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ABSTRACT

Beyond the WTO? An Anatomy of EU and US Preferential Trade Agreements

It is often alleged that PTAs involving the EC and the US include a significant number of obligations in areas not currently covered by the WTO Agreement, such as investment protection, competition policy, labour standards and environmental protection. The primary purpose of this study is highlight the extent to which these claims are true. The study divides the contents of all PTAs involving the EC and the US currently notified to the WTO, into 14 "WTO+" and 38 "WTO-X" areas, where WTO+ provisions come under the current mandate of the WTO, and WTO-X provisions deal with issues lying outside the current WTO mandate. As a second step, the legal enforceability of each obligation is evaluated, judged on the extent to which the text specifies clear obligations. Among the findings are:

(i) EC agreements contain almost four times as many instances of WTO-X provisions as do US agreements;

(ii) but EC agreements evidence a very significant amount of ‘legal inflation’ (i.e., non-legally enforceable provisions) in the WTO-X category, and US agreements actually contain a more of enforceable WTO-X provisions than do the EC agreements; and

(iii) US agreements tend to emphasize regulatory areas more compared to EC agreements.

JEL Classification: F13, F15 and K33
Keywords: enforceable, legal inflation and preferential trading agreements

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1. Introduction

There is growing concern about preferential trade agreements (PTAs) and the role they should play within the multilateral trading system. This concern stems both from their increasing number and their ever-broader scope.

During the period 1948-1994, the General Agreement on Tariffs and Trade (GATT) received 124 notifications of PTAs, of which about 50 were active at the creation of the World Trade Organisation (WTO) in 1995. Since then, more than 250 new arrangements have been notified to the WTO, and the number of arrangements active in 2008 was about 200. A large part of this expansion involves agreements where the European Community (EC)[1] or the United States (US) is a partner. As a result, the EC and the US have become the two main 'hubs' in the pattern of PTAs, with the 'spokes' represented by agreements with the various partner countries.

Modern PTAs exhibit features that earlier PTAs did not possess. In particular, PTAs formed before 1995 concerned only trade in goods and took the form of (mostly) free-trade areas (FTAs) or (more rarely) customs unions (CUs), involving mainly tariff liberalisation. Since the creation of the WTO and the extension of multilateral trade agreements to trade in services and trade-related aspects of intellectual property rights, new PTAs also tend to cover these two subjects, which revolve chiefly around regulatory issues. Besides, there are claims that the new preferential agreements signed by the EC or the US go even further in the coverage of regulatory issues, by including provisions in areas that are not currently covered by the WTO agreements at all, such as investment protection, competition policy, labour standards and protection of the environment.

This claim has potential systemic implications because, although they jointly account for no more than 40 percent of world GDP (at PPP) and world trade, the EC and the US are sometimes viewed as the 'regulators of the world'. It is estimated indeed that, together,

[1] We will generally use the term European Community (EC), which is the legally correct expression in the WTO context. However, we will also sometime use the term European Union (EU) where appropriate.

they account for around 80 percent of the rules that regulate the functioning of world markets.[2]

The relatively broad scope of PTAs involving the EC and the US is reflected in the policy debate, and to a lesser extent in the academic literature. Economic scholars have been arguing for some time about the relationship between PTAs and the multilateral trading system, with a clear division into two camps. On one hand, there are those who argue that PTAs, especially those of the 'new generation', constitute a dangerous threat to the system.[3] On the other, there are those who feel that such concern is overstated, and that there are potential solutions to reconcile the two, providing the political will exists.[4]

There is now also an institutional acknowledgement that PTAs should be regarded as a serious concern for the multilateral trading system. Thus, in opening the conference entitled 'Multilateralising Regionalism', held in Geneva in September 2007, WTO Director-General Pascal Lamy reflected 'that it would be fair to say that proliferation [of PTAs] is breeding concern – concern about incoherence, confusion, exponential increase of costs for business, unpredictability and even unfairness in trade relations'. Yet no concrete action has been taken so far by the policy community to address this multifaceted concern.

This paper serves as a building block in this discussion. We believe that, before embarking upon a discussion as to whether (new) PTAs should be viewed with concern, one needs to examine the facts in greater detail than is typically done in the debate. Our primary purpose, therefore, is to analyse the precise content of the EC and US preferential trade agreements. In order to do this, we divide the subjects covered by these agreements into two categories: 'WTO plus' (WTO+), and 'WTO extra' (WTO-X). The first category corresponds to those provisions of PTAs which come under the current mandate of the WTO, where the parties undertake bilateral commitments going beyond those they have accepted at the multilateral level. An example would be a reduction in

[2] See Sapir (2007).
[3] See, in particular, Bhagwati (2008).
[4] See, for instance, Baldwin (2006).

tariffs. By contrast, the WTO-X category comprises those PTA provisions that deal with issues lying outside the current WTO mandate. An example would be a commitment on labour standards.

At the outset it should be emphasised, however, that our aim is not to answer the question why WTO members – and in particular the EC and the US – include WTO-X obligations in their PTAs. At one end of the spectrum, one might suppose that PTAs serve as a kind of preparation for setting tomorrow's multilateral agenda. According to this argument, assuming consistency in the subject-matter across PTAs, it will be easier to interconnect them and multilateralise them in the future, or at least use their subject-matter as a basis for negotiating tomorrow's WTO rules.[5] But one could also argue that the very existence of WTO-X provisions is evidence that the preferential partners do not wish to include certain items in the WTO, and that is why they consistently maintain them in their PTAs.

The study covers all the 14 EC and 14 US agreements with WTO partners signed by the parties and, generally, notified to the WTO as of October 2008. In order to fully map these agreements, we proceed in two steps.

The first step consists of listing all the policy areas contained in the 28 agreements. For each of the 52 areas identified, we then record whether each agreement specifies obligations.

As a second step, we determine whether each obligation contained in the agreements is *legally enforceable*. We describe more precisely below why we believe that this is an important feature and how we evaluate whether a provision is enforceable or not. Let us simply say for the moment that the general idea is that texts that specify clear legal obligations are more likely to be implemented than highly less hard-edged ones.

In order to shed light on the validity of the claim that the EC and US agreements go substantially beyond the WTO agreements, we divide the (52) identified policy areas into

[5] This view can be found, for instance, in Baldwin (2006).

two groups as already indicated. The first, labelled WTO+, contains 14 areas, whereas the second, labelled WTO-X contains 38 areas.

Applying the WTO+/ WTO-X distinction to the EC and the US sets of agreements, our main findings are as follows.

First, we observe that while both sets cover both WTO+ and WTO-X types of provisions, the 14 EC agreements contain almost four times as many instances of WTO-X provisions as the 14 US agreements do. This would suggest that EC PTAs extend much more frequently beyond the WTO agreements than US PTAs.

However, second, the picture changes dramatically once the nature of the obligations is taken into account. The EC agreements evidence a very significant amount of 'legal inflation', in particular in the parts dealing with development policy. US agreements actually prove to contain more legally enforceable WTO-X provisions than the EC agreements. Hence the latter contain many obligations that have no legal standing.

Third, we also find that both the EC and the US PTAs contain a significant number of legally enforceable, substantive undertakings in WTO+ areas. Fewer obligations contained in EC agreements tend to be enforceable than those of US agreements, but the difference is not as pronounced as for the WTO-X areas.

Finally, we find that there is a difference in the nature of the legally enforceable obligations contained in EC and US agreements, with the latter putting more emphasis on regulatory areas.

The plan of the remainder of the paper is as follows. Section 2 deals with methodological issues related to the agreements being studied, the classification of policies into either WTO+ or WTO-X areas, and the definition of 'legally enforceable' obligations. Section 3 presents our initial findings concerning the coverage, the legal enforceability, and the 'depth' of obligations for WTO+ areas. Section 4 contains similar findings for WTO-X

areas. These two sections prepare the ground for Section 5, which contains our main analyses. Section 6 briefly summarises the results.

2. Methodological issues

The purpose of this section is to describe the set of PTAs under study, to set out how we classify the coverage of these agreements, and how we evaluate whether a covered policy contains legally enforceable obligations.

2.1 PTAs and the WTO

According to WTO rules, members may enter into PTAs with other WTO members either concerning trade in goods, or trade in services, or both. With respect to trade in goods, WTO members that satisfy the requirements included in Article XXIV GATT can legally treat products originating in some WTO Members (those with which they have formed a PTA) more favourably than like products originating in the other WTO member countries. Article XXIV GATT distinguishes between two forms of PTA: free trade areas (FTAs) and customs unions (CUs). For an FTA to be GATT-consistent, its members must liberalise trade between them; for a CU to be GATT-consistent, its members must, beyond liberalising trade between them, agree on a common trade policy vis-à-vis the rest of the WTO membership. All the PTAs that will be considered here are FTAs, with the exception of the EC-Turkey agreement, which is a CU.

In the WTO, it is also possible to form PTAs under a separate legal instrument – the 'Enabling Clause'. But since this possibility is only available where *all* members of the PTA are developing countries, such agreements are not relevant to this study.

The specific conditions for satisfying consistency with the multilateral rules concerning goods trade are laid down in Article XXIV.5-8 GATT. Apart from requesting the PTA to encompass substantially all trade between its members, and not to raise the overall level of protection vis-à-vis the rest of the WTO membership, these provisions oblige WTO

members wishing to enter into a PTA to show that they have complied with the relevant multilateral rules.

With respect to trade in services, Article V GATS mentions only one form of preferential scheme, entitled economic integration. It is akin to a GATT FTA since its members are entitled to retain their own trade policies vis-à-vis third countries, although there are also some differences between the two schemes. The disciplines of economic integration echo those preferential schemes which apply to trade in goods: Article V.1 GATS requires that a PTA has substantial sectoral coverage, and Article V.4 GATS requires PTA members not to raise the overall level of barriers against non-participants.

2.2 The agreements under study

Table 1 lists the set of agreements that are scrutinised in this study, which consists of all PTAs signed between the EC and the US, respectively, and other WTO members as of October 2008. The list includes agreements signed before and after the creation of the WTO, but excludes those where the partner is not a WTO member. It also includes agreements signed by the parties but not yet ratified, and therefore not yet notified to the WTO or actually in force. Of the 28 listed agreements 14 are EC PTAs and 14 are US PTAs, counting the EC agreements with individual EFTA partners (Liechtenstein and Switzerland counting as one owing to their economic union) and the European Economic Area agreement (between the EC and the EFTA countries, except Switzerland) as one PTA.

2.2 The coverage of the agreements

A basic aim of this study is to identify, more precisely than has been done in the literature so far, the legal obligations imposed by PTAs involving the EU and the US, and to compare the nature of these two sets of agreements. To this end, we have gone through the 28 agreements in their entirety, and characterised the obligations which they impose. The contents of these agreements have been divided into 52 policy ‘areas’. This

characterisation is intended to be exhaustive, in the sense that all the provisions contained in the 28 agreements fall under one or other of the areas, except for those that concern the administration of the agreement, which we disregard. The classification is largely based on the article headings in the case of the EC agreements, and on the chapter headings in the case of the US agreements.

In order to shed light on our central issue – whether the EC and US agreements provide for 'more of the same' relative to the WTO agreements, or impose obligations in areas *other* than those already covered in the WTO agreements – we classify the 52 policy areas into two broad groups: 'WTO-plus' (WTO+) and 'WTO-extra' (WTO-X). The former is meant to include obligations relating to policy areas that are already subject to some form of commitment in the WTO agreements. The PTA can here either reconfirm existing commitments, or provide for further obligations. The archetypal obligation here would be the formation of a FTA, since this would be a reduction in tariffs going beyond what is already committed to in the WTO context. Examples of other areas we have classified as WTO+ include obligations concerning SPS (sanitary and phytosanitary) measures, TBT (technical barriers to trade) measures, antidumping, state aid, and obligations covered by the GATS. We have also included those intellectual property rights provisions which address issues falling under the TRIPs agreement. Finally, we have also included export taxes, although the WTO contains no precise commitment in this area. Nonetheless, WTO members could negotiate commitments on export taxes under Article II GATT, so it can be argued that a WTO instrument already exists in this area.

A WTO-X designation is, on the other hand, meant to capture an obligation in an area that is 'qualitatively new', relating to a policy instrument that has not previously been regulated by the WTO. For instance, there are no undertakings with regard to environmental protection in the WTO. We thus classify an environmental obligation as WTO-X. Other such clear examples are obligations concerning labour laws or movement of capital.

2.3 The legal enforceability of identified areas

In order to determine the impact of the EC and US preferential trade agreements, it is important not only to identify the areas in which the agreements contain provisions, but also to determine the extent to which these provisions are legally enforceable. Unclearly specified undertakings, and undertakings that parties are only weakly committed to undertake, and that can be seemingly fulfilled with some token measure, are not likely to be successfully invoked by a complainant in a dispute settlement proceeding, and would presumably therefore also have little impact. In order to shed light on the extent to which this is an issue in practice, we have evaluated each provision in each agreement for the extent to which it specifies at least some obligation that is clearly defined, and that is likely effectively to bind the parties.

With a view to maintaining some degree of objectivity, we have classified certain terms as either implying enforceable or non-enforceable obligations. The following are some examples of terms that we interpret as creating legally enforceable obligations:

- *"The parties shall allow the free movement of capital ..."*
- *"Neither party may expropriate or nationalise a covered investment ..."*
- *"If a party does not accept the technical regulation that is equivalent of its own it shall, at the request of the other party, explain the reasons ..."*
- *"By the end of (exact date) a party shall accede to the following international conventions: ..."*
- *"Neither party may impose performance requirements or enforce any commitment or undertaking, in connection with the establishment, acquisition, expansion, management, conduct, operation or sale..."*
- *"Each party shall not fail effectively to enforce labour (environmental) laws ..."*

As can be seen, the word "shall" appears in many of these examples.

The following examples illustrate formulations that we define to be in the opposite category, not meeting the test of effectively binding the parties:

- "*The parties shall cooperate ...*". It is likely to be very difficult to prove that a party has not 'cooperated'.
- *"Dialogue shall be established ...*". It would require almost complete silence from the respondent for the complainant successfully to argue that no dialogue has been established.
- "S*pecial attention shall be paid to ...*". How could it be verified that special attention has not been devoted to an issue?
- "*Measures necessary for development and promotion of ...*". It is likely to be very hard for a complainant in a dispute to prove either that that a measure is necessary or that it is not necessary for development.
- *"Parties may conclude ...*". This phrase does not impose any restriction on the parties.
- *"Parties shall strive (aim) to ...*". It would be difficult to prove absence of best endeavours.

Distinguishing the degree of legal enforceability in this way cannot only be defended from the point of view of practical experience, but also from the point of view of the principles of international law. One of the requirements in Article 2 of the Vienna Convention on the Law of Treaties for an agreement to be a treaty is that it is "governed by international law". This is normally interpreted to require the parties to intend that the agreement has legal effect under international law. The terminology of an agreement may indicate the extent to which such intent exists.

3. WTO+ areas

This section discusses the extent to which the various WTO+ areas we have identified are covered in the 28 EC and US agreements, whether existing obligations are legally binding, and the extent to which they entail substantive undertakings.[6]

3.1 Coverage of WTO+ areas

The coverage of WTO+ areas in the EC and US agreements is displayed under the heading 'AC' (for Area Covered) in, respectively, Tables 2 and 3, where a dark box indicates that a particular agreement contains an obligation in a particular area.

As can be seen, there is generally speaking a very high degree of coverage in both EC and US agreements. There are three areas for which all EC and all US agreements contain obligations: Industrial Products, Agricultural Products, and TRIPs. All the EC agreements also include obligations concerning Customs Administration, TBT, Antidumping and Countervailing Measures. Most (but not all) of the US agreements also cover these areas. All the US agreements include obligations concerning Public Procurement and Export Taxes, and so do all but one or two of the EC agreements. Also, most EC and US agreements include provisions concerning State Trading Enterprises and State Aid. There is thus a fairly high degree of similarity between the two sets of agreements when it comes to the coverage of WTO+ areas. Both contain obligations in more or less the same areas.

There are, however, a few important differences between the two sets of agreements in terms of coverage. First, GATS obligations are included in all US agreements, but only in

[6] Section 4 will undertake a parallel analysis of WTO-X areas. While we will discuss some findings in the respective sections, we will save the broader discussion to Section 5.

four EC ones. Second, most US agreements include TRIMs obligations, while none of the EC ones has anything explicit on this.[7]

3.2 The enforceability of WTO+ obligations

So far we have discussed the areas that appear in the two sets of agreements. We next seek to identify those obligations that are legally enforceable. The 'LE' in tables 2 and 3 shows the areas where undertakings are legally enforceable.

A dark box indicates that the language is sufficiently precise or committing to provide a legally enforceable obligation. A cross-hatched box indicates that the language is sufficiently precise or committing, but that it is non-enforceable due to an explicit statement that dispute settlement is not available.

Let us start by pointing to the areas that are exempt from dispute settlement. As can be seen, the EC agreement with Mexico has four such exemptions, for SPS, Antidumping, Countervailing Measures, and TRIPs; the EC agreement with CARIFORUM has exemptions for the latter two areas, and the EC-Chile agreement has exemptions for State Trading Enterprises and State Aid. The US agreements contain exemptions from dispute settlement only in the context of SPS, but do so for 10 agreements, allowing dispute settlement regarding SPS measures only in the agreement with Israel and in NAFTA.

In areas that are non-enforceable due to imprecise language, we note that, with respect to the EC agreements, in 7 of the 14 agreements Public Procurement undertakings are not enforceable; in 9 out of the 14 agreements TBT undertakings are not enforceable; and in 10 out of 12 agreements SPS undertakings are not enforceable. The US agreements, on the other hand, contain relatively speaking substantially fewer areas where legally non-

[7] Note, however, that by reaffirming the Art. III and XI GATT rights and obligations in its PTAs, the EC effectively introduces obligations with respect to the two forms of TRIMs currently sanctioned by the multilateral system, that is, export performance-, and local content-type of investment measures.

enforceable language has been included, both in absolute numbers and relative to the number of covered areas.

Turning to the areas with enforceable obligations, we observe that both sets of agreements include such obligations for all their agreements with regard to tariff liberalisation (FTAs) for both industrial and agricultural products, and with respect to 12 out of the 14 agreements in the areas of Customs Administration, Export Taxes, Antidumping, Countervailing Measures, State Aid, and TRIPs.

3.3 Main observations concerning WTO+ undertakings

Our initial conclusions concerning the WTO+ parts of the agreements are the following:

1. Both the EC and US sets of agreements have a large number of legally enforceable obligations with significant undertakings in areas covered by the current WTO mandate, such as tariff cuts in goods, Customs Administration, Export Taxes, Antidumping, Countervailing Measures, Agriculture, and TRIPs.
2. Commitments in the 'new WTO areas' (GATS, TRIPs) figure prominently in both sets of agreements, although more so in US PTAs as far as services are concerned.
3. The extent of the overlap between the two sets of agreements notwithstanding, we still observe some notable differences: the US agreements have substantial, legally enforceable obligations concerning TRIMS, TBT, and GATS, while the EC agreements contain significantly more obligations of this kind concerning State Trading Enterprises.
4. Both sets of agreements opt for staged tariff liberalisation with respect to both industrial and farm goods. Still, it is very difficult to pronounce on their consistency with the WTO rules in light of the confusion surrounding the meaning of the terms appearing in Article XXIV GATT, and the lack of practice regarding the interpretation of Article V GATS.[8]

[8] See Mavroidis (2007).

4. WTO-X areas

We now turn our attention to the WTO-X areas, which refer to provisions regarding commitments in policy areas not covered by the current mandate of the WTO.

4.1 The coverage of WTO-X areas

Tables 4 and 5 provide information about the coverage of the two sets of agreements for WTO-X areas.

We will start by describing the overlap between the two sets of agreements, and then revert to the differences among them. We should note at the outset however that, for the most part, the two sets of agreements differ significantly in their WTO-X subject-matter. Four areas – Environment, Intellectual Property, Investment, and Movement of Capital - appear in both sets of agreements; 12 of the 14 EC agreements include commitments in these areas, and so do 11 of the 14 US agreements. There is also some overlap with regard to Competition: all EC agreements include such a commitment, while 7 of the US agreements also do.

US agreements typically also include commitments in two additional areas: Labour Market Regulation, an item that has been included in 13 US agreements, and Anti-Corruption, where the corresponding number is 10. Besides these areas, US agreements contain commitments in two additional WTO-X areas – Data Protection, which has been included in two agreements, and Energy, which has been included in one.

All of the 38 WTO-X areas – except Anti-Corruption – are covered in at least one of the 14 EC agreements. Of the 14 agreements, ten include provisions concerning Agriculture,[9] Cultural Cooperation, Education and Training, Energy, Financial Assistance, Human Rights, Illicit Drugs, Industrial Cooperation, Money Laundering, Political Dialogue, Regional Cooperation, Research and Technology, Social Matters, and Statistics. The only

[9] We refer to commitments which lie outside the current WTO mandate.

agreement that stands out in terms of coverage is the one with Turkey, which contains commitments in only two areas: Competition and Intellectual Property Rights.

4.2 The enforceability of WTO-X obligations

While the EC agreements contain a larger number of WTO-X areas, it is the US agreements that contain the (proportionately speaking) higher number of legally enforceable obligations in these areas.

The US agreements contain few areas with non-enforceable provisions:

1. The main source of non-enforceability is the exemption of Competition-related disciplines from dispute settlement (illustrated by a cross-hatched box under the heading LE in Table 4.2); all seven agreements that include a Competition provision explicitly exclude the commitments from dispute settlement.
2. There are four further instances of non-enforceability: two regarding Anti-Corruption and two concerning Consumer Protection. In total, only 13 percent (11 out of 82) of the covered provisions are deemed to be non-enforceable.

By contrast, nearly 75% (230 out of 310) of the provisions included in the EC agreements are non-enforceable. The EC agreements contain enforceable obligations in only five WTO-X areas in a significant number of agreements:

1. Competition (in 13 out of the 14 agreements that contain commitments in this area);
2. IPR (11 out of 14);
3. Movement of Capital (13 out of 13);
4. Investment (8 out of 12); and
5. Social Matters (7 out of 13).

For each of the remaining 33 areas, there are no legally enforceable obligations in more than 3 agreements signed by the EC. Most obligations are not enforceable at all. One agreement represents an outlier, the EEA, an agreement that involves the EC and some of its western European trading partners with whom there is a long tradition of multi-level cooperation.

4.3 Main observations concerning WTO-X undertakings

Our initial conclusions concerning the WTO-X parts of the agreements are as follows:

1. Whereas the US agreements typically contain few areas where enforceable obligations have been agreed, the EC agreements contain a smaller (proportional to the overall) number of areas with enforceable obligations, and a much larger number of areas where exhortatory language has been agreed. It thus seems that, whereas the US has adopted a rather 'functionalist' approach (ensuring legal enforceability of the selected areas), the EC has opted for 'legal inflation', whereby a large number of areas are included in the agreement, but very few of them are coupled with legally enforceable obligations.

2. Altogether, only 8 of the 38 WTO-X areas involve legally enforceable obligations in a significant number of agreements.

3. Three of these 8 areas concern both EC and US agreements: Intellectual Property Rights, Investment, and Movement of Capital.

4. Three areas concern mostly or solely US agreements: Anti-Corruption, Environment and Labour.

5. Two areas involve EC agreements only: Competition, and Social Matters.

6. Finally, provisions concerning Terrorism, Illegal Immigration, Visa and Migration, and Illicit Drugs appear in some of the EC agreements (in respectively 5, 6, 3 and 10 agreements), but typically the obligations are not enforceable. Contrary to what may have been expected, these national security-related areas are not present in US agreements.

5. PTAs and the WTO – more of the same, or ventures into new areas?

A central issue in the policy debate concerning PTAs has been whether they support or hinder multilateral trade liberalisation. This issue has received a new twist during the last decade, because of the common claim that these agreements are no longer about deeper integration in areas where the multilateral system already provides a degree of integration but are instead mainly to be seen as ventures into new policy areas. Having so far analysed the WTO+ and the WTO-X areas separately, we will in this section discuss the balance in the EC and US PTAs between the WTO+ and the WTO-X areas. Our purpose is to distil an overall picture of where the *centre of gravity* of these agreements lies. Are they essentially about further integration along the same lines as in the GATT/WTO, or are they mainly about providing integration in new policy areas? As before, we will put particular emphasis on the extent to which identified obligations are likely to be legally enforceable, and we will seek to characterise the areas where legal inflation is most pervasive, and also whether it is likely to be an intentional feature of certain areas.

5.1 Differences in coverage of EC and US PTAs

In order to detect the centre of gravity of the EC and US agreements in terms of coverage, Figure 1 plots the number of covered WTO+ areas (measured on the vertical axis) against the number of covered WTO-X areas (measured on the horizontal axis) for each of the 28 agreements. As can be seen, a very pronounced pattern emerges: all the EC agreements (with one exception) are positioned to the south-east of the US agreements. That is, in terms of coverage, the EC agreements have more WTO-X and fewer WTO+ areas than the US agreements. Hence, while both the EC and the US agreements cover a large

proportion of WTO+ areas (between 10 and 12 for the EC and between 12 to 14 for the US, out of a maximum of 14), the EC PTAs cover a much greater proportion of WTO-X areas (reaching around 30 in recent agreements, out of a maximum of 38) than US agreements (with less than ten areas covered, even in the most recent agreements).

5.2 Centre of gravity of EC and US PTAs adjusted for legal enforceability

If one discards non-enforceable obligations, the previous picture changes dramatically. As shown in Figure 2, while the number of WTO+ areas remains slightly larger for US agreements (ranging between 11 and 13) compared to EC agreements (ranging between 8 and 10), the number of WTO-X areas with legally enforceable provisions is now slightly higher for US (ranging between 5 and 6) compared to EC (ranging mostly between 3 and 5) agreements.[10] The EC agreements thus evidence a very considerable degree of 'legal inflation' in WTO-X areas, a phenomenon which is much less prevalent in the EC agreements for WTO+ areas or in the WTO+ and WTO-X areas of the US PTAs.

It should be noted that the two latest EC agreements, with Albania and the CARIFORUM, contain slightly more legally enforceable WTO-X provisions than do the US agreements. In this respect, the EC-CARIFORUM agreement resembles more the US PTAs than any other EC PTA: it covers relatively few WTO-X areas, of which many contain legally enforceable provisions.[11] Still, only half of the 14 WTO-X areas that are covered contain enforceable obligations. And the EC-Albania agreement, while having eight areas with enforceable obligations, features the same degree of legal inflation - 23 out of the 31 areas in the EC-Albania agreement are classified as non-enforceable - as the other EC agreements.

[10] One agreement stands out in each set: the EEA agreeement on the EC side, with 23 legally binding provisions, and the US-Israel agreement, with zero.
[11] The EC-Albania PTA is a more traditional EC agreement in this respect: it covers 31 WTO-X areas, of which only 8 contain legally binding provisions.

5.3 In which areas is legal inflation most pervasive?

Table 6 reorganises somewhat the data on coverage and legally enforceability in order to highlight the type of areas where legal inflation is most pervasive. The table divides all areas (i.e. both WTO+ and WTO-X areas) into five broad groups, along different lines than the WTO+/WTO-X distinction, which was designed to capture the nature of each area relative to the WTO agreements. Here the intention is instead to capture the content of each area in terms of policy objectives or instruments. Group 1, Trade- and Investment-related Obligations, is meant to capture obligations that address policy instruments affecting goods trade and investment, and which are applied at the border. Group 2, GATS/TRIPs/IPR, and Group 3, Migration-related Regulations, are self-explanatory. Group 4, Domestic Trade-related Regulations, is intended to include obligations concerning domestic (behind-the-border) regulations. Finally, Group 5, labelled 'Other', includes all remaining areas and mainly contains development-related provisions from EC agreements. Although this grouping of areas is heuristic, we believe that it is informative in that it reflects sharp differences in legal inflation across groups as the discussion below indicates.

Table 6 gives, group by group, the number of times each area within the group occurs in EU or US agreements; it then gives, group by group, the number of instances each area within that group occurs with enforceable obligations. In addition, it calculates an Index of Legal Inflation, which is defined as the number of instances of legally non-enforceable obligations in a group of areas relative to the total number of times that group of areas occurs.

There are two main findings that emerge from the table. First, and once again, there is a striking difference between the EC and the US agreements. Taking all areas together, the inflation rate is 55 percent for the EC PTAs compared to only 10 percent for the US agreements. Second, there are significant differences across areas. Distinguishing between the Trade and Regulations areas (i.e. groups 1-4) on the one hand and 'Other' areas on the other hand, one observes a second striking difference. For the EC the

inflation rate is only 26 percent in the former grouping as opposed to 92 percent in the latter. Moreover, the difference in inflation rates between the EC and the US is much less for Trade and Regulations (26 versus 10 percent) than it is for the total of all areas.

One may wonder whether the difference of legal inflation between EC and US agreements is not simply the reflection of a unique feature of some EC agreements, which is that they are not simply trade agreements, but instead constitute a first step towards EU membership. In other to check for this possibility, we have computed the legal inflation rates for the nine EC agreements with non-European countries,[12] which can be regarded as trade agreements comparable to those between the US and its partners. Taking all areas together, the inflation rate for these nine EC agreements is 61 percent, which is six percentage points more than the inflation rate for all the 14 EC agreements. Moreover, the inflation rate for the EC RTAs with non-European partners is larger than the inflation rate for the EC RTAs with all partners for every single of the five broad groups shown in Table 6. One can, therefore, safely conclude that the difference of legal inflation between EC and US RTAs is not caused by the presence of agreements with potential future EU members amongst the EC RTAs.

We now detail these differences across the five groups. As can be seen from Table 6, there are clearly systematic differences in the extent of legal inflation in the different groups. At one end we have the Trade and Investment group, which displays literally zero legal inflation for the US agreements, and only nine percent for the EC agreements, with most of the latter explained by obligations in the WTO-X Investment area. Furthermore, not only is there little or no inflation, these areas are also covered in almost all agreements of both the EC and the US (with the exception of Export Taxes, and TRIMs in EC agreements), and they very often involve substantial undertakings. The GATS/TRIPs/IPR group displays a very similar pattern.

At the other end of the spectrum in terms of legal inflation is the 'Other' group, which largely consists of development-related undertakings appearing in the cooperation parts

[12]Five of the 14 EC PTAs are with European partners: EEA, Turkey, FYRoM, Croatia, and Albania.

of the EC agreements. The US agreements effectively have no instances of this group of areas, and are therefore irrelevant here. For this group, which contains a large number of areas which are covered in a large number of EC agreements, the legal inflation rate is 92%! This average is higher than the inflation rate for any of the other groups, and is even higher than each individual area in all other groups, with the exception of two areas: the Visa, Border Control and Asylum area, and the Human Rights area. Based on this observation, we would argue that, to the extent that these agreements promote development, it is not because of the enforceability of their legal commitments.

Provisions related to domestic regulations, in the broad sense of the term, can be found in both WTO+ and WTO-X areas. In the group Domestic Trade-related Regulations we have tried to distinguish regulations which have more obvious potential to be used as legal arguments in a trade dispute from those that do not seem to have such potential. It is for this reason that, for instance, Labour and Environment areas are grouped together with the SPS and TBT areas, while areas such as Nuclear Safety and Money Laundering - which can also be said to address domestic regulation - are kept under the 'Other' label. It is also for this reason that the Environment and Labour areas are classified as potentially affecting trade.

Turning to the numbers, we see that this group reveals a more complicated pattern than the other groups. However, there is a significant difference in legal inflation in the group for the EC and the US agreements, with 42 percent of the areas covered in EC agreements being non-enforceable, compared to only 24 percent for the US.

An issue of particular interest with regard to EC and US PTAs is the extent to which they can be seen as a means of transferring the regulatory regimes of the EC and the US to other countries. The scattered pattern that emerges for this group makes it difficult to draw unambiguous conclusions in this regard, and may also indicate that the groups need to be redefined to answer this question properly. But it is noteworthy that in almost all the areas in this group, the PTAs extend either international or EU/US domestic regulatory standards to partner countries. Since the EU and the US already broadly meet the

international or domestic regulatory standards contained in the PTAs, these agreements could indeed potentially be vehicles for transferring regulatory rules of the EC and the US to their PTA partners. One might imagine various ways in which such a transfer occurs. For instance, the formation of the PTAs may affect domestic policy discussions concerning the choice of regulatory regime. However, for these agreements to effect such a transfer by legally binding the partner countries to a hub's regulatory regime, they must contain enforceable provisions. As we have seen, the picture seems to be mixed in this regard.

5.5 Closing remarks

The general picture that emerges from comparing the undertakings in the WTO+ and WTO-X areas for the two sets of PTAs is the following:

1. The EC agreements go much further than the US agreements in covering areas outside the scope of the WTO agreements. There has also been an increasing tendency to this effect.

2. When adjusting for non-enforceable language, one observes significant 'legal inflation' in non-WTO parts of the EC agreements. In fact, the EC agreements are similar to the US agreements in that much of the emphasis of enforceable language is on existing WTO areas.

3. Both EC and US PTAs contain non-WTO areas with substantial undertakings. An important aspect of both sets of agreements is thus that they combine substantial undertakings in WTO areas and in non-WTO areas.

4. A significant proportion of the substantial, legally enforceable obligations is in areas where domestic or international regulations are important, but the specific regulatory areas differ for the two hubs.

6 Conclusion

There is growing concern about preferential trading agreements and the role they should play in the multilateral trading system. Not only are they becoming increasingly prevalent, there is also a perception that many recent PTAs, especially those centred on the EC and the US, go far beyond the scope of the current WTO agreements.

With a view to shedding light on whether the above perception corresponds to reality, this study has assessed in some detail all the PTAs signed by the EC or the US and other WTO members by dividing all the areas they include into two categories: WTO+ obligations, which are areas already covered by the present WTO agreements, and WTO-X obligations, which are areas currently falling outside these agreements.

Our examination of the two sets of PTAs yields two main findings.

First, both EC and US agreements contain a significant number of WTO+ and WTO-X obligations. However, EC agreements go much further in terms of WTO-X coverage than US agreements. When discounting for 'legal inflation' the picture remains largely the same for US agreements, but it changes dramatically for EC agreements. Adjusting for 'legal inflation', US agreements actually contain more legally binding provisions, both in WTO+ and WTO-X areas, than EC agreements.

It is thus clear that the EU and the US have chosen markedly different strategies for including provisions in their PTAs that go beyond the WTO agreements. In particular, EC agreements display a fair deal of 'legal inflation', a phenomenon almost totally absent in US agreements. The study does not permit us to draw precise conclusions about this asymmetry of behaviour between the EU and the US, but the fact that much of the 'legal inflation' occurs in development-related provisions, which are unique to the EC agreements, suggests that the EU has a greater need than the US to portray its PTAs as not driven solely by commercial interests. Our feeling is that this may reflect a lack of consensus on the part of EU member states about the ultimate purpose of these PTAs, the

wide variety of provisions of weak legal value representing a compromise between various interests among EU members.

Second, although EC and US preferential trade agreements do go significantly beyond the WTO agreements, the number of legally enforceable WTO-X provisions contained in EC and US PTAs is still in fact quite small. Provisions that can be regarded as really breaking new ground compared to existing WTO agreements are few and far between: environment and labour standards for US agreements, and competition policy for EC agreements. These provisions clearly all deal with regulatory issues. The other enforceable WTO-X provisions found in EC and US PTAs concern domains that more or less relate to existing WTO agreements, such as investment, capital movement and intellectual property, which also concern regulatory matters.

The fact that the new, legally enforceable WTO-X provisions all deal with regulatory issues suggests that EC and US agreements effectively serve as a means for the two hubs to export their own regulatory approaches to their PTA partners. The study does not permit us to draw conclusions about the respective costs and benefits of this situation for the hubs and the spokes, but our feeling is that it serves primarily the interests of the two 'regulators of the world'. This feeling is based on the fact that the legally enforceable WTO-X provisions included in EC and US agreements have all been the subject of earlier, but failed, attempts by the EU and/or the US to incorporate them in WTO rules, against the wishes of developing countries. To the extent that our conclusion is correct, it supports the view expressed *inter alia* by WTO Director-General Pascal Lamy that PTAs might be breeding concern about unfairness in trade relations.

What the implications of our findings are for the 'regionalism-versus-multilateralism' issue is beyond the scope of this paper. But what is clear is that a serious discussion of this matter needs to start from a detailed assessment of the nature of EC and US PTAs, including the findings reported in this study.

References

Baldwin, R. E., 2006, Multilateralising Regionalism, Spaghetti Bowls as Building Blocks on the Path to Global Free Trade, World Economy, 29: 1451–518.

Bartels L., 2008, Social Issues: Labor, Environment and Human Rights, in Bilateral and Regional Trade Agreements: Commentary, Analysis and Case Studies, ed. by Simon Lester and Bryan Mercurio, Cambridge: Cambridge University Press.

Bhagwati, 2008, Terminates in the Trade System: How preferential agreements undermine free trade, Oxford: Oxford University Press.

Bourgeois, J., K. Dawar and S.J. Evenett, 2007, A Comparative Analysis of Selected Provisions in Free Trade Agreements, Study commissioned by DG Trade, Brussels: European Commission, mimeo.

Cordonier Segger J.M., 2007, Sustainable Development in RTAs, in Regional Trade Agreements and the WTO Legal System, ed. by Bartels L. and Ortino H., Oxford: Oxford University Press.

Dawar K., 2008, Assessing Labour and Environmental Regimes in Regional Trading Arrangements, Society of International Economic Law (SIEL), Inaugural Conference, Working Paper No. 55/08.

Desta M. and N. Barnes, 2007, Competition Law in Regional Trade Agreements: An Overview, in Regional Trade Agreements and the WTO Legal System, ed. by Bartels L. and Ortino H., Oxford: Oxford University Press.

Elliott, K.A., 2006, Labour Standards, in Trade Relations Between Colombia And the United States, ed. by J.J. Schott, Policy Analysis in International Economics, no. 79/2006, Washington, D.C.: Peterson Institute for International Economics.

Krajewski, M., 2007, Services liberalization in RTAs: Lessons for GATS unfinished business, in Regional Trade Agreements and the WTO Legal System, ed. by Bartels L. and Ortino H., Oxford: Oxford University Press.

Lesser, C., 2007, Do Bilateral and Regional Approaches for Reducing Technical Barriers to Trade Converge Towards the Multilateral Trading System?, OECD Trade Policy Working Papers, No. 58.

Mavroidis, P. C., 2007, Trade in goods, Oxford: Oxford University Press.

McCaffery, S., 2006, Understanding International Law, Newark: LexisNexis.

Mercurio, B., 2007, TRIPS-Plus provisions in FTAs: Recent Trends, in Regional Trade Agreements and the WTO Legal System, ed. by Bartels L. and Ortino H., Oxford: Oxford University Press.

Ortino, F., 2008, RTAs and Trade in Services, in Lester S. and Mercurio B. eds., Bilateral and Regional Trade Agreements: Commentary, Analysis and Case Studies, Cambridge: Cambridge University Press.

Pugatch, M.P., 2007, A Transatlantic Divide? The EU and US approach to the international regulation of Intellectual Property Trade-Related Agreements, ECIPE Working Paper 02/2007.

Reuter P., 1989, Introduction to the Law of Treaties, London: Pinter Publishers.

Roy M., J. Marchetti and H. Lim, 2006, Services liberalization in the New Generation of PTAs: How much further than GATS?, WTO Staff Working Paper ERSD-2006-07.

Sapir A., 2007, Europe and the Global Economy, in Fragmented Power: Europe and the Global Economy, ed. by Sapir A., Brussels: Bruegel.

Table 1: EC and US PTAs with other WTO members, signed as of October 2008*

EC Agreements	Date of signature by parties	US Agreements	Date of signature by parties
Norway	11/11/1970		
Iceland	22/07/1972		
Switzerland	22/07/1972		
EEA†	02/05/1992	Israel	22/04/1985
Turkey	06/03/1995	NAFTA	17/12/1992
Tunisia	17/07/1995	Jordan	24/10/2000
Israel	20/11/1995	Singapore	06/05/2003
Morocco	26/02/1996	Chile	06/06/2003
Jordan	11/24/1997	Australia	18/05/2004
South Africa	11/10/1999	Morocco	15/06/2004
Mexico	23/03/2000	CAFTA-DR	05/08/2004
FYRoM	09/04/2001	Bahrain	14/09/2004
Egypt	25/06/2001	Peru	12/04/2006
Croatia	29/10/2001	Oman	19/01/2006
Chile	18/10/2002	Colombia	22/11/2006
Albania	12/06/2006	Panama	28/06/2007
CARIFORUM	15/10/2008	South Korea	30/06/2007

Source: World Trade Organisation (WTO), European Commission (DG External Relations) and Office of the United States Trade Representative. Notes: * The EC also has reciprocal PTAs with several non-WTO members: Algeria, Andorra, Faroe Islands, Lebanon, Overseas Countries and Territories (OTCs), the Palestinian Authority, San Marino, and Syria. † The EEA was signed between the European Community and the EFTA countries, except Switzerland. Some EFTA countries later joined the European Community (now Union). The remaining EFTA countries which belong to the EEA are Iceland, Lichtenstein and Norway. Switzerland has signed separate bilateral agreements with the European Community that also cover both trade in goods and in services. When we refer to the EEA, we will use the term loosely to cover all agreements that have been concluded between EFTA countries, including Switzerland, and the EC.

Table 2: Classification of WTO+ areas in EC agreements

Table 3: Classification of WTO+ areas in US agreements

Source: Authors. Note: The GATS area covers commitments related to services liberalisation. AC: Area covered; LE: Legally enforceable.

Table 4: WTO-X areas covered in EC Agreements

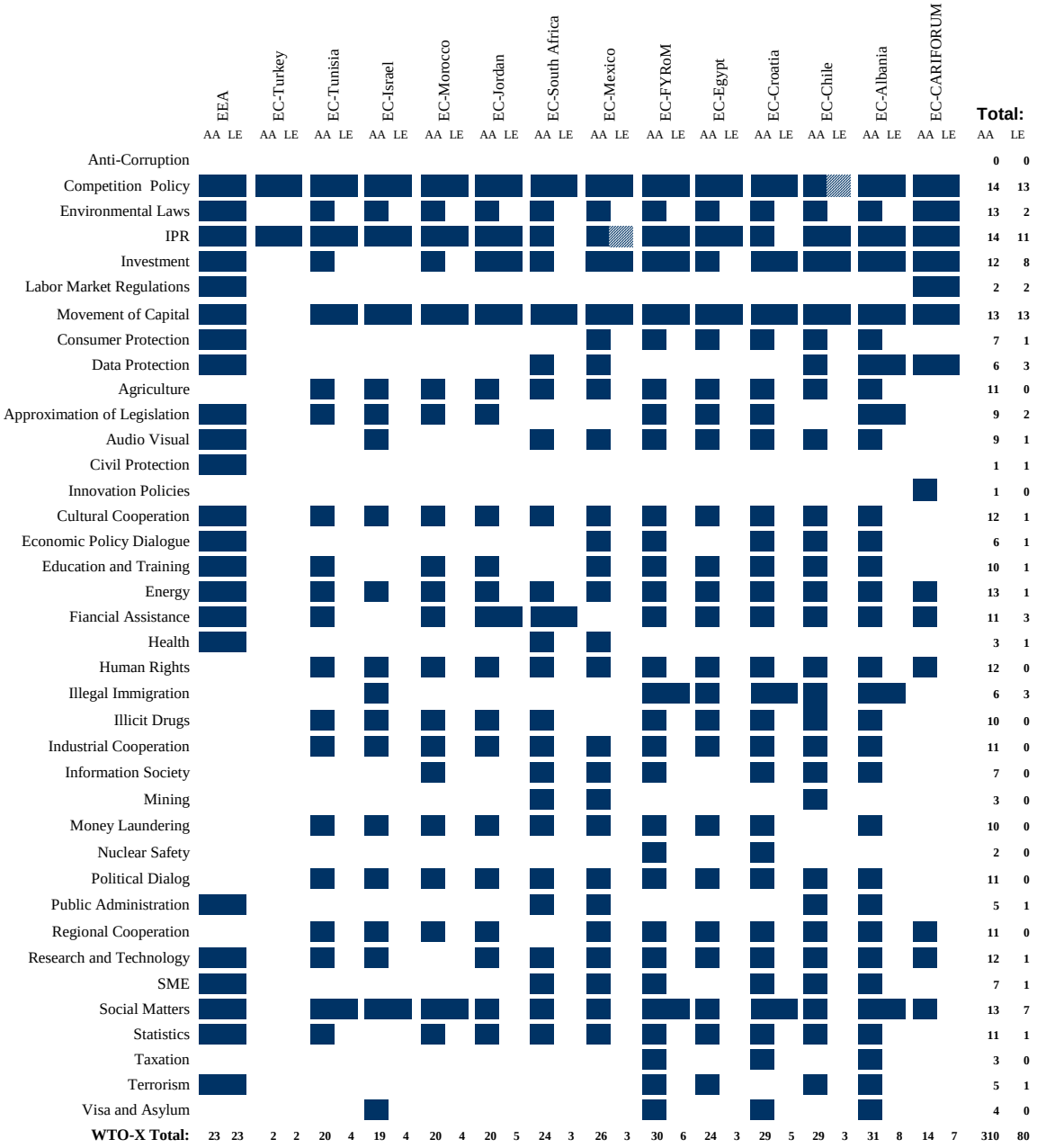
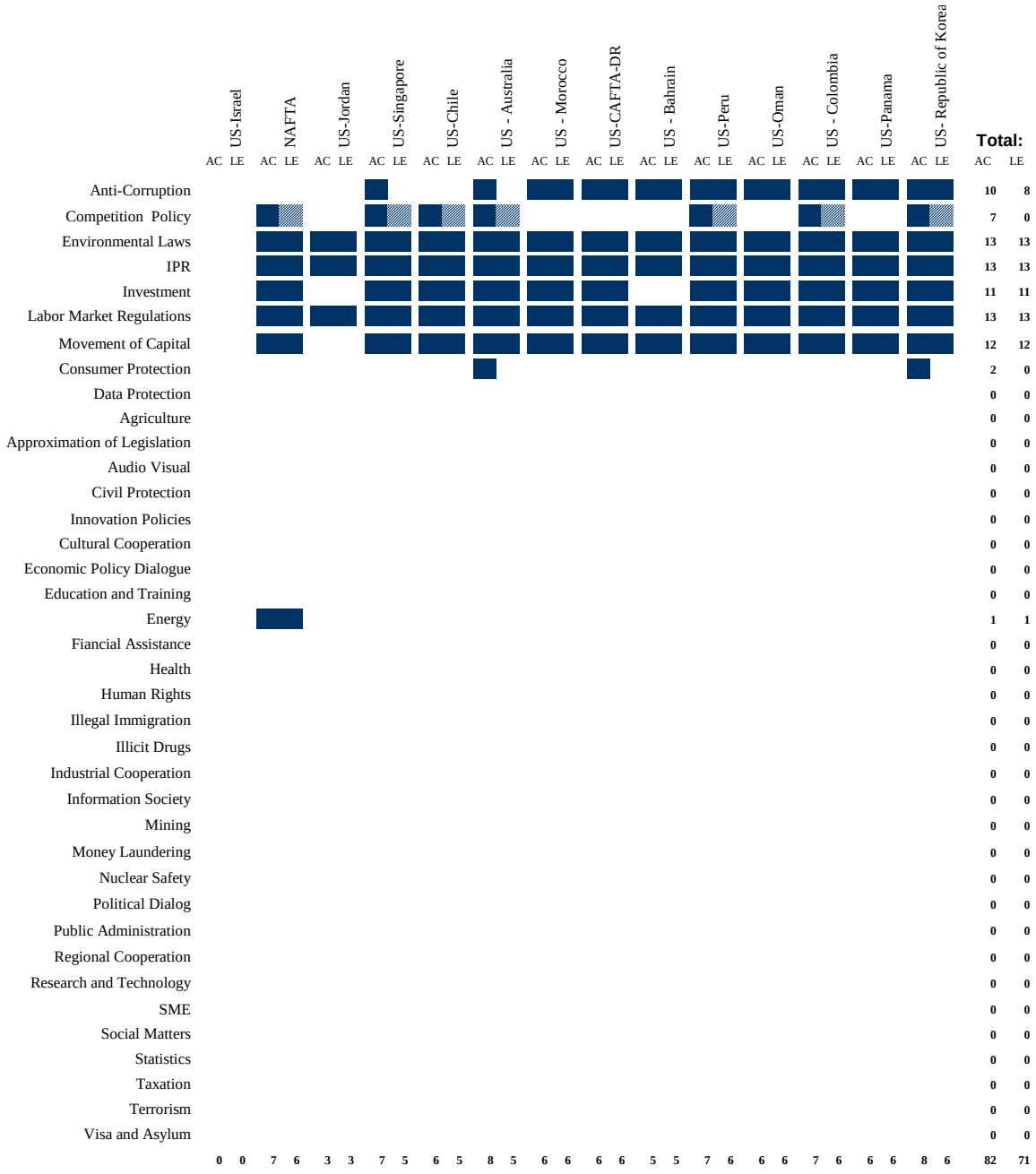


Table 5: WTO-X areas covered in US Agreements



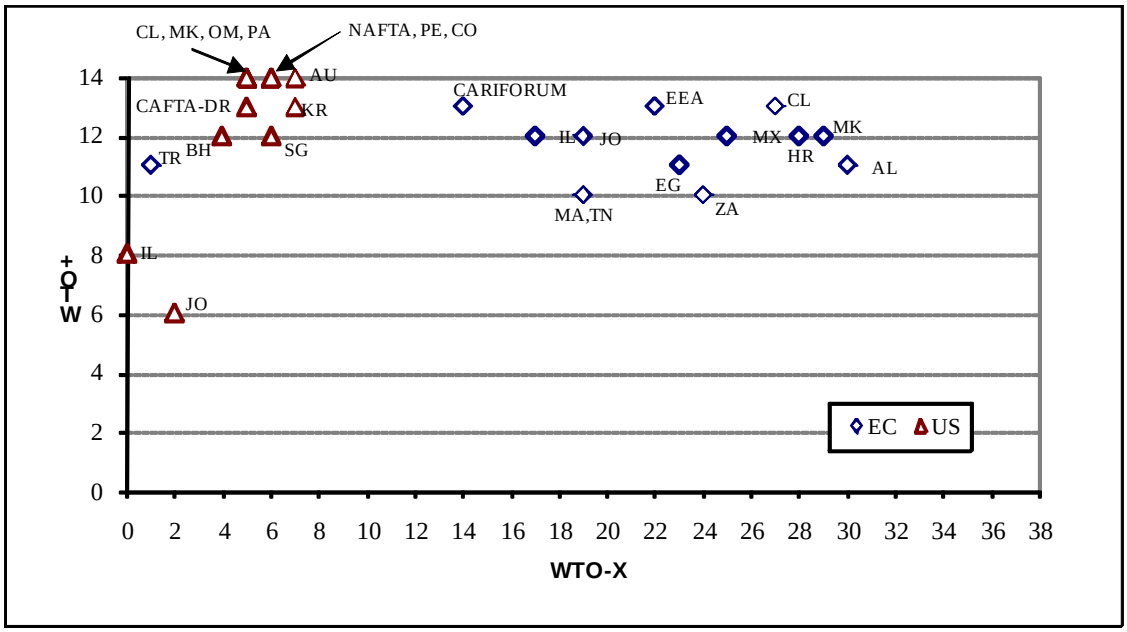
Source: Authors. Note: AC = Area covered; LE = Legally enforceable.

Table 6: Legal inflation by groups of areas

	EU PTAs			US PTAs		
	AC	LE	Legal Inflation	AC	LE	Legal Inflation
1. Trade- and Investment-related Obligations	107	98	8%	113	113	0%
2. GATS/TRIPs/IPR	32	28	13%	40	40	0%
3. Migration-related Regulations	23	10	57%	-	-	-
4. Domestic Trade-related Regulations	104	60	42%	103	78	24%
Total Trade and Regulations:	**266**	**196**	**26%**	**256**	**231**	**10%**
5. Other	**206**	**17**	**92%**	**1**	**1**	**0%**
Total all areas:	**472**	**213**	**55%**	**257**	**232**	**10%**

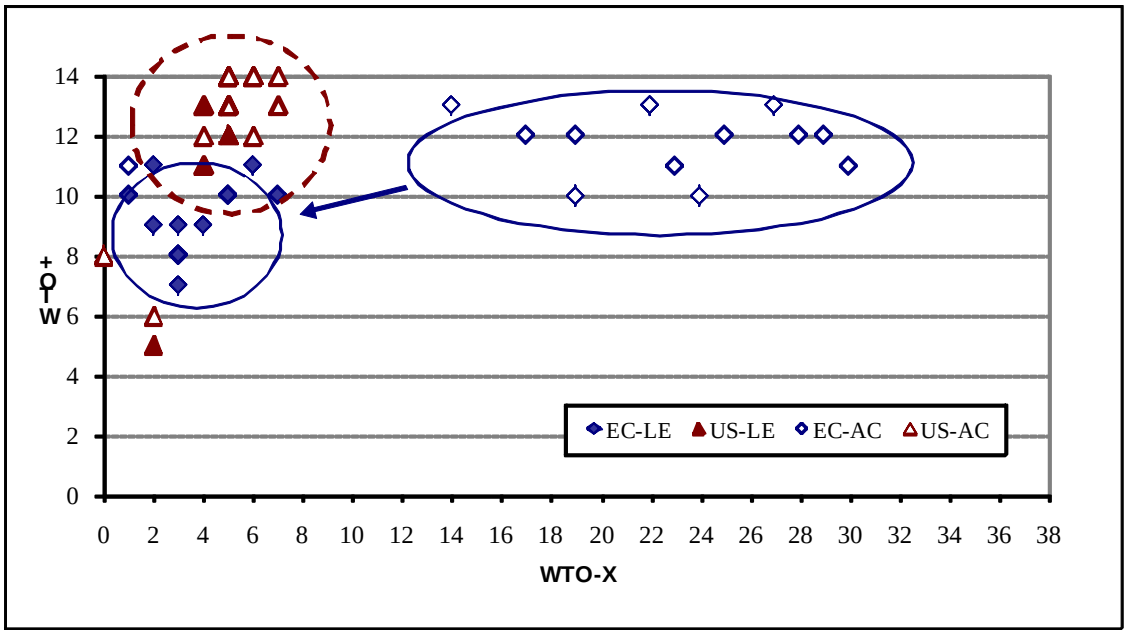
Source: Own calculations.

Figure 1: The balance between WTO+ and WTO-X undertakings in terms of coverage



Source: Own calculations based on Table 3.1, Table 3.2, Table 4.1 and Table 4.2.

Figure 2: The balance between WTO+ and WTO-X undertakings, discounting for the lack of legal enforceability



Source: Own calculations based on Table 2.1, Table 3.1, Table 3.2, Table 4.1 and Table 4.2. Note: LE: Legally enforceable; AC: Areas covered.