principles”, not to maintain them “without sufficient scientific evidence” (art. 2.2), and only divert from international standards if they can provide a “scientific justification” (art. 3.3). This difference from the TBT Agreement arises because the system specifies three public international standards bodies, most importantly the Codex Alimentarius Commission (CAC) for food safety. The CAC was set up as an intergovernmental organisation in 1961 by the WHO and FAO, and adopts standards by simple majority vote. Although it has become more science-focused, establishing expert committees and trying to separate risk assessment from risk management, a debate continues about the limits to such a separation and the CAC retains significant political dimensions.

Serious disputes are arising under the SPS Agreement, primarily pitting the US against the EU. Over the last few decades the EU has generally become more cautious about risks related to food and the environment, whereas the US has become more relaxed.<sup>53</sup> Regarding Genetically Modified Organisms (GMOs), the US focuses on food safety and approves products unless there is evidence confirming risks. The EU considers broader risks, such as the environment, and applies the precautionary principle. In an earlier case involving EU restrictions on *Beef Hormones*,<sup>54</sup> the Appellate Body pointed out that the precautionary principle had not been written into the SPS Agreement, but left open the possibility that a structured risk assessment incorporating aspects of that principle might be legitimate. However, in a decision on GMOs or *Biotech Products*,<sup>55</sup> a Panel significantly undermined the principle primarily by insisting that the SPS Agreement was applicable and therefore authorisations had to be processed without “undue delay” (art. 8). Some have objected to such “constitutionalising manoeuvres” by the WTO vis-à-vis the EU, prioritising the “private rights of applicants seeking authorisation for their products” over “political sensitivities” and ongoing debate about controversies for which science still really has no clear answers.<sup>56</sup>

The WTO may continue to develop a global governance regime based on ostensibly more “universal” principles of free markets and objective science. However, the system faces considerable challenges to both effectiveness and legitimacy,<sup>57</sup> as these two contentious cases attest. The experience of the EU may offer a way forward, despite divergences created by its ever-growing scope and institutionalisation. Structurally, one difference remains that the WTO’s “legislature” comprises only member states, with no equivalent to the European Parliament. Secondly, the WTO Secretariat has more limited executive functions than the EC. It cannot implement secondary legislation like Directives to advance “positive harmonisation”, and thus it

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<sup>53</sup> {Vogel 2003}

<sup>54</sup> WT/DS26/AB/R, 13 February 1998: {Sien, 2007}

<sup>55</sup> WT/DS291/R, 29 December 2006, not appealed: {Zurek 2007}

<sup>56</sup> {Joerges 2007} p. 12

<sup>57</sup> {Bermann & Mavroidis eds 2006}

cannot sue member states for breaching underlying Agreements (or even initiate Trade Policy Reviews of member states, on a discretionary basis). Thirdly, although a key feature of the WTO system is greater “judicialisation”, decisions are first reached by ad hoc Panels, and even those from the permanent Appellate Body remain subject to being overruled if all member states agree. Although that would require even the winning party to agree and has never happened, WTO dispute resolution – at least in practice and perception<sup>58</sup> – remains more tightly linked to informal negotiation processes than many ECJ proceedings. A related difference is that individuals cannot pursue rights directly against the WTO itself or member states.<sup>59</sup>

In terms of substantive law, the WTO does not impose a generic “negative harmonisation” agenda as extensive as that based on the 1979 *Cassis de Dijon* decision by the ECJ (discussed further in Part III.B below). However, 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 judiciary. They go further in expressly giving priority to standards from specified international bodies, whereas the more venerable General Agreement on Tariffs and Trade (GATT, art. XX) provided no such overt guidance in promoting harmonisation.

Thus, one option is to formally amend the WTO system to advance more politically acceptable but still trade-enhancing “positive harmonisation” mechanisms, perhaps even including strict-liability product liability law.<sup>60</sup> A more realistic shorter-term alternative is to allow greater scope for democratic values to feed into the current “negative harmonisation” regime. The WTO’s judiciary arguably should not scrutinise regulations as strictly as the ECJ does when it reviews restrictions applied by EU member states (unlike when, arguably, the ECJ reviews rules imposed by the EC, its institutional partner in the EU). After all, the EU system involves more derogations of sovereignty, greater scope, and greater legitimacy for the ECJ that has been built up over decades of cooperation with national courts.<sup>61</sup> Although this might seem to create more uncertainty in the WTO system, compared to the EU, uncertainty already exists due to the complications of (many more) WTO member states still negotiating “Rounds” of tariff reductions, rather than beginning from the EU’s starting principle of zero tariffs and free trade. Further, this proposal is not directed primarily at the more mundane “core” situations where scientists from different backgrounds will tend to converge on their assessments. Rather, the proposed review standard – not as strict as that applied by the ECJ for EU member states – is aimed at cases of significant scientific uncertainty, where politics must already begin to influence the risk assessment stage.<sup>62</sup>

Such a proposal, or even the development of a “positive harmonisation” agenda, may be even easier to achieve nowadays in an era of proliferating bilateral or regional FTAs. This is especially true of Agreements involving the EU or its states on one side, but also it may also be possible with countries like Japan that have already experimented with novel forms of public-private governance, albeit within their

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<sup>58</sup> {Weiler, 2001}

<sup>59</sup> {Tancredi 2004}

<sup>60</sup> {Reich 2004} pp. 325-8, 336-8, 353-6

<sup>61</sup> {McNelis 2001}

<sup>62</sup> See generally Joerges (2007) op cit

borders rather than supra-nationally.<sup>63</sup> 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**

Although slower to get going than the US, from the mid-1970s the EU has strengthened consumer product safety regulation more consistently. This now has more impact on the (now 27) member states in this area of law, as in consumer law more generally. A major impetus initially came from the UK regime, although that country has been more laggard than leader in promoting consumer protection in Europe, as witnessed by the Thatcher administration's sustained critiques of what became the 1985 Product Liability Directive.<sup>64</sup> The Consumer Product Safety Act 1978, partially mirroring the CPSA in the US, established a regime for mandating safety standards by regulations (as introduced in 1961), as well as bans and warning notices. Part II of the UK's Consumer Protection Act 1987 subsumed such measures, but added (in s. 10) a "general safety provision" (GSP) imposing a duty only to supply safe goods. Five years later, the original General Product Safety Directive (GPSD) extended this GSP to all EU manufacturers of general consumer products, and in 2001 the amended Directive added information disclosure requirements on manufacturers (as well as distributors, to a lesser extent).

This pattern is consistent with greater regulatory activity in consumer and environmental law in the EU, accelerating from the mid-1980s, just as the US was slowing down after leading the EU in these fields since the 1960s. This broader phenomenon of "trading places" can be tied to three major developments in the EU.<sup>65</sup> Waves of safety failures and inept responses generated distrust of government in the late 1980s (such as the Chernobyl nuclear accident in 1986) and the late 1990s (especially "mad cow disease" or BSE from 1996). Relatedly, "green" politics spread from the northern countries to, notably, the UK and France. In addition, a greater role for consumer protection has been institutionalised at the EU level, along with more and more access and veto points for consumer interests, in further treaties agreed in 1987 (Single European Act, SEA), 1992 (the "Maastricht" Treaty on European Union), and 1997 (the Treaty of Amsterdam).

The EU is emerging as a quasi-federal system centred on the powerful EC as the main originator and enforcer of policy (the executive); the Council of Ministers from member states and the (increasingly important) European Parliament (as legislative bodies); and the ECJ (heading the judicial branch). From small beginnings in 1957, the EU's primary agenda has been stated as economic liberalisation among its members. However, the mandate has slowly broadened, and tensions have always been evident with more statist traditions particularly in certain continental European nations.

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<sup>63</sup> Nottage (2005) op cit.

<sup>64</sup> See generally {Nottage 2004}

<sup>65</sup> Vogel (2003) op cit

The liberalisation agenda has also combined two different models.<sup>66</sup> A decentralized 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*.<sup>67</sup> 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, unless the host state can 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 realized 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 (pursuant to what is now art. 94 of the Maastricht Treaty). 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 centralized 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. The EC finally obtained enactment of the 1985 Product Liability Directive. It also announced a “New Approach” to standard-setting.<sup>68</sup> 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 – indeed, after 1987 under the SEA, potentially by qualified majority – broad “essential safety requirements”. The preferred means to achieve these requirements would be elaborated by standard-setting organisations.<sup>69</sup>

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”.<sup>70</sup> 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

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<sup>66</sup> {Nottage 2007} Harmonisation

<sup>67</sup> Case 120/78 [1979] ECR 649

<sup>68</sup> {Egan, 2001}

<sup>69</sup> {Howells 2000}

<sup>70</sup> {Joerges & Vos eds, 1999}

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.<sup>71</sup>

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.

From the late 1990s, safety failures and governance issues (including exposure of some corruption within the EC) created momentum for further reform. Strengthening the product liability regime was seen as insufficient, partly because it had generated few court judgments, although the option for states to exclude primary agricultural products was removed (Directive 99/34/EC). Instead, the GPSD was given more teeth in 2001. 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. Regulators also had to be guided by the “precautionary principle”, erring on the side of caution (intervention) when faced with irreversible harm from a risk whose nature and magnitude cannot be determined with scientific certainty.<sup>72</sup> This much-debated principle has evolved from 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.<sup>73</sup>

In 2001, as well, regulatory failures such as the BSE debacle led the EC to publish *European Governance – A White Paper* (COM(2001)428), urging greater independence, accountability, transparency and participation. “Comitology” is one area to be reassessed in the light of this,<sup>74</sup> as well as a later draft constitution proposed for the EU – so far to no avail directly. Both documents also highlight the roles that might be played by European agencies. These had grown from four in 1993 to 15 in 2003, especially in safety-related areas, despite the ECJ having set strict limits on combining legislative, executive and judicial functions along US lines.<sup>75</sup> It remains to be seen how these broader challenges to governance in the EU will play out in the field of consumer product safety regulation. Some call for a European Product Safety Agency,<sup>76</sup> concentrating on risk assessment recommendations like the new European Food Agency.

Meanwhile, an alternative to the current US model is presented by the revised GPSD, as well as the way it and New Approach Directives remain deeply embedded in

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<sup>71</sup> 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).

<sup>72</sup> {Fairgrieve & Howells 2006}

<sup>73</sup> Vogel (2003) op cit pp. 566-7

<sup>74</sup> {Vos 2005}

<sup>75</sup> *Meroni*, Case 9/56 [1957-8] ECR 133; cf {Geradin 2005}

<sup>76</sup> {Hodges 2005}

standard-setting processes incorporating both private and public elements. Although there are some parallels especially in legislative provisions, wording often differs and there are gaps, such as the lack of the GSP and a precautionary principle in the US. The EU approach also retains more government engagement, despite more scope for market forces introduced since the 1980s. Whereas the US was the initial leader in consumer protection generally, the EU now leads the way. However, momentum may eventually level off there too if the political salience of consumer regulation declines, costs are re-emphasised, or more open policy-making processes lead to gridlock.<sup>77</sup>

### III.C Asia-Pacific Developments

Already we can see analogies emerging in the Trans-Tasman context. The broader CER agenda generated the TTMRA, although as noted above (Part II) this 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:<sup>78</sup>

1. Exclusions: for legislation related to customs controls and tariffs, intellectual property, taxation and specific international obligations related to the sale of goods;
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”).<sup>79</sup>

Successive cooperation programs have remained unsuccessful in establishing an “Australia New Zealand Therapeutic Products Authority” (ANZTPA).<sup>80</sup> That was partly inspired by a Trans-Tasman standard-setting agency for foodstuffs, now known as Food Standards Australia New Zealand (FSANZ). 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

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<sup>77</sup> Vogel (2003) op cit p. 580

<sup>78</sup> See [http://www.austlii.edu.au/au/legis/cth/consol\\_act/tmra1997350/](http://www.austlii.edu.au/au/legis/cth/consol_act/tmra1997350/), respectively Schedules 1, 2 and 3; and [www.coag.gov.au](http://www.coag.gov.au) regarding Temporary Exemptions (s 46(3) of the Australian legislation).

<sup>79</sup> Compare also *User Guide* (2006) op cit, pp 19-20, with most recently [http://www.austlii.edu.au/au/legis/cth/num\\_reg\\_es/tmra20091n65o2009649.html](http://www.austlii.edu.au/au/legis/cth/num_reg_es/tmra20091n65o2009649.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).

<sup>80</sup> See eg <http://www.womens-health.org.nz/index.php?page=trans-tasman-agencies>

national body in 1991, and then the bilateral Agreement Concerning a Joint Food Standards System concluded in 1995 (and amended in 2002).<sup>81</sup>

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.<sup>82</sup> 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.<sup>83</sup>

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.<sup>84</sup> 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.<sup>85</sup> However, all other APEC members so far participate only in the “information exchange” aspect.

Instead, in 2006 and then again in 2008 as part of a broader reform of consumer law nation-wide, Australia’s Productivity Commission recommended some specific reforms to the Trade Practices Act (Cth, TPA). These have now been 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. They have also been approved by the Council of Australian Governments (CoAG). Accordingly, since 2009 the Australian Treasury (the federal government agency responsible for consumer policy) has been working on possible legislation, which state governments would then re-enact or “apply” nation-wide. However, this

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<sup>81</sup> See *User Guide* (2006) op cit, p 30; and <http://www.foodstandards.gov.au/aboutfsanz/historyoffszanz.cfm>; and [2002] ATS 13 at <http://www.austlii.edu.au/au/other/dfat/treaties/2002/13.html>

<sup>82</sup> 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 International Organisations (Privileges and Immunities) Act 1963 declaring JAS-ANZ to be an international organisation to which the Act applies.”

<sup>83</sup> See {Nottage 2007} Yearbook. The problem has got worse after the GFC has diminished investment returns from the funds received several years ago by Standards Australia (which actually develops the standards) when it sold its rights to publish and market the standards to SAI Global (which was set up as a listed company, answerable of course primarily to its shareholders and the customers buying those standards).

<sup>84</sup> See [http://www.med.govt.nz/templates/StandardSummary\\_254.aspx](http://www.med.govt.nz/templates/StandardSummary_254.aspx) and the text at [http://www.delous.ec.europa.eu/newzealand/EU\\_NZ\\_relations/agreements\\_mra.htm](http://www.delous.ec.europa.eu/newzealand/EU_NZ_relations/agreements_mra.htm)

<sup>85</sup> The last two aspects include mutual recognition of (a) test reports and (b) certification. See [http://www.med.govt.nz/templates/StandardSummary\\_251.aspx](http://www.med.govt.nz/templates/StandardSummary_251.aspx)

is apparently subject to a further formal regulatory impact assessment process, and the outcome will not automatically control the New Zealand government as it is not bound by the CoAG agreement.

Nonetheless, given New Zealand's agreement in principle at the MCCA level, 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 TTRMA, 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 TTRMA 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.<sup>86</sup>

By contrast, the EU minimizes 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 consumers), a variant of the CE mark system, and a GSP (including the precautionary principle). Meanwhile, however, aspects of the 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 derive inspiration from recent developments particularly in Europe. As mentioned above (Part III.B and in the Table at the outset of Part III), 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, fires caused by product failures) and accidents (requiring hospital treatment). China added similar regulations in 2007, Canada has legislation before its parliament, 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).<sup>87</sup>

By contrast, the Productivity Commission's renewed recommendations for some form of disclosure requirement were not mentioned in Treasury officials' February 2009

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<sup>86</sup> "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](http://www.med.govt.nz/templates/MultipageDocumentPage_2369.aspx)) and also s47 of the Australia legislation (at [http://www.austlii.edu.au/au/legis/cth/consol\\_act/tmra1997350/s47.html](http://www.austlii.edu.au/au/legis/cth/consol_act/tmra1997350/s47.html)).

<sup>87</sup> {Harland and Nottage 2009}

Consultation Paper on an Australian Consumer Law.<sup>88</sup> However, apparently they are now working separately towards new product safety legislation that will include a disclosure requirement, although that will have to survive a Regulatory Impact Assessment. If it does, and 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), and disseminate information quickly and appropriately to the public.

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.<sup>89</sup> Indeed, 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.<sup>90</sup>

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 since 2007,<sup>91</sup> and an AusAID-funded capacity-building exercise from November 2008 regarding general consumer product safety.<sup>92</sup> 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 last year Fonterra (formerly the New Zealand Dairy Board) voluntarily disclosed to the New Zealand government its growing concerns about milk products produced by its Sanlu joint venture 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.<sup>93</sup> But to minimize 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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<sup>88</sup> <http://www.eastasiaforum.org/2009/03/25/australias-lethargic-law-reform-how-not-to-revive-consumer-spending/>

<sup>89</sup> See [http://ec.europa.eu/consumers/safety/prod\\_legis/docs/report\\_impl\\_gspd\\_en.pdf](http://ec.europa.eu/consumers/safety/prod_legis/docs/report_impl_gspd_en.pdf)

<sup>90</sup> {Freeman 2009}.

<sup>91</sup> See

<http://www.foodstandards.gov.au/monitoringandsurveillance/apecfoodsafetycooperationforum/index.cfm>.

<sup>92</sup> See [www.apec.org/.../apec.../08\\_scsc\\_PrdtSafetyConsWkshp\\_GI.pdf](http://www.apec.org/.../apec.../08_scsc_PrdtSafetyConsWkshp_GI.pdf)

<sup>93</sup> See my <http://www.eastasiaforum.org/2008/10/14/melamine-laced-milk-in-china-nz-japan-and-beyond/> (updated in Nottage, Rits L Rev, op cit).

(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 the Canadian Bill, 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 eg “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 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 importers can comply with the new Canadian legislative requirement to notify regulators there about serious accidents that occur overseas, as well as within Canada. 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. 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.<sup>94</sup>

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<sup>94</sup> Australia and Japan have recently negotiated new bilateral treaties: see [http://www.dfat.gov.au/GEO/japan/japan\\_brief.html](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: {Burnett 2007}. Having a tax treaty actually folded into a broader (true) EPA has the wider benefit of making us reconsider the rationales and formats of

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:<sup>95</sup>

“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 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 over 2005-6 include:

- “The signing of the Treaty on Mutual Recognition of Securities Offerings in February 2006.
- The completion of the Review of the Memorandum of Understanding (MoU) on Business Law in February 2006 with a revised agenda for the next five years.
- The establishment of a common Australia/New Zealand passport/customs line at Australian airports from November 2005.
- The establishment of the Trans-Tasman Council for Banking Supervision to enhance cooperation in trans-Tasman banking regulation.
- The establishment of the Trans-Tasman Accounting and Auditing Standards Advisory Group (TTAASAG) developed a protocol of cooperation between the two countries' accounting standards bodies. It also hosted the inaugural Asia-Oceania Regional Policy Forum on International Financial Reporting Standards.
- The commencement of payments of the Wine Equalisation Tax rebate to New Zealand wine producers.
- Signing of the Protocol to the New Zealand Australia Double Taxation Agreement.
- The completion of negotiations for substantially more liberal trans-Tasman Rules of Origin (ROO), albeit with one exception in the area of men’s suits.
- Endorsement by the New Zealand and Australian Governments of the Trans-Tasman Mutual Recognition Arrangement (TTMRA) review outcomes.

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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.

<sup>95</sup> <http://www.mfat.govt.nz/Foreign-Relations/Australia/2-SEM/index.php>.

- An undertaking to consider adding an investment component to CER to reduce barriers to trans-Tasman capital flows.”

Some of these are certainly significant, but they are very disparate and often not readily apparent. This creates more challenges as both Australia and New Zealand venture into regional arrangements like AANZFTA and the Trans-Pacific Partnership.<sup>96</sup> Developing cooperation in what still appears to be quite an ad hoc fashion also makes the Trans-Tasman model difficult to perceive and therefore adopt for other countries in the Asia-Pacific region that are presently negotiating their own FTAs.

This, 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. This would also make it easier to realize that even this part of our world is already beginning to institutionalize elements not so dissimilar to some basic building blocks of the EU, and to highlight where we still differ so we can have more fruitful discussions about possible justifications for such variation.

Through such re-conceptualisations, it also becomes more likely that we will identify – and indeed acclaim – more areas where our partnerships do, or can, achieve a more sustainable balance of economic efficiency and democratic legitimacy.

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<sup>96</sup> See <http://www.dfat.gov.au/trade/fta/tpp/index.html> and <http://www.mfat.govt.nz/Trade-and-Economic-Relations/Trade-Agreements/Trans-Pacific/index.php>

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