

“Fairness” in the Trade and Investment Agreements*

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1. Introduction

“Free and Fair” trade is what has been aimed for, globally. That is to say, as mentioned in the mission of World Trade Organization (WTO), to create an environment for “open, fair and undistorted competition”. Political leaders including Prime Minister Abe of Japan often comments upon signing or concluding Economic Partnership Agreement (EPA), and Free Trade Agreement (FTA), as they would contribute to creating “Free and Fair” trade environment and/or “Fair rule”. For an example, Japan-EU Summit Joint Statement upon signing Japan-EU EPA in July, 2018 mentioned that “the Agreement will be the model of high standard, free, open and fair trade and investment rules in the 21st century.¹”, and that “Japan and the EU are sending a powerful message to promote free, fair and rules-based trade²”. Also, when the political leaders gather for a meeting, they often endeavor to voice together to strive for realizing “Free and Fair” trade environment as the most recent G20 summit’s leaders’ declaration³.

The meaning of “fair” in trade and investment is generally not definite or universal. As we see in the current situation that are mainly stemmed from the United States’ act under Trump Administration, that the word “fair” could sometimes be used to justify its policy on protectionism, which is not compatible to what the international society has been trying to achieve or realize.

* This paper is incomplete.

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¹ Japan-EU Summit Joint Statement Tokyo (July17, 2018)
<https://www.mofa.go.jp/files/000382201.pdf#search=%27japan+eu+fair+abe%27> (accessed on June 29, 2019).

² Ibid.

³ G20 Osaka Leader’s Declaration includes the following: “strive to realize a free, fair, non-discriminatory, transparent, predictable and stable trade and investment environment”.
https://www.g20.org/pdf/documents/en/FINAL_G20_Osaka_Leaders_Declaration.pdf (accessed on June 30, 2019).

This paper addressed to the following questions: 1) What are the concepts that are relevant to fairness and embedded in multilateral and bilateral agreements, and 2) how has the word “fair” used as an instrument to justify the acts of countries, by using the United States as an example. As for 1), the paper identified that the concept of “equitable / non-discrimination” and “reciprocal / mutually advantageous” are the keys⁴.

2. Precedent Studies:

As Suranovic (2000) mentioned “the literature on fairness is diverse, multi-disciplinary, and often impenetrable.⁵”, there are accumulation of literatures on fairness on trade and investment, offering many different observations and analysis. Stiglitz and Charlton (2005) conducted an analysis based on the principles that included “any agreement should be fair⁶” and “any agreement should be arrived at fairly⁷”. He also pointed out that there is long history of unilateral trade policy in the case of the United States.⁸” Bergsten (1996) pointed out the difficulties of defining reciprocity and mentioned that “all agree in principle that any negotiation of this matter must elicit fair contributions from all parties. But it is extremely difficult, in purely intellectual terms even before turning to the politics, to equate concessions across issues as disparate as tariffs and national competition policies. The concept of reciprocity was never very precise and became even more difficult when the GATT turned to negotiating nontariff barriers. Nevertheless, the political economy of trade requires each country to demonstrate that its own concessions were matched by those of its partners, and it is highly desirable to buttress the case with orders of magnitude if not precise estimates.⁹”

⁴ Though “equality and non-discrimination” is categorized as one in this paper, the author of this paper acknowledges that there should be careful studies required on the similarities and differences on “reciprocal” and “mutually advantageous”. The same for “reciprocal and mutually advantageous” that is categorized as one in this paper but needs to have further studies.

⁵ Steven M. Suranovic (2000) “A Positive Analysis of Fairness with Applications to International Trade”, *World Economy*, v. 23, iss. 3, p. 283.

⁶ Joseph E. Stiglitz and Andrew Charlton (2005) “Fair Trade For All”, Oxford University Press, p.68.

⁷ *Ibid.*

⁸ Stiglitz and Charlton (2005), p.352.

⁹ C. Fred Bergsten (1996) “Globalizing Free Trade” *Foreign Affairs* Vol. 75, No. 3, p.116.

Narlikar (2006) pointed out of the importance of the scope, mentioning that “what one regards as a fair bargain depends on several factors: who the actor is, who the other negotiating parties are, and the forum in which negotiations are taking place. Parties can apply different criteria in defining fairness, resulting in claims that are mutually contradictory and yet equally legitimate.¹⁰” Suranovic (2000)¹¹ identified Seven Principles of Fairness and categorized as follows: “a. Equality Fairness (1) Non-Discrimination Fairness, (ii) Distributional Fairness (iii) Golden-Rule Fairness¹², b. Reciprocity Fairness (iv) Positive Reciprocity Fairness, (v) negative Reciprocity Fairness, (vi) Privacy Fairness, (vii)Maximum Benefit Fairness”.

Based on the precedent research, especially the Suranovic’s, this research considered “equitable / non-discriminatory” and “reciprocal / mutually advantageous” are the two important concept that are embedded in the trade and investment related agreements.

3. Scope of this research

What “fair” means may be different by the scope or the stages. For an example, when Japanese Prime Minister Abe mentions “fair” in his comment upon signing or concluding EPA/FTA between Japan and other country, it mentions about the agreement or the rule itself. On the other hand, the fairness in the annual report by the Ministry of Economy, Trade and Industry (METI), Japan is address to fairness in of the different stages. METI annually issues Report on “Compliance by Major Trading Partners with Trade Agreements (WTO, FTA/EPA and IIA¹³)” since 1992. METI once again discussed and defined what “fair” is in 2017 and 2018, and as mentioned in the report of 2018 version, fairness is rule-oriented and not result-oriented, and is to follow the rules. Unlike

¹⁰ Amrita Narlikar (2006) “Fairness in International Trade Negotiations: Developing Countries in the GATT and WTO” *The World Economy*, p.1005.

¹¹ Steven M. Suranovic (2000) “A Positive Analysis of Fairness with Applications to International Trade” *World Economy*, v. 23, iss. 3, pp. 283-306.

¹² Definition of Golden Rule Fairness, according to Suranovic is as follows: “An agent should take some action which has an effect upon another only if the agent also finds it acceptable for another agent to take a comparable action which has the identical effect upon himself”. Suranovic (2000), p.291.

¹³ Abbreviation of International Investment Agreement.

the comment of the Prime Minister that evaluate the rule itself, “fair” in the report does not address to the rule itself nor to evaluate the fairness of the rule itself.

This paper’s scope on fairness is the rule itself, its function, and how it has been utilized, but not on how the rule has been established in the negotiation process. This paper also does not cover “fair trade” of which definition is “a way of buying and selling products that makes certain that the people who produce the goods receive a fair price¹⁴”.

4. The concepts that are relevant to fairness in trade and investment agreements that are embedded in multilateral and bilateral agreements

4-1 “Equality / Non-discrimination” and “Reciprocal / Mutually advantageous” in the preambles of the agreements

In order to address to the first part of this research on the concept that are relevant to fairness and embedded in multilateral and bilateral agreements, the relevant texts on the agreements were analyzed.

Havana Charter

Aforementioned research by Suranovic (2000) defined “fairness” of trade and investment by the seven principles, which could be categorized in to two parts: Reciprocal and Equitable.

Those two concepts, reciprocal and equitable, have been incorporated in the multilateral agreements (that included those that have not been issued). The initial endeavor to issue a multilateral agreement after Second World War was the Havana Charter¹⁵, the Final Act of the United Nations Conference on Trade and Employment, which was concluded in March 1948. The ratification of this Charter was eventually failed due to lack of approval by the US Congress¹⁶, and so was an establishment of

¹⁴ Cambridge Dictionary, <https://dictionary.cambridge.org/ja/dictionary/english/fair-trade> (accessed June 25, 2019).

¹⁵ Havana Charter, https://www.wto.org/english/docs_e/legal_e/havana_e.pdf (accessed on June 25, 2019).

¹⁶ Irwin (2000) analyzed that “the reason the proposed International Trade Organization was defeated in the late 1940s was that U.S. business feared that the ITO was as much about regulating resale price maintenance and other business practices as about cutting tariffs.”

International Trade Organization (ITO), a multilateral forum on trade and investment which establishment was being discussed along with the Charter but not been realized. Though neither of them, ITO and Havana Charter, were realized, much of the elements were succeeded to General Agreement on Tariffs and Trade (GATT) and WTO rules.

Also, the word “fair” appears in an investment relevant clause such as Fair and Equitable Treatment¹⁷ (FET). Havana Charter included fair and equitable clause, a clause often used in investment relevant chapter of EPA/FTA as well as bilateral investment agreement. Havana Charter the first agreement (drafted) that included FET. FET could be described as “an ‘absolute’, ‘non-contingent’ standard of treatment, i.e. a standard that states the treatment to be accorded in terms whose exact meaning has to be determined, by reference to specific circumstances of application, as opposed to the ‘relative’ standards embodied in ‘national treatment’ and ‘most favoured nation’ principles which define the required treatment by reference to the treatment accorded to other investment. Although some references to the standard can be found in the first negotiating attempts of multilateral trade and investment instruments, it became established as a principle mainly through the increasing network of bilateral investment treaties.¹⁸” The meaning of FET in terms of what it covers and what kind obligation it burdens to host country, were gradually developed, by the accumulation of Investor-State Dispute Settlement (ISDS) Awards.

Table 1 includes the extracts from the preamble and other clause of Havana Charter that are relevant to “equitable / non-discrimination” and “reciprocal / mutually advantageous”.

Douglas A Irwin (2000) “Do We Need the WTO?” Cato Journal, Winter, v. 19, iss. 3, pp. 351

¹⁷ Fair and Equitable Treatment (FET), or its relevant clause are often stated in the investment related agreement. Of EPAs and FTAs that Japan has concluded as of today, FET or related clause is included in all EPA/FTA that Japan has concluded as of July 1, 2019.

¹⁸ OECD, “Fair and Equitable Treatment Standard in International Investment Law”, Directorate for Financial and Enterprise Affairs Working Papers on International Investment (Number 2004/3), https://www.oecd.org/daf/inv/investment-policy/WP-2004_3.pdf, p.2 (accessed on June 30, 2019).

Table 1 Preamble and other clause of Havana Charter

Name of the agreement	Organization	Contents
Havana Charter	United Nations Conference on Trade and Employment	<p>Article 1 PURPOSE AND OBJECTIVES For the Purpose of REALIZING the aims set forth in the Charter of the United Nations, particularly the attainment of the higher standards of living, full employment and conditions of economic and social progress and development, envisaged in Article 55 of that Charter. TO THIS END they pledge themselves, individually and collectively, to promote national and international action designed to attain the following objectives: ... Para 3. To further the enjoyment by all countries, on equal terms, of access to the markets, products and productive facilities which are needed for their economic prosperity and development. Para 4. To promote on a <u>reciprocal and mutually advantageous</u> basis the reduction of tariffs and other barriers to trade and the <u>elimination of discriminatory treatment</u> in international commerce.</p>
		<p>SECTION D - STATE TRADING AND RELATED MATTERS Article 29 Non-discriminatory Treatment ... Para 2 ... The provisions of paragraph 1 shall not apply to imports of products purchased for governmental purpose and not with a view to commercial resale or with a view to use in the production of goods for commercial sale. With respect to such imports, and with respect to the laws, regulations and requirements referred to in paragraph 8 (a) of Article 18 , each Member shall accord to the trade of the other Members <u>fair and equitable treatment</u>.</p> <p>*Article 18 National Treatment on Internal Taxation and Regulation 8. (a) The provisions of this Article shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale.</p>

Multilateral Agreement on Investment

Another collective endeavor on investment was Multilateral Agreement on Investment (MAI), under an initiative by Organisation for Economic Co-operation and Development (OECD). Negotiations were launched in May 1995, with an objective to “provide a broad multilateral framework for international investment with high standards for the liberalization of investment regimes and investment protection and with effective

dispute settlement procedures, open to non-OECD countries¹⁹”. The negotiation stopped in April 1998 in the middle of the discussion process, and never been finalized nor resumed the negotiations. However, its drafted text also included some of the concept that are relevant to fairness.

Multilateral Agreement on Investment, MAI : Draft Consolidated Text²⁰, as of 22 April 1998²¹

Table 2 Preamble and other clause of drafted MAI

Name of the agreement	Organization	Contents
Multilateral Agreement on Investment (MAI)	Organisation for Economic Co-operation and Development (OECD)	<p>I. GENERAL PROVISIONS</p> <p>PREAMBLE</p> <p>The Contracting Parties to this Agreement,</p> <p>...</p> <p>Para 4 Emphasising that <u>fair</u>, transparent and predictable investment regimes complement and benefit the world trading system;</p>
		<p>IV. INVESTMENT PROTECTION</p> <p>1. GENERAL TREATMENT 1</p> <p>1.1. Each Contracting Party shall accord to investments in its territory of investors of another Contracting Party <u>fair and equitable treatment</u> and full and constant protection and security. In no case shall a Contracting Party accord treatment less favourable than that required by international law.</p> <p>1.2. A Contracting Party shall not impair by [<u>unreasonable or discriminatory</u>] [<u>unreasonable and discriminatory</u>] measures the operation, management, maintenance, use, enjoyment or disposal of investments in its territory of investors of another Contracting Party.</p> <p>5. Expropriation and General Treatment</p> <p>1. GENERAL TREATMENT</p> <p>1. Each Contracting Party shall accord to investments in its territory of investors of another Contracting Party <u>fair and equitable treatment</u> and full and constant protection and security. Such treatment shall also apply to the operation, management, maintenance, use, enjoyment or disposal of such investments.</p>

¹⁹ OECD, <https://www.oecd.org/investment/internationalinvestmentagreements/multilateralagreementoninvestment.htm> (accessed on June 25, 2019).

²⁰ OECD, <http://www1.oecd.org/daf/mai/pdf/ng/ng987r1e.pdf>, (accessed on June 25, 2019).

²¹ Final text was not made.

World Trade Organization

The WTO Agreement is “based on the concept of reducing trade barriers and applying nondiscriminatory rules²²” and they are included in the following basic principles of WTO: Principle of Most Favored Nation (MFN) Treatment, principle of national treatment, principle of general prohibition of quantitative restrictions, and principle regarding tariffs as legitimate measures for the protection of international industries²³.

METI explained WTO as follows, by introducing some of the definitions by WTO itself: “In order to contribute to these objectives, the WTO Agreements are established for the purpose of entering into reciprocal and mutually advantageous arrangements designed for “the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations. This means that the WTO Agreements are structured, for the purpose of introducing market-economy principles into international trade, on the basis of the two ideals: (1) reducing trade barriers, and (2) applying nondiscriminatory rules. ²⁴”

²² METI, “Overview of the WTO” Part II: WTO Rules and Major Cases 2018 Report on Compliance by Major Trading Partners with Trade Agreements - WTO, EPA/FTA and IIA – “ https://www.meti.go.jp/english/report/data/2018WTO/pdf/02_00.pdf, p.143 (accessed on June 25, 2019).

²³ Ibid.

²⁴ METI, “Overview of the WTO” Part II: WTO Rules and Major Cases 2017 Report on Compliance by Major Trading Partners with Trade Agreements - WTO, EPA/FTA and IIA -" https://www.meti.go.jp/english/report/data/2017WTO/pdf/02_01.pdf (accessed on June 25, 2019).

Table 3 Preamble of WTO and GATs

Name of the agreement	Organization	Contents
WTO	World Trade Organization (WTO)	WTO Agreement PREAMBLE. ... Para 3 Being desirous of contributing to these objectives by entering into <u>reciprocal and mutually advantageous</u> arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the <u>elimination of discriminatory</u> treatment in international commerce,
GATs		General Agreement on Trade in Services, GATs PREAMBLE ... Para 3 Desiring the early achievement of progressively higher levels of liberalization of trade in services through successive rounds of multilateral negotiations aimed at promoting the interests of all participants on a <u>mutually advantageous</u> basis and at securing an overall balance of rights and obligations, while giving due respect to national policy objectives;

Separately from its rule, WTO explains the rules on non-discrimination as follows²⁵: “The rules on non-discrimination — MFN and national treatment — are designed to secure fair conditions of trade. So too are those on dumping (exporting at below cost to gain market share) and subsidies. The issues are complex, and the rules try to establish what is fair or unfair, and how governments can respond, in particular by charging additional import duties calculated to compensate for damage caused by unfair trade.” WTO also explains the interpretation of reciprocal and mutually advantageous arrangements as follows, by introducing the awards by the WTO dispute settlement ²⁶: “By referring to an award and the statement of the Appellate Body, that "the security and predictability of 'the reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade' is an object and purpose of the WTO Agreement, generally, as well as of the GATT 1994. Finally, the interpretation must ensure the security and predictability of the reciprocal and mutually advantageous

²⁵ WTO, https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm (accessed on June 25, 2019).

²⁶ WTO, https://www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_preamble_jur.pdf (accessed on June 25, 2019).

arrangements manifested in the form of concessions. ²⁷“, and also by referring to a different case that “The Panel observed that: "Other provisions of the GATT 1994 refer to 'reciprocal and mutually advantageous' concessions and arrangements. Notably, the preamble to both the GATT 1994 and the WTO Agreement recognize the objective of entering into 'reciprocal and mutually advantageous arrangements' directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations. It seems to us that they basically convey the notion of balanced concessions and arrangements. ²⁸”

As shown above, concepts of reciprocal and equality or non-discriminatory are existing in the agreements in Havana Charter and the following agreements among multilateral countries/regions and were primarily relevant to tariff reduction. The word “fair” appears as a part of text of MAI, though the meaning of it was not defined. Non-discrimination is relevant to creating “equal playing field²⁹”.

Economic Partnership Agreement and Free Trade Agreement

In addition to WTO rules, the number of concluded EPA/FTA³⁰ is increasing.

²⁷ WTO, https://www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_preamble_jur.pdf (accessed on June 30, 2019).

²⁸ WTO, https://www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_preamble_jur.pdf (accessed on June 30, 2019).

²⁹ OECD identifies “levelling the playing field” as follows: “Making trade work for all implies that we also address concerns around the world that competition in the global economy is not ‘fair’, that it is distorted by market barriers and government actions that favour companies and products that are not necessarily the best. A level playing field in global trade means that all countries and firms compete on an equal footing to offer consumers everywhere the widest possible choice and the best value for money.” OECD, <https://www.oecd.org/trade/topics/levelling-the-playing-field/> (accessed on June 30, 2019)

³⁰ EPA/FTA often includes following clauses: Trade in Goods, Rules of Origin, Customs Procedures and Trade Facilitation, Sanitary and Phytosanitary Measures, Standards, Technical Regulations and Conformity Assessment Procedures, Trade Remedies, Trade in Services, Telecommunications Services, Investment, Movement of Natural Persons, Competition, Intellectual Property, Electronic Commerce, Small and Medium Enterprises, Economic and Technical Cooperation, Government Procurement, Dispute Settlement. Investment Chapter is one of the clauses in the agreements of which texts includes the rules on investments. Furthermore, Investment Chapters of the EPA/FTA that Japan has concluded in the past include rules on: Scope (of investment), Most-Favored Nation, National Treatment (Pre-establishment / Post-establishment), Prohibition of Performance Requirements, Dispute Settlement Mechanism, Fair and equitable treatment, Expropriation and compensation for losses, Transfer, Subrogation, Restrictions on nationality requirements for senior management and boards of directors.

The below chart include preamble of some of the multilateral and bilateral agreements: Preambles of the recent regional EPA/FTA, namely, Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)³¹, Japan-EU EPA³², and United States-Mexico-Canada Agreement (USMCA)³³, as examples.

Table 4 Preamble of CPTPP, Japan-EU EPA, and USMCA

Year	Name of the agreement	Countries	Contents (extracts from Preamble)
2018 (entered into force)	Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)	Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam	ESTABLISH a predictable legal and commercial framework for trade and investment through <u>mutually advantageous</u> rules; ... AFFIRM that state-owned enterprises can play a legitimate role in the diverse economies of the Parties, while recognising that the provision of unfair advantages to state-owned enterprises undermines fair and open trade and investment, and resolve to establish rules for state-owned enterprises that promote a level playing field with privately owned businesses, transparency and sound business practices;
2019 (entered into force)	AGREEMENT BETWEEN THE EUROPEAN UNION AND JAPAN FOR AN ECONOMIC PARTNERSHIP	Japan, EU	BELIEVING that creating a clearly established and secured trade and investment framework through <u>mutually advantageous</u> rules to govern trade and investment between the Parties would enhance the competitiveness of their economies, make their markets more efficient and vibrant and ensure predictable commercial environment for further expansion of trade and investment between them; ... SEEKING to establish clear and <u>mutually advantageous</u> rules governing trade and investment between the Parties and to reduce or eliminate barriers thereto;
2018 (signed)	United States-Mexico-Canada Agreement (USMCA)	US, Mexico, Canada	ENHANCE AND PROMOTE the competitiveness of regional exports and firms in global markets, and conditions of <u>fair</u> competition in the region;

Those above EPA/FTA agreements that were recently signed or entered into force do not include the word reciprocal. In fact, it is the same for many other EPA/FTA

³¹ New Zealand's Ministry of Foreign Affairs and Trade, CPTPP, <https://www.mfat.govt.nz/assets/Trans-Pacific-Partnership/Text/0.-Preamble.pdf> (accessed on June 30, 2019).

³² Ministry of Foreign Affairs, Japan, Japan-EU EPA, <https://www.mofa.go.jp/files/000382106.pdf> (accessed on June 30, 2019).

³³ Office of the United States Trade Representative, USMCA, <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between> (accessed on June 30, 2019).

as well that include “mutually advantageous” but not “reciprocal”³⁴.

Conclusion of this section, 4-1

The concepts of equality and reciprocity are embedded in the multilateral agreement, historically, and are partly succeeded to EPA/FTAs. Multilateral agreements, Havana Charter (draft of its final version) and WTO, include the word “reciprocal and mutually advantageous” in the text, but the recent regional and bilateral EPA/FTAs that this paper studied do not include the word “reciprocal” in the respective agreement. The reason why EPA/FTA may not necessarily have the word “reciprocal” is because of the agreement being the result of the reciprocal concessions, and expects no further reciprocal concessions in terms of tariff reduction. However, when considering that 1) reciprocity may apply not only to the tariff reduction but may also apply to the rule of EPA/FTA, and 2) that every agreement has the possibilities of the revision in the future, the agreement could have remained the word “reciprocal” instead of excluding it. This should require further studies.

As for the “equality” or “non-discrimination”, the concept seems to be embedded in the agreement, but with more variation in their relevant expressions in EPA/FTA. For an example, CPTPP states as mentioned in the table “AFFIRM that state-owned enterprises can play a legitimate role in the diverse economies of the Parties, while recognising that the provision of unfair advantages to state-owned enterprises undermines fair and open trade and investment, and resolve to establish rules for state-owned enterprises that promote a level playing field with privately owned businesses, transparency and sound business practices”. This implies that by mentioning “level playing field” in details, equality or non-discrimination is no longer just MFN or NT.

4-2 Structure

The dispute settlement system under WTO is important as a mean to settle disputes between the countries, which is relevant to fairness. The structure of WTO rules

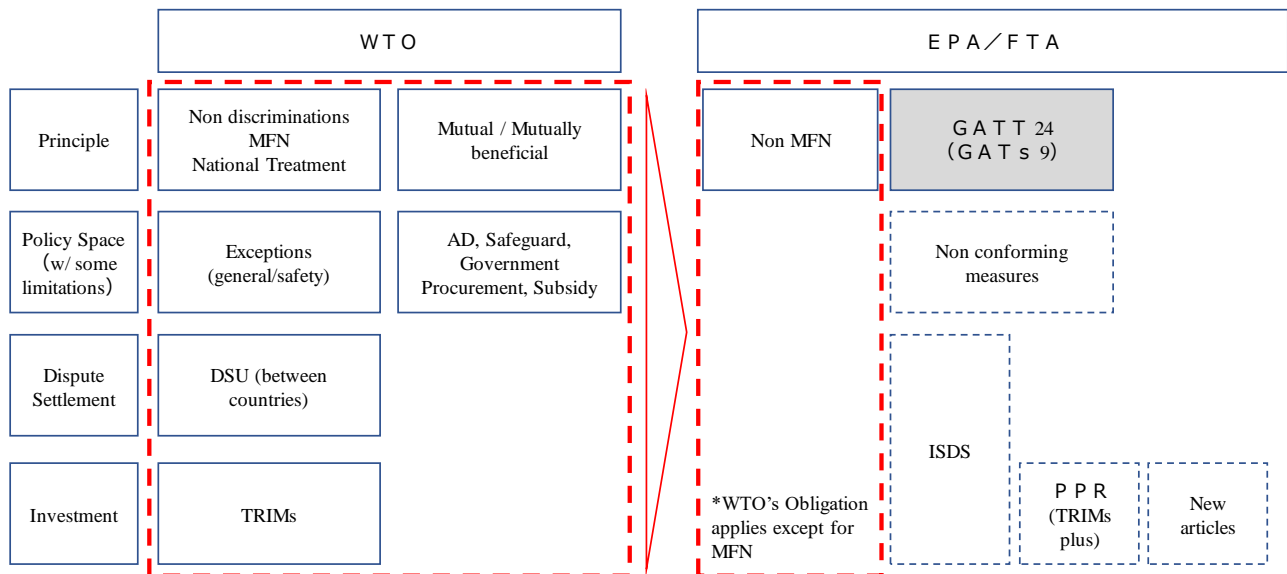
³⁴ This applies to the agreements that Japan concluded.

contributes to securing “fairness” among the WTO members by: 1) having specific rules that are consistent to the principles, 2) allowing exceptions with certain limitations, and 3) enabling to settle the issue between the countries under dispute settlement scheme. This structure can be interpreted as 1) having agreements on measures or treatment that every WTO member country should follow which would contribute to realizing th WTO’s objectives, 2) providing a policy space and capacity for exercising “right to regulate” to each member country as a mean to maintain sovereignty, by the exceptions on some measures such as on subsidies, and 3) having dispute settlement mechanism in which third party other than the disputing parties would involve and make judgements accordingly, under a rule that have been agreed by all WTO member countries.

The table below shows the structure above in both WTO and EPA/FTA. EPA/FTA are primarily based on WTO rules, namely, GATT article XXIV(24) as well as GATs article IV(9). Each EPA/FTA and/or regional agreement is individual and is the result of mutual agreements by the participating parties of the agreement. However, they are not completely apart from WTO rules, especially for those EPA/FTA that mentions about compatibility of WTO³⁵.

³⁵ For an example, Japan-EU Economic Partnership Agreement states in its PREAMBLE as follows: “BUILDING on their respective rights and obligations under the WTO Agreement and other multilateral, regional and bilateral agreements to which both Parties are party”.

Figure 1 Mechanism and Relationship between WTO and EPA/FTA³⁶



*Terms of the abbreviated word are explained in the footnote³⁷.

The dispute settlement system is important, as a way to solve disputes under agreed rule. However, currently, the WTO dispute settlement system is not functioning due to the dysfunction of Appellate Body. Due to the concerns on the dispute settlement, The United States has blocked appointments at the WTO appellate body, which is seriously undermining the function of WTO.

Dispute settlement system is the one way to secure “fairness” in trade and investment under WTO scheme. However, the world has learnt by the current situation that there is a chance that the mechanism becomes unfunctional under a certain condition.

5. How has the word “fair” used as an instrument to justify the acts of countries – the case of the United States

The United States has been using the word and the concept of “reciprocal” in its

³⁶ Prepared by the author of this paper. The bottom part on investment is added as this research covers investment in addition to trade relevant.

³⁷ MFN: Most Favoured Nation (not to discriminate among countries), AD: Anti-Dumping, TRIMs: Agreement on Trade-Related Investment Measures (measures on investment issues under WTO), DSU: Dispute Settlement Understanding, PPR: Performance Prohibited Requirements, ISDS: Investor State Dispute Settlements.

trade and investment relevant policies. President Trump often talks “reciprocal and fair” to justify its act. The current act of the United States under the leadership of President Trump is being criticized. There are reasons for being criticized, especially as the measures which would be led to protectionism. However, such acts that may be led to protectionism are not totally new or different from the United States’ past acts. There is a certain consistency and the likeliness of the country’s act and policy from the past. Some of which acts were also brought to WTO dispute settlement. The concept of reciprocity existed in the United States policies before the World War and the policies and actions toward protectionism have been seen in the history of the United States³⁸. Section 301³⁹ has been used, nonetheless “as the George H.W. Bush and Clinton administrations continued using Section 301, trading partners became increasingly unhappy with what became known as an “aggressively unilateral” US approach.⁴⁰”.

After current Trump administration has launched in January 2017, the policy on trade and investment has been “America First”. Current trade policy, 2018 Trade Policy Agenda, clearly mentions about this America First objective, which includes five major priorities “(1) adopting trade policies that support our national security policy; (2) strengthening the U.S. economy; (3) negotiating better trade deals that work for all Americans; (4) enforcing U.S. trade laws and U.S. rights under existing trade agreements; and (5) reforming the multilateral trading system. ⁴¹” Trump Administration issues policies that are relevant to the above priorities, which eventually led to acts toward

³⁸ Such as Reciprocal Trade Agreements Act in and its development, and the actions that were justified by the act.

³⁹ Section 301 allows the United States to retaliate against foreign countries that are determined to have unfairly restricted the US exports.

⁴⁰ Chad Bown, article on August 3, 2017, “Rogue 301: Trump to Dust Off another Outdated US Trade Law?” Peterson Institute for International Economics, “<https://www.piie.com/blogs/trade-investment-policy-watch/rogue-301-trump-dust-another-outdated-us-trade-law> (accessed on June 30, 2019).

⁴¹ “PUTTING AMERICA FIRST:

THE PRESIDENT’S 2018 TRADE POLICY AGENDA

To establish a trade policy that promotes America’s security and prosperity, the Trump administration will focus on five major priorities” United States Trade Representative, <https://ustr.gov/sites/default/files/files/Press/Reports/2018/AR/2018%20Annual%20Report%20I.pdf> (accessed on June 30, 2019).

protectionism. President Trump also prioritizes bilateral over multilateralism, to have the “deal”. The country withdrew from Trans Pacific Partnership Agreement (TPP), concluded USMCA, a revision of North American Free Trade Agreement (NAFTA) which is expected to be ratified, and eager to conclude bilateral agreements including with Japan. Trump is also using the word that are used in the agreement texts. All these acts could be the thread to the liberalization of trade and investments. It is ironic that President Trump is using the words that appeared even in the preamble of WTO, reciprocal, to justify his acts, though the aim, act and the expected result are rather toward opposite direction from that of WTO’s.

The United States under Trump administration have several times announced its measure to impose high tariff on China, by using its Section 301. President Trump considers China being unfair or China being creating the unfair environment for healthy competitions because of the subsidies. WTO could not have been addressed to both side of acts, the subsidies issues and the current “reciprocal” act on tariffication, as of today.

6. Conclusion

This paper is part of an endeavor to address to a question, what is “fairness” in trade and investment, especially in terms of the relevant agreements. This paper firstly identified “reciprocity” and “equality” as two keys that are relevant to fairness, and examined the preambles and/or the relevant texts of multilateral and bilateral agreements to see how those concepts are included respectively. Reciprocity, with a set with the concept of “mutually advantageous”, is embedded in the preamble of Havana Charter and WTO and its relevant agreement such as GATs. The equality and/or the non-discrimination were initially MFN and National Treatment (NT) under WTO agreement, as aforementioned WTO’s interpretation suggested. The word “equal playing field” is included in the preamble of CPTPP⁴², which may suggest that there is a possibility of an

⁴² Preamble of CPTPP includes the following: “AFFIRM that state-owned enterprises can play a legitimate role in the diverse economies of the Parties, while recognising that the provision of unfair advantages to state-owned enterprises undermines fair and open trade and investment, and resolve to establish rules for state-owned enterprises that promote a level playing field with privately owned businesses, transparency and sound business practices”.

expansion of the meaning of equality and/or non-discrimination in the EPA/FTAs, which goes beyond MFN and NT.

It may have a significant meaning in including and maintaining the concept of “fair”, in addition to “free”, as the objective of WTO that seeks for further liberalization. It may be so because the concept of fairness could be accepted by all, regardless of the region, the development stage, and values, which may hedge the concerns over further liberalization. It may also be so when considering the function of the FET in the Investment Chapter of EPA/FTA, which may conveniently “absorb” what the other clause cannot cover. However, the word “fair” could sometimes be used to justify a policy on protectionism, which is not compatible to what the international society has been trying to achieve or realize. The word “fair” could be used to justify one’s position, for an example a government of country A that impose higher tariff to a country B to protect the local industry of its country. This is due to the vagueness of the meaning of fairness. No political leaders who often use the word “fair” when describing the environment that they are aiming at or the drafted text of MAI that included the word “fair”, explicitly explained what “fair” implies.

Nonetheless, the wording of the outcome of the world leaders’ statements that includes the recent G20 Summit in Osaka, is always an issue. It is especially so recently, on trade and investment related. The most recent G20 Osaka Leaders’ Declaration which was issued on June 29, 2019⁴³ included the words “free” and “fair”, but did not include

⁴³ G20 Osaka Leader’s Declaration includes the following:

“FOSTERING ROBUST GLOBAL ECONOMIC GROWTH

Trade and Investment

8. ...We strive to realize a free, fair, non-discriminatory, transparent, predictable and stable trade and investment environment, and to keep our markets open. International trade and investment are important engines of growth, productivity, innovation, job creation and development. We reaffirm our support for the necessary reform of the World Trade Organization (WTO) to improve its functions. We will work constructively with other WTO members, including in the lead up to the 12th WTO Ministerial Conference. We agree that action is necessary regarding the functioning of the dispute settlement system consistent with the rules as negotiated by WTO members. Furthermore, we recognize the complementary roles of bilateral and regional free trade agreements that are WTO-consistent. We will work to ensure a level playing field to foster an enabling business environment.”

https://www.g20.org/pdf/documents/en/FINAL_G20_Osaka_Leaders_Declaration.pdf (accessed on June 30, 2019). Underlines were made by the author of this paper.

the message to fight against protectionism. Likewise, the word “reciprocal”, the word that President Trump often uses, was not included in the aforementioned G20 Leader’s Declaration, either. Ongoing talk between the United States and Japan which has started this year, 2018, was once named “Free, Fair and Reciprocal” (FFR) trade talk. In the Japan-U.S. Joint Statement as a result of Japan-U.S. Summit Meeting in September 2018, following is mentioned: “The President reiterated the importance of reciprocal trade, as well as reducing the trade deficit with Japan and other countries. Prime Minister Abe emphasized the importance of free, fair, and rules-based trade^{44,45}. When considering the vagueness of the meaning of “fair” or what the word implies, the word should be complemented with one or more of other words, such as “mutually advantageous” and furthermore, words to show a position against protectionism.

For future studies, some issues need to be addressed. First of all, it is the future of the dispute settlement system both in WTO and EPA/FTA. The current discussions on the WTO reform includes the reform of the Dispute Settlement Understanding. The dispute settlement system, namely ISDS, under investment related obligation under EPA/FTA are now aiming for possible reform, at multilateral forum such as at International Centre for Settlement of Investment Disputes (ICSID), and United Nations Commission on International Trade Law (UNCITRAL). Thirdly, the similarities and the difference between the followings: 1) rule-based and result-based, 2) reciprocal and mutually advantageous, and 3) equality and non-discrimination. It would also be worthwhile to analyze if the act of the United States that leads to protectionism toward other countries would have been different if there were a free trade agreement or bilateral investment agreement, and if so, in what way.

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