# Czech Yearbook of International Law®

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## BIBLIOGRAPHY, CURRENT EVENTS, CYIL & CYArb® PRESENTATIONS, IMPORTANT WEB SITES



All contributions in this book are subject to academic review.

## List of Abbreviations

| | |
|---|---|
| **ADR** | Alternative Dispute Resolution |
| **AIS** | Automated Information System |
| **AMR** | Annual Ministerial Review |
| **ARIO** | Articles on the Responsibility of International Organizations |
| **AU** | African Union |
| **BRIC** | Brazil, Russia, India and China |
| **CAT** | Committee against Torture |
| **CE** | Council of Europe |
| **CED** | Committee on Enforced Disappearances |
| **CEDAW** | Convention on the Elimination of All Forms of Discrimination against Women |
| **CERD** | Committee on the Elimination of Racial Discrimination |
| **CIS** | Commonwealth of Independent States |
| **COREPER** | Committee of Permanent Representatives |
| **CRC** | Committee on the Rights of the Child |
| **CRPD** | Committee on the Rights of Persons with Disabilities |
| **CSR** | Corporate Social Responsibility |
| **DARIO** | Draft Articles on Responsibility of International Organizations |
| **DARS** | Draft Articles on the Responsibility of States for International Wrongful Acts |
| **DASR** | Draft Articles on State Responsibility |
| **DCF** | The Development Cooperation Forum |
| **Draft Articles** | Draft Articles on the Responsibility of International Organizations, 2011 |
| **e-arbitration** | Electronic Arbitration |
| **EC** | European Community |

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|---|---|
| **e-commerce** | Electronic Commerce |
| **EcoSoc** | UN Economic and Social Council |
| **ECtHR** | European Court of Human Rights |
| **e-democracy** | Electronic Democracy |
| **EEC** | European Economic Community |
| **e-elections** | Electronic Elections |
| **e-governance** | Electronic Governance |
| **e-government** | Electronic Government |
| **ECHR** | European Convention on Human Rights |
| **e-justice** | Electronic Justice |
| **e-mediation** | Electronic Mediation |
| **e-parliament** | Electronic Parliament |
| **e-procurement** | Electronic Procurement |
| **ERM** | Exchange Rate Mechanism |
| **e-state** | Electronic State |
| **EU** | European Union |
| **European Convention** | Convention for the Protection of Human Rights and Fundamental freedoms |
| **e-voting** | Electronic Voting |
| **FSC** | Forest Stewardship Council |
| **FST** | Fair Share Theory |
| **GAC** | General Affairs Council |
| **GATT** | General Agreement on Tariffs and Trade |
| **GDP** | Gross Domestic Product |
| **GDPR** | General Data Protection Regulation |
| **GNP** | Gross National Product |
| **GSTP** | Global System of Trade Preferences among Developing Country |
| **HLPF** | The High Level Political Forum |
| **HRC** | Human Rights Committee |
| **IBRD** | International Bank for Reconstruction and Development |
| **ICCPR** | International Covenant on Civil and Political Rights |
| **ICID** | International Commission of Inquiry on Darfur |
| **ICJ** | International Court of Justice |
| **ICSID** | International Centre for Settlement of Investment Disputes |
| **ICT** | Information and Communication Technology |
| **ICTY** | International Criminal Tribunal for the former Yugoslavia |
| **IHL** | International Humanitarian Law |

| | |
|---|---|
| **IHRL** | International Human Rights Law |
| **ILC** | International Law Commission |
| **ILO** | International Labour Organisation |
| **IMF** | International Monetary Fund |
| **IOs** | International Organizations |
| **IUCN** | International Union for Conservation of Nature |
| **KFOR** | Kosovo Force |
| **MFN** | Most Favoured Nation |
| **NAFTA** | North American Free Trade Agreement |
| **NATO** | North Atlantic Treaty Organization |
| **NGOs** | Non-governmental Organisations |
| **NT** | National Treatment |
| **OAS** | Organization of American States |
| **ODR** | Online Dispute Resolution |
| **OECD** | Organization for Economic Co-operation and Development |
| **OPEC** | Organization of the Petroleum Exporting Countires |
| **PIL** | Private International Law |
| **RANHiGS** | Russian Academy of National Economy and Public Administration |
| **RIA** | Regulatory Impact Analysis/Assessment |
| **Roskomnadzor** | The Federal Service for Supervision of Communications, Information Technology, and Mass Media of Russian Federation |
| **RSIWA** | Responsibility of States for Internationally Wrongful Acts |
| **SDT** | Special and Differential Treatment |
| **SPT** | Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment |
| **TEU** | Treaty on European Union |
| **TFEU** | Treaty on the Functioning of the European Union |
| **UN** | United Nations |
| **UNCITRAL** | United Nations Commission on International Trade Law |
| **UNCTAD** | United Nations Conference on Trade and Development |
| **UNDESA** | UN Department of Economic and Social Affairs |
| **UNGA** | United Nations General Assembly |

| | |
|---|---|
| **UNIDO** | United Nations Industrial Development Organization |
| **Union** | The Eurasian Economic Union |
| **UNMIK** | United Nations Mission in Kosovo |
| **UNSC** | United Nations Security Council |
| **VCIOM** | All-Russian Public Opinion Research Center |
| **VCLT** | Vienna Convention on the Law of Treaties of 1969 |
| **WB** | World Bank |
| **WHO** | World Health Organization |
| **WIPO** | World Intellectual Property Organization |
| **WTO** | World Trade Organisation |
| **WWF** | World Wildlife Fund |
| **CDEDM** | Center for the Development of e-democracy mechanisms of the North-West Management Institute RANHiGS |

# Articles

Csongor István Nagy

# Free Trade, Public Interest and Reality: New Generation Free Trade Agreements and National Regulatory Sovereignty

***Key words:***
*international investment arbitration | international investment regime | international law | international trade | investment arbitration | investment disputes | investment protection | investment treaty | investment treaty arbitration | regional economic integrations |WTO law*

***Abstract*** *| International free trade has become one of the central global issues of the 21st century both in terms of fierce political debates and economic significance. While some states seem to resort to protectionism, others see enormous possibilities in trade liberalization. The paper presents, through the triangle of free trade, local values and economic interests, the central issues of new generation free trade agreements, the purposes they pursue, the problems they address and the techniques they may use. After placing the current debate in its political and social context, it describes the interaction between free trade and local public interest, the role value standards, in particular environmental and labour standards, play in international economic relations, the controversial issue of international investment protection and investor-state arbitration, the mechanisms of regulatory coordination, the relationship between regulatory sovereignty and protectionism and the settlement of international trade disputes. The paper ends with the author's closing thoughts.*

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# I. Introduction

acknowledges its support. The author is indebted to Professor John J. Barceló III and Professor David A. Gantz for their comments on the earlier draft of this paper. Of course, all views and any errors remain the author's own.
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**8.01.** International free trade has become one of the central global issues of the 21st century both in terms of fierce political debates and economic significance.

**8.02.** The United Kingdom's pending secession from the European Union and the new US administration's policy to call off the EU-US Free Trade Agreement – Transatlantic Trade and Investment Partnership (TTIP), cancel the Trans-Pacific Partnership Agreement (TPP) and renegotiate the North American Free Trade Agreement (NAFTA) all prove that the reception of the new era has not been devoid of political upheavals. Nonetheless, recent developments also suggest that the internationalization of free trade cannot be halted. Though after a tumultuous process, the Canada-EU Free Trade Agreement – Comprehensive Economic and Trade Agreement (CETA) was signed last year (to enter into force 21 September 2017) and the withdrawal of the US from the TPP seems not to have put an end to the trans-pacific project but to bring about an economic region without the US (TPP 12-minus-one agreement) and to open the door to another economic giant (China).

**8.03.** New generation free trade agreements are opening a new age in international economic relations, and necessitate the re-thinking of our fundamental notions on global governance, state sovereignty and regulatory autonomy.[1] The share of free trade in the global economy is becoming paramount and the emerging new-generation free trade agreements not merely abolish tariffs and quotas (as old-fashioned agreements did) but effectively open up national regulatory sovereignty to international governance, re-shaping regulatory autonomy, internationalizing national competences and, according to some, raising serious questions of democratic legitimacy. New-generation free trade agreements cover the whole spectrum of items (goods, services, technology, capital etc.), ambitiously, address not only traditional barriers to trade (such as tariffs and quantitative restrictions), but also, in a comprehensive manner, all trade restrictions and state acts (e.g. regulatory disparities, public procurement, certain fundamental rights issues).

[1] Of course, the erosion of traditional sovereignty started long-ago. See e.g. JOHN H. JACKSON, SOVEREIGNTY, THE WTO, AND CHANGING FUNDAMENTALS OF INTERNATIONAL LAW, Cambridge University Press 57-78 (2006).

## II. Political and Social Context

**8.04.** The recent period of world trade created a very special political and social environment for the free trade boom experienced nowadays.

**8.05.** First, the failure of the Doha Round of WTO negotiations suggests that, in global trade, multilateralism reached its limits and pushed pro-free-trade states towards bilateralism (or restricted multilateralism). In parallel to Doha's failure as to further trade liberalization, a complicated network of free trade and investment partnership agreements is emerging. Although in the WTO system bilateralism had been traditionally treated as an exception, very likely, the new wave of free trade agreements will make bilateralism (or regionalism) the rule. Though the sunset of the Most-Favoured-Nation principle (WTO's prohibition to discriminate between trading partners) was predicted in the scholarship, this is becoming a reality with the emergence of the new-generation of free trade agreements. Furthermore, while some states reverted to protectionism, others considered free trade as a way-out from the current economic crises. This resulted in a new generation of free trade agreements, like the Transatlantic Trade and Investment Partnership (TTIP), the Trans-Pacific Partnership (TPP) and the EU-Canada Comprehensive Economic and Trade Agreement (CETA), and the Trade in Services Agreement (TiSA) (a multilateral agreement of restricted geographical scope).

**8.06.** Second, it appears that the global system fulfilled its mission by minimizing traditional trade restrictions and the focus of world trade shifted from traditional trade restraints to regulatory restraints (facially even-handed regulatory hindrances, such as standards) and was extended to other subjects of trade, such as services, technology and capital. It has to be taken into account that in the last period the social role of regulation strengthened extraordinarily and, today, its significance in the market is incomparably higher than it was at the age when the principles of the law of economic relations were worked out.

## III. Free Trade, National Interests and International Governance

**8.07.** All free trade systems, including WTO law, allow states to restrict trade if justified by a local legitimate end. States may introduce standards, shape taxation, impose public service duties on enterprises or maintain monopolies in a way that restricts trade and free competition. Since the regulatory frameworks contain

vague and fluid concepts and notions, states are normally afforded a wide margin of appreciation and the application of the law becomes a social and mental process, blending economic, societal and legal considerations and aspects.

**8.08.** A pivotal question is the definition of restriction. The spectrum is very vide, ranging from the notion that goods lawfully produced in one state have to be admitted to all other states[2] to the concept that only genuine protectionist measures are caught in the net of the prohibition of restrictive measures.[3] The central issue is the treatment of non-discriminatory restrictions. There is a common understanding that distinctly applicable rules should be regarded as protectionist. There are, however, problems in that the identification of de facto discrimination is burdened by serious conceptual and practical problems.[4] The status and treatment of these even-handed regulations is diverse. While, in principle, EU free movement law also prohibits non-discriminatory measures, provided they are restrictive,[5] in the US Supreme Court's case-law, non-discriminatory restraints are rarely condemned.: while such restraints are certainly caught in the net of the Dormant Commerce Clause, US courts seem to be rather deferential when it comes to the justification of non-discriminatory state measures, proceeding from a presumption of validity.[6] By way of example, while the CJEU, in the golden share cases,[7] condemned plentiful apparently non-discriminatory measures, because they discouraged foreign investors (though in the same way and to the same extent as domestic investors) from investing, the very same cases caused no major uproar on the other side of the Atlantic, where the US Supreme Court approved such state measures as even-handed regulations with only incidental effects on interstate commerce, whose restrictive effects are not clearly excessive in relation to the putative local benefits.[8] Arguably, WTO law mainly focuses on discriminatory

[2] ECJ Judgment of 20 February 1979, 120/78 *Rewe-Zentral AG* v. *Bundesmonopolverwaltung Für Branntwein (Cassis de Dijon)* [1979] ECR 649.

[3] Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICHIGAN LAW REVIEW 1091 (1986).

[4] Lothar Ehring, *De Facto Discrimination in World Trade Law National and Most-Favoured-Nation Treatment – or Equal Treatment?* 36(5) JOURNAL OF WORLD TRADE 921 (2002).

[5] See NIAMH NIC SHUIBHNE, THE COHERENCE OF EU FREE MOVEMENT LAW: CONSTITUTIONAL RESPONSIBILITY AND THE COURT OF JUSTICE, Oxford University Press (2013).

[6] For examples of cases where a restrictive measure was found unconstitutional see *Bibb* v. Na*vajo Freight Lines, Inc.,* 359 U.S. 520 (1959) and *Kassel* v. *Consolidated Freightways Corp*., 450 U.S. 662 (1981).

[7] For example ECJ Judgment of 4 June 2002, C-503/99 *Commission* v. *Belgium* [2002] ECR I-04809; ECJ Judgment of 23 May 2000, C-58/99 *Commission* v. *Italy* [2000] ECR I-3811; ECJ Judgment of 4 June 2002, C-367/98 *Commission* v. *Portugal* [2002] ECR I-4731; ECJ Judgment of 4 June 2002, C-483/99 *Commission* v. *France* [2002] ECR I-4781; ECJ Judgment of 2 June 2005 , C-174/04 *Commission* v. *Italy* [2005] ECR I-4933.

[8] *Indiana Takeover Law Dynamics Corporation*, 481 US 69 (1987); *Edgar* v.*MITE Corp*., 457 U.S. 624 (1982); *Lewis v BT Investment Managers, Inc.*, 447 U.S. 27 (1980).

measures,[9] though it encompasses special regimes for technical measures and for sanitary and phytosanitary measures.[10] At the same time, new-generation free trade agreements cover these issues very intensively, suggesting that non-discriminatory trade restrictions have become a central issue of free trade.

**8.09.** A similar global experience may be drawn as to whether the public interest regulatory considerations involved may be taken into account when inquiring whether a measure is restrictive or not. The usual pattern is that free trade law prohibits states from restricting trade but allows them to do so if they act for the purpose of a legitimate local end.[11] This would suggest that the question of restriction is independent of the question of justification. This seems to be the approach taken by the US Supreme Court.[12] However, both the CJEU and the WTO Dispute Settlement Body have developed a case-law where, seemingly perversely, a restriction may not be regarded as a restriction at all if it serves a legitimate regulatory aim.[13] This approach inevitably leads to a logical contradiction. A measure does not need to be justified under the public interest exception, if it serves the public interest, as in this case, it does not qualify as a restriction at all. Why is it necessary to have a public interest exception, if restrictions serving the public purpose are not qualified as a restriction at all. The rationale behind this approach is probably very simple and not commensurate to the theoretical debate it incited. The public interest exception is a statutory exception and the public interest goals that may be relied upon are enumerated (that is, the list is exhaustive). Decision-makers, however, realized very early that states may pursue numerous other legitimate ends beyond the ones enumerated and the only conceptual possibility to accommodate these ends was the concept of restriction. A comparison of the CJEU's and the WTO Dispute Settlement Body's jurisprudence reveals the operation and rationale of this conceptually incoherent approach.

**8.10.** Free trade systems differ as to how local legitimate ends are defined, the standard on the basis of which the existence and weight of public interest are judged and the way states' margin of appreciation is conceived when comparing the weight of free trade with the public interest values. The crucial question is

[9] Including subsidies, which are discriminatory in the broadest sense.

[10] WTO Agreement on Technical Barriers to Trade; Agreement on the application of sanitary and phytosanitary measures.

[11] See e.g. GATT Article XX, Article 36 TFEU.

[12] *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970)

[13] See e.g. ECJ Judgment of 11 July 1974, 8/74 *Procureur du Roi v Benoît* **v.** *Gustave Dassonville* [1975] ECR 837; Appellate Body Report, EC – *Asbestos*, WTO Doc WT/DS135/AB/R.

whether the court can make value-judgments when contrasting disgeneric values (such as free trade versus public interest goals).

**8.11.** Proportionality is one of the fundamental elements of the analytical framework. Nevertheless, free trade and public interest are not unigenous values; hence, they cannot be weighed with each other without a proper value-judgment. There is no exchange rate for contrasting them. The pivotal question is whether the reviewer, a court, tribunal, or dispute settlement body, has the power to interfere with the state's value-judgment and, if it does, what is the margin left to the state. It may also be the case that once the public interest goal is genuine, all reasonably connected trade restrictions are justifiable, irrespective of the ratio between the advancement of the public interest and the restriction of trade (which obviously cannot be expressed in numerical terms). In the latter case, the proportionality analysis is reduced to the pursuance of those less restrictive alternatives, which still advance the same public interest goal.

**8.12.** While policy decisions obviously seem to be the prerogative of the democratically elected government, courts have adopted various attitudes. For instance, in some systems courts have been inclined to second-guess national policy decisions, while in others they have been much more deferential to national policy-making, both in free movement and investment law.[14] As noted above, an alternative of the balancing standard (where free trade is balanced against a local value, like consumer protection or public health) is the less restrictive alternative approach, where the tribunal allegedly does not confront disgeneric values but merely investigates whether the same legitimate end could be achieved through a less restrictive measure.[15] However, this approach, in most cases, seems to be hypocritical. While two alternatives may make a roughly similar contribution to the same end, in the vast majority of the cases they differ in terms of effectiveness. By way of example, in the case of a hazardous material, labelling may be regarded as an alternative to a complete ban. However, a complete ban is susceptible of completely excluding the risk to public health, while labelling serves the same aim less effectively. Hence, frequently, even the adoption of less restrictive measures involves some kind of a value-judgment, since different methods serving the same public interest goal tend to have diverging effectiveness in

[14] See e.g. ICSID Case No. ARB/07/22 (29 June 2012).

[15] Appellate Body Report, *Brazil-Measures Affecting Imports of Retreaded Tyres*, paragraph 178, WT/DS332/AB/R (3 December 2007).

advancing that public interest goal. Less restrictive measures may be slightly less effective.

**8.13.** A hot issue is the extent of the deferentialism enjoyed by the state when making factual evaluation in an information vacuum. For example, can the state opt for a non-mainstream theory, if the scientific community is divided as to certain additives' impact on health?

**8.14.** Since statistical data, particularly in food-safety cases, often points out only correlations but may prove no causation, these debates, at times, involve the risk of *the ice-cream-murder fallacy. Studies show*[16] *that the consumption of ice cream and murders are positively correlated. The more ice cream is sold, the more homicides are committed and vice versa. Is there a correlation between the two? Yes, of course. Would it be reasonable to draw the conclusion that there is causation? No, of course not. Both ice cream consumption and murders increase in the summertime, when people stay out later. Correlation does not mean causation.* In hard cases, the regulator and the court/tribunal has to make a decision under (scientific) uncertainty. This could be called an information vacuum. In most cases, neither the regulator, nor the court has sufficient information about the existence and extent of the public interest problem, and they have to make decisions on the basis of the sporadically available data.

## IV. Value Standards

**8.15.** While fundamental rights do not appear to be of trade-relevance and there is no global endeavour to create a global regime for these universal values,[17] states have realized that compliance with fundamental rights requirements has economic effects because it has cost implications, and domestic producers are put at a competitive disadvantage if they have to comply with higher standards. Although this seems to be no different from a traditional regulatory competition problem, fundamental rights have a special status. On the one hand, states, for obvious reasons, are disinclined to lower their standards and to impair their fundamental rights protection for reasons of trade. On the other hand, human rights may easily camouflage the economic considerations behind fundamental rights claims.

[16] JOAN WELKOWITZ, BARRY H. COHEN, R. BROOKE LEA, INTRODUCTORY STATISTICS FOR THE BEHAVIORAL SCIENCES, John Wiley & Sons 136 (2012).

[17] See Susan A. Aaronson, Jamie Zimmerman, *Fair trade? How Oxfam presented a systematic approach to Poverty, Development, Human Rights & Trade*, 28(4) HUMAN RIGHTS QUARTERLY 998 (Nov 2006).

**8.16.** It is not a surprise that, for instance, labour[18] and environmental standards have become one of the major issues of world trade.[19] Of course, this is nothing new. The proliferation of free trade agreements just brought an old phenomenon to the light. Anecdotal evidence suggests that the principle of equal treatment for men and women, which appeared not to fit in with the provisions of the Treaty on the European Economic Community, was inserted because of the insistence of France .This principle was well entrenched under French law and France feared that French enterprises would suffer a competitive disadvantage, if other Member States allow women to be paid less.[20]

**8.17.** Furthermore, rule of law, transparency, and due process (fair trial)[21] became hot issues mainly for similar reasons. International (inter-state) dispute settlement can mainly address national rules and visible government actions. The net of free trade law can scarcely catch under-the-radar violations such as hidden discrimination and undue influence on judicial proceedings.[22]

**8.18.** Trade policy to promote fundamental rights and freedoms may appear not only in the negotiation phase, through linking trade concessions to the protection of fundamental rights, but the impairment of certain values may justify the restriction of trade. Under WTO law states may be possibly allowed to restrict trade not only with reference to the products' characteristics but also in case they find the process used to produce the goods unacceptable (process-based restrictions). Although the relevant cases emerged in the context of the protection of the life of animals,[23] they may be easily extrapolated to other values as well. This case-law opens the door to the extra-territorial assertion of local values and the enforcement of these values upon exporting states.

[18] See Phillip Alston, *'Core labour standards' and the transformation of the international labour rights regime*, 15(3) EUROPEAN JOURNAL OF INTERNATIONAL LAW 457 (2004).

[19] See European Parliament, Resolution of 25 November 2010 on Human Rights and Social and Environmental Standards in International Trade Agreements, (2009) 2009/2219(INI), 15(a).

[20] European Commission: Questions and Answers: What has the EU done for women? 50 years of EU action on Gender Equality for One Continent. Available at http://europa.eu/rapid/press-release_MEMO-14-156_en.htm.

[21] Robert Wolfe, *Regulatory transparency, developing countries and the WTO*, 2(2) WORLD TRADE REVIEW 157 (2003).

[22] Razeen Sally *Looking East: The European Union's new FTA negotiations in Asia*, 2007(3) JAN TUMLIR POLICY ESSAYS 8 (2007), available at: http://www.ecipe.org/app/uploads/2014/12/looking-east-the-european-union2019s-new-trade-negotiations-in-asia-1.pdf (accessed on 27 December 2017).

[23] United States – *Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DB58/AB/R; Dispute Settlement Panel Report On *United States Restrictions On Imports of Tuna*, 30 I.L.M. 1594, 1599 (1991).

**8.19.** Another important intersection between free trade law and fundamental rights is the question of whether violations of fundamental rights (freedoms) qualify as a restriction of trade and *vice versa.* Can the concept of restriction of trade be used to prohibit acts violating fundamental rights? In the last period, the European Commission tried to object to national laws and measures that appeared to infringe fundamental rights on the basis that they restricted trade or were contrary to other provisions of EU law. In certain cases, the Commission tried to amplify the scope of EU law. By way of example, the Commission raised various objections as to the Slovak Language Law, because it feared that the violation of fundamental rights (restriction on the use of languages other than the state language) may hinder inter-state trade.[24] In another case, Hungary introduced a forced early retirement scheme in the justice sector, reducing the retirement age from 70 to 62. As a result of this requirement, around 274 judges and public prosecutors had to retire. The law's opponents had serious concerns on the law's impact on the independence of the judiciary. Although the Commission was reluctant to base its claim on the argument that the law endangered the independence of the judiciary, it successfully attacked the law before the CJEU on the basis that it was not compatible with EU equal treatment law (Directive 2000/78/EC), which prohibits discrimination at the workplace on grounds of age. Here, a well-established principle of EU law (equal treatment) was used as a surrogate to protect the independence of the judiciary.[25] As to fundamental rights, in the EU, the current period resembles the state of US constitutional law in the 19th and early 20th century. At that time, the Bill of Rights of the US Constitution initially applied solely to the federal government and not to states. However, a number of its provisions became, due to the Supreme Court's interpretation, applicable also to states by way of the Constitution's 14th Amendment.[26]

[24] See Opinion on the Implementing Principles to the Slovak State Language Law Prepared by the European Commission's Legal Service (2010), available at: http://www.hhrf.org/hhrf/index.php?oldal=426 [https://perma.cc/C5PJ-9G2G] (accessed on 21 December 2017).

[25] Csongor István Nagy, *Do European Union Member States Have to Respect Human Rights? The Application of the European Union's 'Federal Bill of Rights' to Member States*, 27(1) INDIANA INTERNATIONAL & COMPARATIVE LAW REVIEW 1, 9-10 (2017).

[26] *Gitlow* v. *New York*, 268 U.S. 652 (1925). See John James Barcelo, *ECJ Review of Member State Measures for Compliance with Fundamental Rights*, *in* UNION DE DROIT, UNION DES DROITS: MELANGES EN L'HONNEUR DE PHILIPPE MANIN 767 (Jean-Claude Masclet, Hélène Ruiz Fabri, Chahira Boutayeb & Stéphane Rodrigue eds., 2010), available at: https://ssrn.com/abstract=1543222 (accessed on 21 December 2017).

## V. Investment Protection: Substantive Standards and Procedural Mechanisms

**8.20.** The first investment protection treaty (Germany-Pakistan Treaty of 1959) was meant to convert certain constitutional requirements (such as expropriation, and protection of legitimate expectations) into international obligations so as to guarantee them (guarantee function). The initial purpose of these treaties was to project certain constitutional requirements to the level of international disciplines. They were normally concluded between developed and developing countries and led by the concerns respecting the latter's legal system. The obligations assumed were, as a matter of courtesy, mutual, that is, reciprocal. However, these treaties did not aim at establishing higher or in any sense different standards for investment protection than the ones already part of the constitutional traditions of western democracies. The rationale was to convert the relevant constitutional rights and principles into international law guarantees in the form of bilateral agreements, so they could not be nullified unilaterally.

**8.21.** Nonetheless, there was no global agreement and especially no uniformity as to the investment protection standards. It is noteworthy that although goods, services and knowledge (intellectual property) are regulated in the temple of world trade (WTO), investment issues, including investment protection, were almost entirely left out, with the exception of the relatively insignificant provisions of TRIMs. The major turning point was when even developed democracies started concluding bilateral investment treaties. Today, investment protection has become an integral part of new generation free trade agreements, some of which are concluded between developed democracies (Canada, European Union, United States). With this, the guarantee function was put into the shade, and investment protection law fully detached from its original *raison d'être*.

**8.22.** Although, interestingly, investment protection, at least as far as substantive standards are concerned, has always remained bilateral, without a realistic chance of a multilateral system, during this half-century, this pattern brought about a labyrinthine network of bilateral arrangements, and investment protection took a life of its own Instead of a duplicate, it became an independent parallel system.

**8.23.** The major sources of uncertainty are the investment protection treaties' 'treatment provisions' including fair and equitable treatment, security and protection, non-discrimination and national treatment. These principles centre around fluid

concepts, confer on arbitral tribunals extremely wide powers to review national policy decisions and national administrative and judicial proceedings, entailing far-reaching consequences for states. The doctrine of legitimate expectations, deduced from the fair and equitable treatment standard, may raise separation-of-powers issues: a state may be called to account for breaking the promises the executive made also as regards issues coming under the legislative's competence.

**8.24.** Furthermore, investor-state arbitration subjected genuine public-law disputes to an arbitral procedural pattern, initially designed for purely commercial disputes, which is devoid of democratic legitimacy due to its secrecy, non-transparency and ad-hoc nature.[27]

**8.25.** The above developments were topped by new generation free trade agreements, which are blamed for introducing these loose standards and the attached dispute settlement mechanism lacking democratic legitimacy into relations between developed democracies.

## VI. Standards and Regulatory Coordination

**8.26.** Nowadays, the most important hurdles to trade are not traditional trade restrictions but disparities between national technical, sanitary, phytosanitary, consumer, environment etc. standards. While there is a general understanding that discriminatory measures should be prohibited, the status of non-discriminatory measures is dubious. The more tolerant approach opens the way to veiled protectionism, while the more interventionist approach goes hand in hand with the risk of subordinating local regulatory values to free trade. New -generation free trade agreements champion regulatory coordination, but are also claimed to raise sensitive issues of democratic legitimacy.[28]

**8.27.** While there is a general understanding that discriminatory measures providing differential treatment to import and domestic products should be prohibited, the status of non-discriminatory measures is dubious, albeit nowadays the most important hurdles to trade are not traditional trade

[27] Cf. Joseph H.H. Weiler, *European hypocrisy: TTIP and ISDS*, 25(4) EUROPEAN JOURNAL OF INTERNATIONAL LAW 963 (2014) ('[T]he Bar that adjudicates them [investment disputes] is of a limited range (…), and dominated by arbitrators from private practice rather than public interest backgrounds (…); and most damning of all, the substantive provisions of the investment treaties, when it comes to protecting societal interests, are woefully defective and inferior when compared with similar public interest provisions in trade agreements such as the WTO itself.').

[28] As to financial services, see Brett Bickel, *Harmonizing regulations in the financial services industry through the transatlantic trade and investment partnership*, 29 EMORY INTERNATIONAL LAW REVIEW 557 (2015).

restrictions but disparities between national technical, sanitary, phytosanitary, consumer, environmental etc. standards. Under EU law, even non-discriminatory barriers to trade may fall foul of free movement law. In the US, both discriminatory and non-discriminatory measures restricting inter-state commerce are caught in the net of the Dormant Commerce Clause, though even handed measures carry the presumption of validity and states enjoy a high level of deferentialism. On the other hand, WTO law, put it simply, appears to centre around the national treatment standard and the possibility to condemn non-discriminatory measures is limited. The more tolerant approach opens the way to veiled protectionism and preserves the partitioning of the free trade area along national borders. At the same time, the more interventionist approach (followed by the CJEU) subordinates local regulatory values to free trade and may entail legitimacy issues. All these approaches have their merits and drawbacks and they show that the best way-out is some sort of coordination. Some disparities are attributable to differences in terms of public policy; however, a considerable part of the diversity is due to diverging traditions and to contingencies (such as the size of fenders or the colour of turn lights) and may shield local producers from competition.

## VII. Regulatory Sovereignty and Protectionism

**8.28.** The purpose of the states' margin of appreciation is to preserve regulatory autonomy and the free trade system's legitimacy, since the excessive promotion of free trade may suppress local legitimate regulatory policy considerations. Although states are granted a certain margin to enforce local values, this also implies the risk of disguised protectionism, since regulatory decision-making is frequently impregnated by nationalistic and protectionist trade interests. Although this flexibility is meant to ensure that states have the appropriate margin of appreciation to protect public interest and to enforce local values, it also implies the perspective of disguised protectionism. Under the surface of good faith balancing, regulatory decision-making is frequently impregnated by nationalistic emotions and protectionist lobbying activity. A wide playing field for local legitimate ends in fact implies more possibilities for disguised protectionism and bad faith trade restrictions. Beneath the surface, the real motivations of trade restrictions may often be traced back to industry lobbying.

**8.29.** This issue points to a central dilemma. The purpose of the margin of appreciation is to preserve regulatory autonomy and the system's legitimacy, since the excessive promotion of free trade may suppress local legitimate regulatory policy considerations and may display free trade as unregulated trade in the eyes of the local electorate. At the same moment, facially non-discriminatory regulation is frequently used to cut out foreign trade.

**8.30.** While some authors argue that only those measures should be prohibited where protectionist intent is proved,[29] the question to be answered still remains how can disguised protectionism be unveiled? May the measure's subjective side be investigated? As noted above, while the state's public interest interference may be backed by disguised protectionism and national market-defence, it is uncertain how a measure that is formally justifiable by public interest purposes and not transgressing the discretionary powers of the state can be pronounced to be driven by nationalistic desires and protectionism. The question is whether the state's subjective intentions (good faith) can be investigated. Also how are the subjective side and the state's good faith defined?

**8.31.** Furthermore, sometimes, the picture looks like the Baptist-bootlegger coalition Both the Baptist and the Bootlegger are supporting the alcohol prohibition – the former for moral, the latter for business reasons. Specifically, if the prohibition were lifted, the bootlegger would lose its market. So both groups want the same result but for different reasons. By way of example: if a country blocks the import of shrimp because the technique used for harvesting them affects sea turtles adversely, this may be supported both by animal protectors and fishing companies The latter may be less concerned about the life of sea animals and more about their local market.[30]

**8.32.** Another example, the Hungarian 'egg case' illustrates the 'Baptist-bootlegger' coalition very well. Retail chains offer large discounts during peak seasons such as Easter but in the discounted packages they sell small (S-size eggs), so purchases concentrate on this category and the purchase of medium (M), large (L) and extra-large (XL) eggs does not increase or might decrease. Domestic egg producers would be able to cover the entire demand in Hungary even in peak seasons; however, they

[29] Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICHIGAN LAW REVIEW 1091 (1986).

[30] See e.g. United States – *Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DB58/AB/R; Dispute Settlement Panel Report On *United States Restrictions On Imports of Tuna*, 30 I.L.M. 1594, 1599 (1991).

cannot supply a sufficient quantity of S-size eggs. The reason is that these are laid by young hens, which make up only a small portion of the Hungarian hen population. As a consequence, during peak seasons retail stores import a considerable amount of eggs compared to minimal importation at other times. This plight is detrimental both to 'Baptists' and 'bootleggers'. The interests of domestic producers are clear. Imports take away the market from them. At the same time, the foregoing scenario also raises serious public interest issues. Consumers are deceived, since they purchase seemingly discounted products, which may be cheaper per egg but more expensive per gram. So in this sense the discounted product may be more expensive. These two factors, the legitimate consumer protection considerations and the self-interests of domestic producers, may intermingle in a legislative proposal.

**8.33.** A notable example for 'dodgy' restraint is price regulation. There are numerous examples in various parts of the world on how price floors were used to cut out foreign trade.[31] The pattern is the following: local consumers have a certain loyalty towards local brands, but switch to import brands if they are (considerably) cheaper. As free trade law does not permit the frontal restriction of trade, in such scenarios states often introduced price floors to deprive foreign products of their competitive advantage: if on the shelves the prices of the import and domestic products are the same, the local consumer would very probably opt for the well-known local brand. If the only chance to overcome local brand loyalty is lower price, a floor price is susceptible of cutting-out foreign trade.

## VIII. Dispute Settlement, Direct Effect, Case-Law and Enforcement

**8.34.** The rules of free trade law remain theoretical provisions as long as no effective enforcement mechanisms are attached to them. Hence, when comparing different substantive law regimes, it is crucial to cover the issues of procedure and enforcement.

**8.35.** One of the central questions of enforcement is access to the dispute settlement mechanism. In numerous systems, free trade is considered to be an inter-state matter, that is, trade benefits are conferred on states and, accordingly, only states have the power to enforce these rights. Other systems may confer standing also

[31] See ECJ Judgment of 24 January 1978, 82/77 *van Tiggele* [1978] ECR 25; *Cloverland-Green Springs Dairies, Inc.* v. *Pa. Milk Mktg. Bd.*, 298 F.3d 201 (3rd Cir. 2002); Csongor István Nagy, The Hungarian Competition Office stops a cartel investigation due to blocking legislation: can national law suppress a cartel investigation that affects inter-state trade? (Watermelon cartel), 10 April 2013, e-Competitions, N°53124.

on enterprises. The status and role of free trade law in national legal systems raises intricate legal issues, since it is inherently interlinked with the question of damages liability for the violation of the rules of free trade law and leads us back to the question of access. It also raises the issue of who the addressees of the trade benefits are. Is free trade law conceived as a system of trade benefits conferred on states or as a system of normative rights, where the right to trade is conferred on enterprises? It is a pivotal part of the analysis whether the institutional notion of free trade is converted into a rights-based system or it remains an interstate issue.

**8.36.** As far as structure is concerned, free trade systems range from ad-hoc dispute settlement mechanisms and permanent dispute settlement bodies to direct application by national courts. Free trade law's dispute settlement mechanism is probably one of the politically most sensitive issues, given that this is the point where the international subjection of certain aspects of national regulatory sovereignty is perceived to manifest itself.

**8.37.** A seemingly practical but extremely relevant question is the allocation of the burden of proof and the standard of proof. The practicing lawyer knows that the burden of proof and the standard of proof determine the outcome of real matters in numerous cases. The reason for this is that in most cases facts are uncertain, so the court, at the end of the day, will have to use proxies. The burden of proof and the standard of proof are the more important in restriction of trade cases where the court has to judge the state measure in an information vacuum. Interestingly, notwithstanding their significance, burden of proof and standard of proof are quite often not addressed in free trade laws,[32] although court proceedings cannot work without such notions.

**8.38.** An important facet of enforcement is the consistency of the case-law and the role of precedents. While investment arbitration has largely preserved its ad-hoc nature, where judgments have persuasive but no binding authority, free trade systems having a permanent dispute settlement organization appear to provide more transparency and predictability.

## IX. Closing Thoughts

**8.39.** As amplified above, the blend of various political and social factors resulted in a new age of free trade law, which

[32] See John J. Barceló III, *Burden of Proof, Prima Facie Case and Presumption in WTO Dispute Settlement*, 119 CORNELL LAW FACULTY PUBLICATIONS (2009), available at http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1118&context=lsrp_papers (accessed on 27 December 2017).

intrudes considerably into national regulatory sovereignty and fundamentally re-shapes the basic notions of economic relations, sovereignty and democratic process.

**8.40.** First, new-generation free trade agreements address regulatory restraints that are socially rooted and closely intertwined with national regulatory autonomy, thus, entailing a major shift of sovereign regulatory powers onto international governance.

**8.41.** Second, while the excessive promotion of free trade may suppress local legitimate regulatory policy considerations and may display free trade as unregulated trade in the eyes of the local electorate, impairing the legitimacy of the notion of free trade,[33] facially non-discriminatory regulation is frequently used by local interest groups to cut out foreign trade.

**8.42.** Nowadays, trade liberalization is not about the diminution and abolition of tariffs and quotas. These have been overwhelmingly lifted anyway in the last half century. If one believes that free trade makes the cake bigger, then trade liberalization should be sustainable if the framework makes sure that the extra slices are distributed fairly both on the international and the domestic level. It is imperative that the framework of trade be balanced and enable all states to benefit from the bounties of further trade liberalization. Furthermore, the process will be sustainable only if on the domestic scene the losers of free trade are taken care of through the benefits of the winners – the latest US presidential elections have showed that this has not always necessarily been the case.

**8.43.** It has to be noted that these experiences and perceptions are neither new, nor novel. The evolution of the European internal market, which is, of course, a much more ambitious project than trade liberalization, has been surrounded by exactly the same dilemmas, protectionist temptations and pitfalls. The choice is not between having a slice in a common cake and having your own cake. The choice is between having a huge slice from a giant cake and having a little cake on your own, while the taste is the same. There is no way for states to have a bigger cake unless they bake it jointly.

> Boris Johnson: I think what – look, the single market people will think what do you mean by the single market? The single market is a huge territory now that comprises the member states of the European Union. Would we be able to trade freely with that territory? I think yes we would.

[33] See e.g. Jane Kelsey, *New-generation free trade agreements threaten progressive tobacco and alcohol policies*, 107(10) ADDICTION 1719 (2012).

> Andrew Marr: But would we actually leave it as an institution? In other words, if I'm making marmalade and I'm trying to sell my marmalade to Italy and the Italians say do you know what, Andrew Marr, your marmalade has too many pips in it per jar, we're not going to accept it and that is a pure attempt to stop my marmalade coming in, then there are rules so – you'd lose all of that?[34]

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## *Summaries*

**DEU** [***Freihandel, öffentliches Interesse und die Wirklichkeit: Freihandelsabkommen der neuen Generation und die regulatorische Souveränität von Nationalstaaten***]

*Der internationale Handel ist zu einer der zentralen globalen Fragen des 21. Jahrhunderts geworden, ob in hitzigen politischen Debatten oder in Sachen seiner wirtschaftlichen Bedeutung. Während es so aussieht, dass einige Staaten Zuflucht im Protektionismus suchen, sehen andere Staaten im Gegenteil die enormen Möglichkeiten, die ihnen eine Liberalisierung des Handels verschafft. Der vorliegende Beitrag zeigt anhand des Dreiecks ‚Freihandel, lokale Werte, wirtschaftliche Interessen' die grundlegenden Fragen auf, mit denen sich Freihandelsabkommen auseinandersetzen, deren Zweck und Ziel, die Probleme, mit denen sie sich befassen, und die Techniken, die sie nutzen können. Der Artikel stellt die gegenwärtige Debatte zuerst in deren politischen und sozialen Kontext, bevor er die Wechselwirkung zwischen Handelsfreiheit und lokalem öffentlichen Interesse abhandelt, sowie die Rolle von Wertenormen (insbesondere in den Bereichen Umweltschutz und Arbeitsrecht), das Spiel in internationalen Wirtschaftsbeziehungen, die kontroverse Frage des internationalen Investitionsschutzes und der Schiedsverfahren in Streitigkeiten zwischen Investoren und Staaten, die Mechanismen zur Koordinierung der Regulierung, die Beziehung zwischen regulatorischer Souveränität und Protektionismus und die Beilegung internationaler Handelsstreitigkeiten. Der Beitrag schließt mit abschließenden Betrachtungen des Autors.*

[34] Andrew Marr show, Boris Johnson, 6 March 2016.

**CZE** [***Volný obchod, veřejný zájem a realita: dohody o volném obchodu nové generace a národní regulační svrchovanost***]
*Mezinárodní obchod se stal jednou z ústředních globálních otázek 21. století, jak co do vášnivých politických debat, tak co do hospodářského významu. Zatímco se zdá, že některé státy se uchylují k protekcionismu, jiné naopak vidí enormní možnosti v liberalizaci obchodu. Tento příspěvek předestírá, prostřednictvím trojúhelníku volný obchod, místní hodnoty a hospodářské zájmy, ústřední otázky dohod o volném obchodu nové generace, jejich účel a cíle, problémy, jimiž se zabývají, a techniky, které mohou využít. Po zasazení současné debaty do jejího politického a sociálního kontextu článek následně popisuje interakci mezi volným obchodem a lokálním veřejným zájmem, roli hodnotových norem, zejména norem v oblasti ochrany životního prostředí a pracovněprávních norem, hru v mezinárodních hospodářských vztazích, kontroverzní otázku mezinárodní ochrany investic a rozhodčího řízení ve sporech mezi investory a státy, mechanismy koordinace regulace, vztah mezi regulatorní svrchovaností a protekcionismem a urovnávání mezinárodních obchodních sporů. Příspěvek je zakončen závěrečnými úvahami autora.*

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**POL** [***Wolny handel, interes publiczny a rzeczywistość: umowy o wolnym handlu nowej generacji i narodowa suwerenność regulacyjna***]
*Handel międzynarodowy należy do centralnych globalnych zagadnień XXI wieku, zarówno jako temat burzliwych debat politycznych, jak i pod względem jego znaczenia gospodarczego. Wydaje się, że niektóre państwa skłaniają się w stronę rozwiązań protekcjonistycznych, zaś inne przeciwnie – dostrzegają gigantyczny potencjał, jaki niesie ze sobą liberalizacja handlu. Artykuł zajmuje się przede wszystkim najważniejszymi kwestiami związanymi z umowami o wolnym handlu nowej generacji, omawia ich cele, poruszane tam problemy oraz techniki, które mogą być w nich stosowane.*

**FRA** [***Le libre-échange, l'intérêt public et la réalité : la nouvelle génération des accords de libre-échange et la souveraineté réglementaire nationale***]
*Le commerce international est devenu au XXIe siècle un des plus grands défis de portée mondiale. En effet, il s'agit d'un domaine*

*qui a une grande importance économique et qui fait l'objet de discussions politiques passionnées. Si certains États favorisent le protectionnisme, d'autres estiment que la libéralisation des échanges offre de vastes opportunités. Le présent article examine les aspects cruciaux des accords de libre-échange de la nouvelle génération, leurs objectifs, les problèmes qu'ils traitent et les mécanismes dont ils peuvent se servir.*

**RUS** [***Свободная торговля, общественные интересы и реальность: соглашения о свободной торговле нового поколения и национальная независимость в области регулирования***]

*Международная торговля стала одним из главных глобальных вопросов XXI века как в страстных политических дебатах, так и в экономическом плане. Похоже, что некоторые страны стремятся к протекционизму, а другие, наоборот, видят огромные возможности в либерализации торговли. В данной статье основное внимание уделяется главным вопросам соглашений о свободной торговле нового поколения, их целям, проблемам, с которыми они сталкиваются, и методам, которые они могут использовать.*

**ESP** [***Libre comercio, interés público y la realidad: convenios del libre comercio de la nueva generación y la soberanía nacional regulatoria***]

*El comercio internacional se ha convertido en uno de los principales temas globales del siglo XXI, tanto a nivel de apasionados debates políticos como de la importancia económica. Parece que mientras que algunos Estados recurren al proteccionismo, otros optan por la liberalización comercial como vía de enormes posibilidades. El texto plantea las principales cuestiones relacionadas con los convenios del libre comercio de la nueva generación, sus objetivos, los problemas a los que se enfrentan y las técnicas que pueden adoptar.*

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