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## Statement of Opponent

Doctoral Dissertation of Max Salomon Jansson, ‘Value Reconciliation in Trade Law in Light of Criteria on Process and Production Methods – A Comparative Study of the EU, the U.S. and the WTO’

### 1 Research questions

In a generally well-written introduction Jansson outlines that he wishes to explore the impact of process and production methods (PPMs) on the legal tests that are used in trade law – are these disrupted, and which values are admitted/recognised? I think that these questions could perhaps have been more clearly and fully presented, but that apart, they are interesting for a number of reasons. First, the emphasis on how PPMs may affect legal structure, rather than their mere legality, is interesting, and by comparison with the WTO literature also original. The debate on whether PPMs are abhorrent and illegal, or desirable policy tools, which occupied that literature for some time now seems a bit archaic, and Jansson’s take is more contemporary and realistic: PPM measures will happen, but what will that mean for the law? Second, the fact that he is taking a comparative approach adds value here, as this has been largely absent from the literature (since perhaps Jochem Wiers PhD a couple of decades ago), and given his plausible presumption that the law in this area is developing and changing, a trans-jurisdictional approach to the underlying principles seems more appropriate than a purely internal one, since an internal perspective makes it harder to conceive or justify departures from the status quo.

As a starting point, the idea that WTO, EU and US law will struggle with the same basic questions and almost certainly have something to learn from each other, as well as having plausibly to adapt to each other, is a useful one – although, again, I think this could have been spelled out more elaborately. The author provides a solid explanation of why the comparative method is worthwhile in general, but gives less attention to what it specifically offers to this topic. However, it is worthwhile, and the author establishes a research project that is defined, original, and worth pursuing.

An additional element of this is the law and economics aspect, and the ambition to investigate, as I understood it, the extent to which environmental concerns can be, and have been, integrated within economic approaches to the law as it is used in courts. This is a sympathetic question, as is the idea of challenging economic

approaches from ‘within’ by using their own language and concepts to address environmental concerns. It is not immediately apparent however, whether this will amount to more than simply using the language of externalities and efficiency, which, while it would be quite coherent with Jansson’s stated approach, might just reveal how relatively simple and elastic the economic approach to law is.

## 2 Structure

The choice of chapters and subjects is certainly clear and coherent, and ensures a lot of ground is covered. Being ordered around different steps in the legal process, with then a case study, means that quite a lot of standard doctrine has to be rehearsed, and it is not the most concise way of approaching the topic. One might have gone straight to the principled question of what makes PPMs different. On the other hand, given that the research question is specifically addressed to the way that legal tests may change or be disrupted, it makes sense to break the legal process into steps and consider each step. At any rate, while at times the thesis seems overdetailed, so that one loses a sense of the direction of the overall argument, its approach can also be defended on grounds of thoroughness, and I did not think this was a problem that invalidated its argument: rather, it is a presentational choice.

## 3 Argument and analysis

Generally there is no doubt that the thesis is lawyerly and well-researched, and the analysis of case law and scholarship is informed and at a level that one would expect. There is no problem here. That is not to say that I found all aspects of the argument equally persuasive or without weaknesses. For example, in the analysis of likeness in EU law he is too dismissive of the considerable amount of case law on this, and of its subtleties and nuances. He addresses justification of distinctions between apparently ‘like products’ in a few lines, but it is an important part of the law, and, moreover, it cannot be fully separated from the question of likeness, as, for example, *Chemical Farmaceutici* shows. One of the problems with Jansson’s highly reductive approach to structure is that, particularly in EU law, the different aspects of legal tests are often inter-dependent and sometimes even interchangeable. This may not correspond to some notions of legal tidiness, but it appears to be a legal fact, and means that a reductive approach can miss nuance. This is a common problem with continental PhDs taking this traditional approach to presentation. It seems to me that

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PPMs go to the heart of likeness in EU law, and help us realise why the Court has always refused to come down firmly on the side of either objective properties or competitive relationship as determinative, just as it has refused to explicitly introduce justification as something independent from likeness, while nevertheless admitting it to the working of Article 110.

The other risk with the highly detailed structure of the thesis is that in breaking the doctrine down into so many sub-sections it risks being superficial in its analysis of them. In the part on proportionality, the conclusions and analysis seem to me generally solid, well-informed, and hard to argue with. They stand as well-researched and justified conclusions. However, there was room for deeper analysis of why the Court of Justice is variable and inconsistent, and which explanatory factors might be relevant here. That analysis might have been easier if proportionality had also been treated as a whole. This is, of course, not the formal constitutional tradition surrounding that concept, but in practice the Court seems to me to ask whether a measure seems sensible in its internal market context, and throw in the elements of proportionality in a somewhat ad hoc way to support its conclusions on that. Necessity and suitability appear sometimes almost interchangeable, while consistency pops up randomly at different places in the analysis. Proportionality *strictu sensu* is, as Jansson correctly notes, rare, and appears to be used when it summarises the situation concisely, rather than because it is analytically necessary. Jansson looks at each step separately so that this global picture is lost to some extent. This also affects his criticisms – while he provides strong critiques of individual judgments and legal points, both from a coherence and policy point of view, wider criticism of the total effects, and underlying philosophy, of the proportionality law is less well-developed.

Chapter 5, the case study, is informative and interesting. It is notable that it draws less on the scholarship than the other chapters, which may be a weakness, although I am not sufficiently informed on this particular topic to know whether this is a gap in the literature or in Jansson's research.

Chapter 6 is, in a sense, the heart of the thesis, since it addresses the characteristic which is generally treated as distinctive of PPMs. It is a thorough, generally clear, and legally solid chapter which, by drawing together law from the three fields, does make an enlightening and original contribution. I do think that there are weaknesses – particularly in the approach to extraterritoriality, which is not systematically defined, even though the scholarship has often indicated that this is a problematic and perhaps even useless concept. While the chapter does consider the legitimacy of e.g. global environmental concerns and even moral concerns, it does not really address in enough detail where a line can be coherently drawn between 'local' and 'extra-

territorial'. The idea, at times implicit, that local health and environmental issues are different in principle from concern for e.g. tropical forests or global warming or biodiversity is much too simple, and really could have used unpacking.

This is related to another idea that was also over-simple – the distinction between externalities and protection of other values. It is perfectly arguable that all trade conditions, if genuinely effective, can be presented as combatting externalities, and it is certainly the case that the line between externalities and other concerns is very problematic: a product made by low-paid workers contributes to inequality and social problems which can be seen as externalities just as much as waste deposition in a river. There is also the question whether foreign externalities should be treated the same as local ones. Generally, this was all under-theorised, given that these ideas played a prominent role in the thesis.

#### 4 Conclusions

Generally, if I had to summarise, the thesis gathers together an impressive amount of law which is presented and discussed with obvious legal expertise. The choices of topic and of jurisdictions are good ones, and the highly structured approach makes the work a source of reference and authority on the different aspects of how PPM-related values and trade-promotion are weighed and balanced. At a micro-level, where the lawyer or researcher wants to look at a particular aspect of this process, I do not know of any work equaling it in substance or scope, and this makes it a contribution to the field of quite some value. In the old-fashioned sense, the thesis investigates what has been decided in a defined field and presents this in a coherent and structured way, filling a gap in the scholarship that is of legal and social importance.

I do think however that there was room for more theoretical self-reflection and more emphasis on the wider normative picture. To some extent it may be seen as a scholarly choice whether one wishes to serve the legal community or the policy-maker, but these are not entirely separable: the law will probably develop to serve policy, so that global and normative analysis is essential for the lawyer in a field where many open questions remain. Given the amount of knowledge accumulated and presented, there was the possibility to develop in more theoretical depth the fundamental questions of how PPMs raise issues that are fundamentally different from those of other trade restrictions, and the consequences of different choices regarding their legality. The use of the law and economics frame could also have been developed – it was systematic and coherent, but the core concepts that it relies

on were treated more as labels than as ideas explanatory of the world which could be critically examined, so that in the end I did not think that it added much that would not have been present in an analysis using purely the legal terms relied on by courts.

I do not have any doubt that the work is worthy of a PhD – it is really quite a substantive and accurate piece of research on an original question. There is evidence of wide-ranging knowledge of the law and scholarship, or rigorous, precise and critical legal analysis, and the ability to draw useful, relevant and well-founded conclusions. I have no reason to doubt the integrity and independence of the research process. It remains the case that as a work of scholarship it is imperfect and misses some opportunities, but it is still valuable, says much that is new, and has the potential to be developed and built on, whether by the author or others.