THE GREAT MAZE
Regional and Bilateral Free Trade Agreements in Asia

Trends, Characteristics, and Implications for Human Development

POLICY PAPER

Asia-Pacific Trade and Investment Initiative
UNDP Regional Center in Colombo
December 2005

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Acronyms and Abbreviations

AEC	Asian Economic Community
AFAS	ASEAN Framework Agreement on Services
AFTA	ASEAN Free Trade Agreement
AGOA	Africa Growth and Opportunity Act
AIA	ASEAN Investment Area
AIDS	Acquired Immuno Deficiency Syndrome
APEC	Asia-Pacific Economic Cooperation
ASEAN	Association of South East Asian Nations
ASEAN-EU	Association of South East Asian Nations and European Union
ATC	Agreement on Textiles and Clothing
BIMSTEC	Bay of Bengal Initiative for Multi-Sectoral Technical and Economic Cooperation
BIT	Bilateral Investment Treaties
CBI	Caribbean Basin Initiative
CEE	Central and Eastern Europe
CER	(Australia and New Zealand) Closer Economic Relations
CEP	Comprehensive Economic Partnership
CECA	Comprehensive Economic Cooperation Agreement
CEPA	Comprehensive Economic Partnership Arrangement
CEPT	Common Effective Preferential Tariff
CL	Compulsory Licensing
ECO	Economic Cooperation Organization
EEC	European Economic Community
EFTA	European Free Trade Association
EU	European Union
FTA	Free Trade Agreement
FDI	Foreign Direct Investment
G-77	Group of Developing Countries at the United Nations
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GCC	Gulf Co-operation Council

GDP	Gross Domestic Product
GMO	Genetically Modified Organisms
GSP	Generalised System of Tariff Preferences
GSTP	Global System of Trade Preferences
HDR	Human Development Report
HIV	Human Immunodeficiency Virus
HS	Harmonised System
IBSA	India-Brazil-South Africa
ICT	Information and Communications Technology
IOARC	Indian Ocean Association for Regional Cooperation
IPR	Intellectual Property Rights
ISI	Integrated Sourcing Initiative
IT	Information Technology
ITCB	International Textiles and Clothing Bureau
JSEPA	Japan-Singapore Economic Partnership Agreement
LDC	Least Developed Country
MERCOSUR	Southern Cone Common Market
MFA	Multi Fibre Arrangement
MFN	Most Favoured Nation
MIER	Malaysian Institute for Economic Research
MITI	Ministry of International Trade and Industry
MNCs	Multi-National Companies
MNP	Movement of Natural Persons
MRAs	Mutual Recognition Agreements
MSF	Medicin Sans Frontieres
NAFTA	North American Free Trade Agreement
NAMA	Non-Agricultural Market Access
NGOs	Non-Governmental Organizations
NGR	Negotiating Group on Rules
OECD	Organization for Economic Cooperation and Development
OPEC	Organization of the Petroleum Exporting Countries
PTA	Preferential Trading Agreement
RTA	Regional Trade Agreement
RO	Rules of Origin

S&D	Special and Differential Treatment
SAARC	South Asian Association for Regional Cooperation
SACU	Southern African Customs Union
SAFTA	South Asian Free Trade Area
SAPTA	South Asia Preferential Trading Arrangement
SAR	Special Administrative Region
SME	Small and Medium Enterprises
SPS	Sanitary and Phyto-Sanitary Standards
TBT	Technical Barriers to Trade
TDRI	Trade and Development Research Institute
TIFA	Trade and Investment Framework Agreement
TREATI	Trans-Regional EU-ASEAN Trade Initiative
TRIMs	Trade-Related Investment Measures
TRIPS	Trade-Related Aspects of Intellectual Property Rights
UAE	United Arab Emirates
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Programme
UN-ESCAP	United Nations Economic and Social Commission for Asia and the Pacific
UPOV	International Union for the Protection of New Varieties of Plants
US	United States
USA	United States of America
USTR	United States Trade Representative
WTO	World Trade Organization

Introduction

Since January 1995, about 130 Free Trade Agreements (FTA) have been notified to the World Trade Organization (WTO). There are two facets to this proliferation: on the one hand, the establishment of the WTO (and its Single Undertaking) has facilitated the expansion of FTAs by setting common trade obligations, particularly disciplines on non-tariff measures; on the other, setbacks in advancing the multilateral agenda have created new outlets for consideration of bilateral and regional options. Asia-Pacific has been the latest region to catch up with the trend, and its countries are exerting renewed efforts to both deepen and expand regional and sub-regional economic integration, as reflected by a remarkable scale of negotiating activity under way.

In addition to liberalising most trade in goods and providing improved access for services, regional and bilateral free trade agreements can be "WTO-plus,"[1] involving a higher degree of obligation than provided in multilateral trade agreements. Thus, while some FTAs can constitute a step toward greater regional integration in Asia-Pacific, others may frustrate such an effort or even undermine WTO rights of concerned parties. Further, many governments have yet to fully reckon with the development implications of the resurgence of an overt political element in bilateral trade relations. Because there are countries in Asia-Pacific engaged in such negotiations, it is essential that the implications of various models of FTAs with diverse trading partners are well-grasped. For example, qualitative differences in scope, intent and implications exist between South-South FTAs and North-South FTAs, all warranting greater understanding.

[1] The term "WTO-plus" has become common usage to describe provisions in FTAs that go beyond WTO obligations. By definition, almost all FTAs would be WTO-plus in providing freer access for goods (and services) than offered under GATT MFN tariff schedules and GATS schedules of commitments. Most WTO agreements also provide members with rights to take specific actions in pursuit of development objectives; provisions in FTAs that erode these rights could be termed "WTO-minus."

This Paper is divided into four main parts. Parts I, II and III examine this phenomenon of FTA proliferation and the underlying forces and motivations of key players at work. Part IV builds on the analysis to address the impact of the FTA explosion on human development policy choices in key areas such as agriculture, textiles, rules of origin, intellectual property, trade in services, and investment.

PART I
RULES OF THE GAME

The increase in the negotiation of FTAs reflects renewed dynamism in economic integration among developing countries, as well as a "new generation" of North-South FTAs with important implications for the multilateral trading system.

Since 1995 the number of notifications of free trade agreements[2] to the WTO has dramatically increased – now, only one of its members is not party to at least one FTA. More than 220 regional FTAs have been notified to the GATT/WTO (including the period prior to 1995), reflecting a new dynamism in regional economic integration efforts among developing countries. In particular, a noteworthy trend has been the rapid extension of FTAs between developed and developing countries. While developed countries derive economic benefits, including specific sectoral interests, from participation in North-South FTAs, their interest could often be non-trade-related, including such key issues as: i) concerns related to long-term energy security; ii) desire to reward developing countries for supporting global foreign policy objectives; and iii) mitigating pressures for migration by lifting living standards in poorer, neighbouring countries (Abugattas Majluf 2004).

Another objective of developed countries for their participation in North-South FTAs is to expand and modify the trade agenda beyond

[2] This paper addresses trade agreements that are covered by Article XXIV of GATT 1994 or Article V of GATS (see Appendix). It should be noted that the word "regional" does not appear in either of these Articles, which refer to "free trade agreements," "customs unions" and "economic integration." Such agreements, which are exceptions to the MFN clause of GATT, have traditionally been used as a technique for regional integration, but as is described in this Paper, they are now acquiring an inter-regional and bilateral character. Because customs unions have not been attempted by Asia-Pacific countries, this Paper uses the term FTA regardless of whether there is sub-regional, regional, inter-regional, plurilateral or bilateral membership.

what has currently been agreed to in the WTO. The practice of setting precedents – say, on environmental standards, investment rules and TRIPS-plus disciplines – that can then be reintroduced in the WTO is becoming prominent. Major trading powers also are attempting to bind smaller trading partners to commitments that consolidate their respective positions on issues where they find themselves in opposition in multilateral negotiations. Described as "third-generation agreements," they extend into the realm of domestic policies covering, *inter alia*, sanitary measures, trade facilitation, liberalisation of trade in services, investment and competition disciplines, intellectual property rights and Government procurement. These FTAs are transforming the traditional relationship based on unilateral preferences for trade in goods to developing countries into reciprocal agreements encompassing deep integration measures. The Seattle and Cancún Ministerial Conferences of the WTO also have demonstrated the power of developing countries acting in groups, so the bilateral FTA approach can be interpreted as a partial attempt to shift the rule-making process to the regional and bilateral stages.

The question then arises: Why do so many developing countries appear eager to enter into asymmetric North-South FTAs? This is curious, especially when much of their trade in manufactured goods enters rich-country markets duty-free under the unilateral preferences of the GSP. Bound MFN tariff rates in the OECD countries are quite low and have been eliminated in many sectors of interest to developing countries. The current NAMA negotiations in the Doha Round are aiming at an extension of sectoral free trade to a longer list of such products.[3] Thus, the marginal gain from their elimination is minimal, while bound rates

[3] Bicycles, chemicals, electronics/electrical equipment, fish, forest products, gems and jewellery, pharmaceuticals and medical equipment, raw materials and sporting have been identified as candidates for sectoral free trade, while consideration is being given to textiles and apparel, and automobiles and auto-parts. See Report of NAMA Chairman to TNC, WTO document Job (05) 298, 26 November 2005.

in the developing countries are often considerably higher. The burden of tariff liberalisation in North-South FTAs then weighs disproportionately on the developing countries.[4] Indeed, while trade among FTA partners makes up an estimated 40 percent of world trade, a much smaller amount actually benefits from preferences (World Bank 2005, 41). By contrast, FTAs among developing countries (South-South) may result in meaningful tariff reductions and substantial margins of preference.[5]

Sectoral interests in developing countries may extract significant advantages from the elimination of duties on products not covered by preference where tariffs are substantial, such as apparel, footwear and agriculture. However, duty-free entry on textiles and clothing may be subject to complicated rules of origin, while sensitive agriculture products of export interest to poor countries may be excluded or subject to stringent sanitary regulations. Furthermore, FTAs do not establish disciplines on the agriculture subsidies in the major developed countries, exposing farmers in the developing partner to unfair competition. In services, developing countries generally do not have the competitive strengths to take advantage of liberalisation in services trade, particularly because not many new opportunities are provided for the movement of persons. Some developing countries expect that North-South FTAs could result in increasing inflows of FDI, but no convincing evidence exists that FTAs with developed countries increase investment flows to developing countries generally.

Most developing countries appear to be motivated by the "fear of exclusion" and uncertainty over the future of unilateral preferences. Thus, there can be advantages in being the "first mover." The first few

[4] For example, 32 percent of tariff lines in the United States MFN tariff are duty-free and 45 percent at rates of 3 percent or less (i.e., at a level where it is often more profitable for enterprises to pay the MFN tariff than assume the costs involved in satisfying the rules of origin and related administrative procedures).

[5] For example, only 1 percent of India's MFN tariff lines are duty-free.

countries to establish FTAs with economically significant economies (i.e., Japan and the United States) ensures these countries are not discriminated against if the developed partner later enters into FTAs with "competitors." Moreover, precedents set with any "first mover" may create difficulties for latecomers that are less developed or have different economic and social structures. When developed countries negotiate FTAs on the basis of a "template" agreement, negotiations have tended to centre on securing only minor departures from such models to take into account specific interests of the developing-country partner. However, recent experience is showing a greater awareness on the part of developing countries on the need to develop their own models, or at least to insist on major departures.[6] This fear of exclusion is most acute at the sectoral level when FTAs provide significant margins of preference to competitors. The industries that stand to be affected consider their very survival threatened and exert heavy political pressure to pursue the FTA route. Impact on such sectors, particularly those subject to high tariffs, is pressing and urgent, while negative consequences for public health, economic development and national sovereignty in general only become apparent over the longer term.

Economists have long been concerned with the welfare implications of a group of countries forming exclusive clubs that discriminate against non-members. These welfare implications are often analysed by estimating the scale of economy-wide trade diversion and trade creation. For example, upon joining an FTA, a country may switch its imports from an efficient producer of certain goods to a less efficient one, just because of incentive distortions created by tariff differentials. These distortions are most pronounced when goods are highly substitutable. In theory, trade diversion may be – but is not necessarily – welfare-reducing, whereas creation of trade is almost always welfare-enhancing. The net welfare result is obtained by weighing the positive aspects of trade creation

[6] For example, the Thais insisted on positive list on services in FTA negotiations with the United States.

against the negative aspects of trade diversion. In practice, however, this is hard to assess. Schiff and Winters (2003, 212-213) refer to studies that have attempted to ascertain scales of trade diversion at the thematic level – on manufactures, or "investment switching" among members of the EEC, EFTA and NAFTA. When it comes to South-South FTAs, they have been cited as tending to be more trade-creating than trade-diverting (Abugattas Majluf 2004). Yet differences in tariffs do not always account for all trade creation or diversion: rules of origin and exchange rate fluctuations also can complicate the picture.

In orientation, this Paper departs consciously from textbook discussions of "welfare." The FTAs, especially those between countries with different GDP levels, have assumed a strategic fervour, and explanations for the phenomenon of the proliferation of FTAs will increasingly have to be sought in this realm.[7] This approach can, of course, always be complemented by other conventional categories of studies: those that are quantitative and empirical, or those that deal with systemic issues.[8]

[7] One early illustration is the U.S.-Canada FTA that was implemented on 1 January 1989. While academics note that this FTA was an "unusually clean trade policy exercise not bundled into a larger package of macroeconomic or market reforms," permitting quantitative assessments of trade liberalisation on short-term adjustment costs and long-term efficiency gains (Trefler 2001), the authors of this Paper feel that some political motivations were stronger: Energy security and access to investment propelled the United States to seek an FTA, whereas Canada was keen on rules that would be written down in detail in U.S. legislation that would prevent future trade harassment, especially against its export of lumber. The United States took countervailing duty action against this export in subsequent years, which was eventually found illegal by the dispute settlement mechanism of the WTO.

[8] The caveats remain: Empirical studies are subject to the constraint that many components of FTAs are difficult to model accurately because of data lag or irrelevance, while studies on systemic issues do not sufficiently acknowledge the political content of a new generation of FTAs, an aspect that the post-war global trade order sought to minimise.

Whether regional free trade agreements contribute to or undermine the multilateral trading system depends on specific contents of each agreement.

Considerable debate has occurred in academic circles on whether FTAs constitute "building blocks" or "stumbling blocks" to the multilateral trading system. While authors like Schiff and Winters (2003) assert that the canon of "multiple trade blocs is still too new to allow a definitive answer," rules of thumb could be proposed: FTAs that accelerate trade liberalisation (with minimal distortion in global allocation of resources), while not upsetting the balance of rights and obligations in the WTO, could be reasonably judged to be building blocks. In particular, South-South FTAs can provide a training ground to build up competitive strengths. Customs unions among developing countries allow the members to exert greater negotiating leverage in multilateral trade negotiations as well.

An independent report[9] on the future of the WTO acknowledges that some FTAs act as "spurs to the more hesitant development of the multilateral system" and that "small groups of developing countries may see value in liberalising within regional trade arrangements as a means of working their way up to the harsher competitive realities of the global economy." On the other hand, to the extent that FTAs detract from WTO rights, or contain rules of origin and other trade diversionary provisions that create vested interests against multilateral liberalisation, they could be said to be "stumbling blocks." When major countries enter into FTAs for essentially political motives, they also would seem to create a bias against multilateral agreements.[10]

[9] Report by the Consultative Board to the WTO Director-General on "The Future of the WTO," 2004.

[10] Some observers, including the authors of this Paper, question whether the premature suspension of the WTO's Cancun Ministerial Conference in 2003 could be a manifestation of this phenomenon.

Some observers have used the term "spaghetti bowl" to portray what appears to be an incoherent, often overlapping and seemingly random maze of FTAs. The hub-and-spoke analogy also is used to describe the constellation of agreements centred around the United States and the European Union. Such a configuration can marginalise the "spokes," so the choice of certain Asia-Pacific countries to actively promote FTAs is partly motivated by the desire to avoid becoming "just" a spoke (World Bank 2005, 40). However, FTAs have become a tool used to pursue quite coherent global political strategies by major trading countries engaged in a "great game" on the world stage. Unfettered by multilateral constraints, major powers (see Part III) are pursuing geopolitical objectives through bilateral and regional trade negotiations, while smaller countries struggle to ensure that their vital sectoral export interests are protected.

The GATT set out rules for the negotiation of customs unions and free trade areas in its Article XXIV. Up to the launching of the Uruguay Round in 1986, the major exceptions to the fundamental principle of GATT (the unconditional MFN clause of Article 1) were the following: i) EEC and EFTA, subject to the disciplines of Article XXIV; ii) regional agreements among developing countries, mainly in Latin America and Africa; iii) autonomous unilateral preferences granted by developed countries to developing countries, either universal (GSP) or regional; and iv) Global System of Trade Preferences among developing countries, which was largely symbolic. The main criteria in Article XXIV of GATT that allow regional trading arrangements to be set up as a special exception to the MFN rule are:

- Tariffs and other barriers to trade should be eliminated for "substantially all the trade"
- Barriers should not be raised against outsiders
- Interim arrangements must establish a free trade area or customs unions within a reasonable period of time

These criteria intend for regional integration to complement the multilateral trading system, not threaten it. Further, the Tokyo Round had produced the Enabling Clause (1979), which provided legal cover in GATT for the Generalized System of Tariff Preference (GSTP), negotiated in UNCTAD. It also subjected developing countries to less stringent criteria when they enter into FTAs among themselves. Article V of the General Agreement on Trade in Services (GATS) set out rules for economic integration agreements in services. The proliferation of FTAs, however, has led to a concern that the MFN principle is becoming more of an exception than the rule, as remarked by a former Director-General of GATT who chaired the Consultative Board to the WTO Director-General in 2004.

At the Doha Ministerial Conference in 2001, Ministers agreed on the need for a harmonious relationship between the multilateral and regional processes. They agreed to launch negotiations aimed at "clarifying and improving the disciplines and procedures under the existing WTO provisions applying to regional trade agreements." The result of these negotiations to date has been summarised in the Report by the Chairman of the Negotiating Group on Rules (NGRs) to the Trade Negotiations Committee, on 21 April 2005.[11]

[11] The paragraph relating to regional FTAs states: "The Group's work on systemic issues has gained a certain momentum following a Participant's proposal on the interpretation of 'substantially all the trade.' This proposal, made shortly before the Group's last meeting, has already generated a preliminary but detailed discussion …. Work on RTA transparency is progressing…. However, participants have yet to arrive at a consensus view on some issues related to transparency and to reach common ground on systemic issues."

The original motivations of most regional integration efforts were political. These tendencies persist and are more apparent in bilateral free trade agreements.

Regionalism is a European invention: In the 1660s, 12 provinces in the Paris basin (cinq grosses fermes) erected a common tariff wall. During the colonial era between the 1700s and 1900s, most European powers followed preferential trade arrangements with each other's empires. After the political and economic turbulence in the first half of the 20th Century, a customs union was created in 1947 among Belgium, Netherlands and Luxembourg (Benelux), followed by the Treaty of Rome that created the landmark European Economic Community (EEC) in 1957. The EU has continued to expand its linkages to the east as well as to the Mediterranean in the south. Of the 87 notifications of FTAs to the WTO between 1990 and 2002, only 13 had no European partner (Schiff and Winters 2003, 5). As newly independent countries tried to construct a post-colonial world order, South-South trade agreements could have been governed by a similar motive, but they were hindered by the complicated negotiating modalities that reflected the general acceptance of import substitution policies in the 1960s and 1970s, relatively limited trade flows, and difficulties in mutual political relations.

The United States assumed the role of defender of the MFN clause of GATT, which it viewed as a means of unifying the non-communist world and reducing the influence of political considerations in trade relations that had dominated the pre-war scene. It adopted a benevolent attitude to European integration, while at the same time attempting to ensure that it conformed to GATT disciplines. However, a major shift in U.S. policy occurred in 1984 when the Trade and Tariff Act provided the Administration with authority to enter into FTAs. In 1988 it entered into an FTA with Canada, its largest trading partner and a country that had also been a major defender of the MFN clause. With the Uruguay Round still under way, this Agreement was subsequently widened to include Mexico and form the North American Free Trade Agreement (NAFTA).

One objective of NAFTA was security of energy supplies: Canada and Mexico committed not to impose restrictions or taxes on energy exports. In return, they obtained duty-free entry to the United States market, even though tariffs were already low and Mexico benefited from GSP. They also expected that the Agreement would lessen trade harassment in the United States in the form of anti-dumping petitions and countervailing duties.

During this same period, many developing countries liberalised their trading regimes under structural adjustment programmes of the Bretton Woods Institutions. This liberalisation was to a large extent consolidated in the tariff schedules negotiated in the Uruguay Round. The Single Undertaking of the WTO imposed similar levels of disciplines on all members. This raised the "floor" of mutual trade obligations, facilitating the negotiation of FTAs because they only had to focus on the WTO-plus aspects.[12]

A conspicuous dimension of most FTAs is that their negotiations are subject to political dynamics quite different from multilateral negotiations in the WTO. The advantage of being larger and more advanced can be exercised more easily in the bilateral context. In the WTO, developing countries form coalitions around issues, often including rich countries. These coalitions not only enhance their negotiating leverage, but the exchange of information that takes place enhances the technical knowledge of the less advanced developing countries. Furthermore, the efforts to increase transparency in the WTO have borne fruit to a considerable extent as negotiating issues are

[12] Such WTO-plus liberalisation measures could include specific obligations in areas where the application of the unconditional MFN clause has proven to be technically or politically difficult, such as action on SPS, liberalisation of MNP, commitments on government procurement, and exchange of MRAs. The "WTO-minus" measures could include those that erode the rights of members enshrined in the WTO Agreements, such as the imposition of compulsory licensing of patents or performance requirements on foreign investors.

analysed and negotiating papers made available on the WTO website. Day-to-day negotiations in the WTO are handled by Ambassadors, supported by delegations of specialised trade experts, who usually are accredited only to the WTO and devote their time exclusively to that forum. Bilateral negotiations, on the other hand, have a stronger political character. They usually emanate from visits of heads of state and are portrayed as a manifestation of "friendship." The failure to conclude an FTA thus would represent an unfriendly attitude to a developed country whose support in international relations and domestic politics could be vital for the party in power.

Table I: Free Trade Agreements in Asia

[Note: Most Agreements that imply an exchange of deeper concessions and preferences than offered in the multilateral trading system are included in this table. The year indicates the date when Agreements were signed, which may not be identical to the year of ratification. "Under study" indicates mutual political willingness to begin discussions on the coverage and convenience of an Agreement (e.g., signing of TIFA with the United States). "Negotiation in progress" reflects a more advanced stage of discussions. "Early Harvest" Agreements with a commitment to establish an FTA have been considered advanced or concluded.]

	Parties	Year	Type of Agreement
Bangladesh	Bangkok Agreement	1975	Regional Trade Agreement
	BIMSTEC	2004	Regional Trade Agreement
	GSTP	1989	Inter-Regional Trade Agreement
	India	Negotiation in progress	Bilateral Free Trade Agreement
	SAARC (SAFTA)	2004	Regional Trade Agreement
Bhutan	BIMSTEC	2004	Regional Trade Agreement
	India	1995	Bilateral Free Trade Agreement
	SAARC (SAFTA)	2004	Regional Trade Agreement
Brunei	ASEAN (AFTA)	1984	Regional Trade Agreement
	China	2002	ASEAN plus Agreement
	CER	Negotiation in progress	ASEAN plus Agreement
	India	Negotiation in progress	ASEAN plus Agreement
	Japan	Negotiation in progress	ASEAN plus Agreement
	Rep. of Korea	Negotiation in progress	ASEAN plus Agreement

Table I: Free Trade Agreements in Asia

	Parties	Year	Type of Agreement
	Trans-Pacific SEP	2006	Regional Trade Agreement
Cambodia	ASEAN (AFTA)	1999	Regional Trade Agreement
	China	2002	ASEAN plus Agreement
	CER	Negotiation in progress	ASEAN plus Agreement
	India	Negotiation in progress	ASEAN plus Agreement
	Japan	Negotiation in progress	ASEAN plus Agreement
	Rep. of Korea	Negotiation in progress	ASEAN plus Agreement
China	ASEAN	2002	Framework Free Trade Agreement
	Australia	Negotiation in progress	Bilateral Free Trade Agreement
	Bangkok Agreement	2001	Regional Trade Agreement
	Chile	Negotiation in progress	Bilateral Free Trade Agreement
	GCC	Negotiation in progress	Bilateral Free Trade Agreement
	Iceland	Under study	Bilateral Free Trade Agreement
	India	Under study	Bilateral Free Trade Agreement
	Hong Kong	2003	Bilateral Free Trade Agreement
	Rep. of Korea	Under study	Bilateral Free Trade Agreement
	Macao	2003	Bilateral Free Trade Agreement
	New Zealand	Negotiation in progress	Bilateral Free Trade Agreement
	Pakistan	2005	Bilateral Free Trade Agreement
	SACU	Negotiation in progress	Bilateral Free Trade Agreement
Hong Kong	China	2003	Bilateral Free Trade Agreement
	New Zealand	Under study	Bilateral Free Trade Agreement
India	ASEAN	Negotiation in progress	Framework Free Trade Agreement
	Afghanistan	2003	Bilateral Free Trade Agreement

	Parties	Year	Type of Agreement
	Bangkok Agreement	1975	Regional Trade Agreement
	Bangladesh	Negotiation in progress	Bilateral Free Trade Agreement
	Bhutan	1995	Bilateral Free Trade Agreement
	BIMSTEC	2004	Regional Trade Agreement
	Chile	Negotiation in progress	Bilateral Free Trade Agreement
	China	Under study	Bilateral Free Trade Agreement
	Egypt	Negotiation in progress	Bilateral Trade Agreement
	GCC	Under study	Bilateral Free Trade Agreement
	GSTP	1989	Inter-Regional Trade Agreement
	Indonesia	Under study	Bilateral Free Trade Agreement
	Mauritius	Under study	Bilateral Free Trade Agreement
	MERCOSUR	2005	Bilateral Free Trade Agreement
	Nepal	1996	Bilateral Free Trade Agreement
	SAARC (SAFTA)	2004	Regional Trade Agreement
	SACU	Negotiation in progress	Bilateral Free Trade Agreement
	Singapore	2005	Bilateral Free Trade Agreement
	Sri Lanka	1998	Bilateral Free Trade Agreement
	Thailand	2003	Bilateral Free Trade Agreement
Indonesia	ASEAN (AFTA)	1992	Regional Trade Agreement
	India	Under study	Bilateral Free Trade Agreement
	China	2002	ASEAN plus Agreement
	CER	Negotiation in progress	ASEAN plus Agreement
	India	Negotiation in progress	ASEAN plus Agreement
	Japan	Negotiation in progress	ASEAN plus Agreement

Table I: Free Trade Agreements in Asia

	Parties	Year	Type of Agreement
	Japan	Negotiation in progress	Bilateral Free Trade Agreement
	Rep. of Korea	Negotiation in progress	ASEAN plus Agreement
Japan	ASEAN	Negotiation in progress	Framework Free Trade Agreement
	Indonesia	Negotiation in progress	Bilateral Free Trade Agreement
	Malaysia	Negotiation in progress	Bilateral Free Trade Agreement
	Mexico	2005	Bilateral Free Trade Agreement
	Philippines	Negotiation in progress	Bilateral Free Trade Agreement
	Singapore	2002	Bilateral Free Trade Agreement
	Thailand	Negotiation in progress	Bilateral Free Trade Agreement
Rep. of Korea	ASEAN	Negotiation in progress	Framework Free Trade Agreement
	Bangkok Agreement	1975	Regional Trade Agreement
	Canada	Negotiation in progress	Bilateral Free Trade Agreement
	Chile	2004	Bilateral Free Trade Agreement
	China	Under study	Bilateral Free Trade Agreement
	EFTA	Negotiation in progress	Bilateral Free Trade Agreement
	GSTP	1989	Inter-Regional Trade Agreement
	Singapore	2005	Bilateral Free Trade Agreement
Lao P.D.R.	ASEAN (AFTA)	1997	Regional Trade Agreement
	Bangkok Agreement	1975	Regional Trade Agreement
	China	2002	ASEAN plus Agreement
	CER	Negotiation in progress	ASEAN plus Agreement
	India	Negotiation in progress	ASEAN plus Agreement
	Japan	Negotiation in progress	ASEAN plus Agreement
	Rep. of Korea	Negotiation in progress	ASEAN plus Agreement

	Parties	Year	Type of Agreement
Macao	China	2003	Bilateral Free Trade Agreement
Malaysia	ASEAN (AFTA)	1992	Regional Trade Agreement
	Australia	Under study	Bilateral Free Trade Agreement
	GSTP	1989	Inter-Regional Trade Agreement
	China	2002	ASEAN plus Agreement
	CER	Negotiation in progress	ASEAN plus Agreement
	India	Negotiation in progress	ASEAN plus Agreement
	Japan	Negotiation in progress	ASEAN plus Agreement
	Japan	Negotiation in progress	Bilateral Free Trade Agreement
	Rep. of Korea	Negotiation in progress	ASEAN plus Agreement
	New Zealand	Negotiation in progress	Bilateral Free Trade Agreement
	Pakistan	Negotiation in progress	Bilateral Free Trade Agreement
	USA	Under study	Bilateral Free Trade Agreement
Maldives	SAARC (SAFTA)	2004	Regional Trade Agreement
Myanmar	ASEAN (AFTA)	1997	Regional Trade Agreement
	BIMSTEC	2004	Regional Trade Agreement
	China	2002	ASEAN plus Agreement
	CER	Negotiation in progress	ASEAN plus Agreement
	GSTP	1997	Inter-Regional Trade Agreement
	India	Negotiation in progress	ASEAN plus Agreement
	Japan	Negotiation in progress	ASEAN plus Agreement
	Rep. of Korea	Negotiation in progress	ASEAN plus Agreement
Nepal	BIMSTEC	2004	Regional Trade Agreement
	India	1996	Bilateral Free Trade Agreement

Table I: Free Trade Agreements in Asia

	Parties	Year	Type of Agreement
	SAARC (SAFTA)	2004	Regional Trade Agreement
Pakistan	China	2005	Bilateral Free Trade Agreement
	ECO	2004	Regional Trade Agreement
	GSTP	1989	Inter-Regional Trade Agreement
	Malaysia	Negotiation in progress	Bilateral Free Trade Agreement
	Mexico	Under study	Bilateral Free Trade Agreement
	SAARC (SAFTA)	2004	Regional Trade Agreement
	Sri Lanka	2005	Bilateral Free Trade Agreement
	Thailand	Under study	Bilateral Free Trade Agreement
	USA	Under study	Bilateral Free Trade Agreement
Philippines	ASEAN (AFTA)	1992	Regional Trade Agreement
	GSTP	1992	Inter-Regional Trade Agreement
	China	2002	ASEAN plus Agreement
	CER	Negotiation in progress	ASEAN plus Agreement
	India	Negotiation in progress	ASEAN plus Agreement
	Japan	Negotiation in progress	ASEAN plus Agreement
	Japan	Negotiation in progress	Bilateral Free Trade Agreement
	Rep. of Korea	Negotiation in progress	ASEAN plus Agreement
Singapore	ASEAN (AFTA)	1992	Regional Trade Agreement
	Australia	2003	Bilateral Free Trade Agreement
	Bahrain	Under study	Bilateral Free Trade Agreement
	Canada	Negotiation in progress	Bilateral Free Trade Agreement
	China	2002	ASEAN plus Agreement
	CER	Negotiation in progress	ASEAN plus Agreement

	Parties	Year	Type of Agreement
	EFTA	2003	Bilateral Free Trade Agreement
	Egypt	Under study	Bilateral Free Trade Agreement
	GSTP	1989	Inter-Regional Trade Agreement
	India	Negotiation in progress	ASEAN plus Agreement
	India	2005	Bilateral Free Trade Agreement
	Japan	2002	Bilateral Free Trade Agreement
	Japan	Negotiation in progress	ASEAN plus Agreement
	Jordan	2004	Bilateral Free Trade Agreement
	Rep. of Korea	Negotiation in progress	ASEAN plus Agreement
	Rep. of Korea	2005	Bilateral Free Trade Agreement
	Kuwait	Negotiation in progress	Bilateral Free Trade Agreement
	Mexico	Negotiation in progress	Bilateral Free Trade Agreement
	New Zealand	2000	Bilateral Free Trade Agreement
	Pakistan	Negotiation in progress	Bilateral Free Trade Agreement
	Panama	Negotiation in progress	Bilateral Free Trade Agreement
	Peru	Negotiation in progress	Bilateral Free Trade Agreement
	Qatar	Negotiation in progress	Bilateral Free Trade Agreement
	Sri Lanka	Negotiation in progress	Bilateral Free Trade Agreement
	Trans-Pacific SEP	2006	Regional Trade Agreement
	UAE	Under study	Bilateral Free Trade Agreement
	USA	2003	Bilateral Free Trade Agreement
Sri Lanka	Bangkok Agreement	1975	Regional Trade Agreement
	BIMSTEC	2004	Regional Trade Agreement
	Egypt	Negotiation in progress	Bilateral Free Trade Agreement

Table I: Free Trade Agreements in Asia

	Parties	Year	Type of Agreement
	GSTP	1989	Inter-Regional Trade Agreement
	India	1998	Bilateral Free Trade Agreement
	Pakistan	2005	Bilateral Free Trade Agreement
	SAARC (SAFTA)	2004	Regional Trade Agreement
	Iran	2004	Bilateral Free Trade Agreement
	Singapore	Negotiation in progress	Bilateral Free Trade Agreement
	USA	Under study	Bilateral Free Trade Agreement
Chinese Taipei	Panama	2004	Bilateral Free Trade Agreement
	USA	Under study	Bilateral Free Trade Agreement
Thailand	ASEAN (AFTA)	1992	Regional Trade Agreement
	Australia	2004	Bilateral Free Trade Agreement
	Bahrain	2002	Bilateral Free Trade Agreement
	BIMSTEC	2004	Regional Trade Agreement
	China	2002	ASEAN plus Agreement
	CER	Negotiation in progress	ASEAN plus Agreement
	GSTP	1990	Inter-Regional Trade Agreement
	India	Negotiation in progress	ASEAN plus Agreement
	India	2003	Bilateral Free Trade Agreement
	Japan	Negotiation in progress	ASEAN plus Agreement
	Japan	Negotiation in progress	Bilateral Free Trade Agreement
	Rep. of Korea	Negotiation in progress	ASEAN plus Agreement
	New Zealand	2005	Bilateral Free Trade Agreement

	Pakistan	Under study	Bilateral Free Trade Agreement
	Peru	2003	Bilateral Free Trade Agreement
	USA	Negotiation in progress	Bilateral Free Trade Agreement
Viet Nam	ASEAN (AFTA)	1995	Regional Trade Agreement
	China	2002	ASEAN plus Agreement
	CER	Negotiation in progress	ASEAN plus Agreement
	GSTP	1989	Inter-Regional Trade Agreement
	India	Negotiation in progress	ASEAN plus Agreement
	Japan	Negotiation in progress	ASEAN plus Agreement
	Rep. of Korea	Negotiation in progress	ASEAN plus Agreement

Source: Informal compilation by authors

PART II
EVERYONE IS INVITED

Asian countries have been late to join the trend, but now there exists an unprecedented amount of negotiating activity within the region and with extra-regional partners.

Asia was slow to get caught up in the FTA frenzy. Before the late 1990s, the political factors that provided the impetus for regional integration in other regions were largely absent in Asia. Economic integration had been attempted at the region-wide level through a preferential tariff arrangement, the Bangkok Agreement, signed in 1975 between Bangladesh, India, Sri Lanka, Republic of Korea, Lao PDR, Philippines and Thailand (under the auspices of UNESCAP). Its results have been limited, although China's signing of the Bangkok Agreement in 2000 may provide more impetus. The second tier of regional integration initiatives was at the sub-regional level, in Southeast Asia (ASEAN) and in South Asia (SAARC). However, Asian countries have now become very active in deepening existing sub-regional agreements, and the sub-regional groupings are integrating with each other through a variety of mechanisms, including "framework" FTAs, bilateral FTAs and a new sub-regional agreement, BIMSTEC (Bay of Bengal Initiative for Multi-Sectoral Technical and Economic Cooperation), which provides an interface for some South and Southeast Asian integration. The accession of China to the WTO in 2001 and its assumption of an energetic role in trade negotiations likewise have introduced a new dynamism into regional integration in Asia. Japan and the Republic of Korea, which had traditionally remained aloof from regional agreements, also have joined the great game.

This has resulted in a complex maze of overlapping agreements. The three ASEAN Framework Agreements with China, India and Japan eventually would involve 30 sets of bilateral FTA negotiations, and another such framework with the Republic of Korea would add 10. The

countries negotiating SAFTA have a series of bilateral FTAs with each other. Australia and New Zealand have entered into, or are currently pursuing, FTAs with members of both sub-regional groupings (China, SAARC and ASEAN). China is starting an FTA with Pakistan; Singapore has negotiated a large number of FTAs with extra-regional partners, both developed and developing, while Thailand, Republic of Korea, Japan and China are following suit. Member countries of the Islamic Conference are negotiating their own FTA; Singapore, Brunei, New Zealand and Chile have signed a trans-Pacific FTA.[13]

Established in 1967, ASEAN remained more or less a political organisation until the last decade. Efforts at strengthening economic linkages were initiated in 1978 in the form of the ASEAN Preferential Trading Agreement (PTA) which was upgraded into an ASEAN Free Trade Agreement (AFTA) in 1992. The original goal of AFTA was to reduce tariff rates on intra-ASEAN trade to between 0 and 5 percent within 15 years through the Common Effective Preferential Tariff (CEPT) plan. The focus now is on integrating services, investment and other trade-related areas. AFTA liberalisation obligations among member countries vary according to the level of development of each member – the CEPT tariff schedule for manufacturing, processed agricultural goods and non-processed agricultural goods was signed in 1992, with the target to reduce tariffs to between 0 and 5 percent by 2003 for the six original member countries; 2006 for Viet Nam; 2008 for Lao PDR and Myanmar; and 2010 for Cambodia. Quantitative restrictions and other non-tariff barriers also will be eliminated. In 2003 for ASEAN-6, a total of 44,361, or 98.8 percent, of total tariff lines (products) are in the Inclusion List, which mandated the tariff to be reduced to 0-5 percent. Out of this, 99.5

[13] This Paper does not cover FTAs in the Pacific. There does exist, however, the Pacific Island Countries Trade Agreement (PICTA) as well as the Pacific Agreement on Closer Economic Relations (PACER), including Australia and New Zealand. Negotiations are also expected to advance on the Economic Partnership Agreements (EPAs) with the European Union.

percent now have duties in this range. Although the CEPT scheme is almost fully implemented, liberalisation is slower and intra-regional competition feared for a number of products (say, by Malaysia's national car industry or Indonesia's rice farmers).

The ASEAN Framework Agreement on Services (AFAS) was signed in 1995, aimed at expanding the scope of liberalisation beyond those already undertaken under the GATS. Under AFAS, initial negotiations focused on financial services, transport, telecommunications and tourism as well as professional business services, while progress is being made on Mutual Recognition Agreements (MRAs). In the third round of negotiations under the Common Modified Sub-Sector Approach, held in March 2004, member countries considered improving commitments to expand seven sectors onto the fast-track programme and make commitments for an additional 27 sectors. The ASEAN Investment Area (AIA) also was signed in 1998 to govern investment liberalisation. The establishment of AIA is expected to encourage investors to think in regional terms and adopt a regional investment and network strategy.

As integration deepens in ASEAN, its individual members have embarked on FTAs with regional and extra-regional partners. It has adopted the approach of negotiating, as a group, "framework" FTAs with other regional trading partners, within which individual ASEAN members subsequently carry out their negotiations. The Early Harvest of the ASEAN-China Agreement has been finalised with all ASEAN members; Thailand and Singapore have both negotiated FTAs with Japan, while Malaysia is currently engaged. Some ASEAN countries are looking farther for FTA partnership outside the context of these "framework" agreements.

ASEAN Framework Free Trade Agreements

ASEAN-China FTA: The Framework Agreement between ASEAN and China was signed on 4 November 2002 and entered into force on 1 July 2003. The Agreement is to be implemented within the next 10 years and includes an Early Harvest package covering HS Chapters 1-8 (agricultural products such as live animals, meat and meat products, fish, dairy produce, other animal products, live trees, edible vegetables and edible fruits and nuts) as well as selected specific products beyond those chapters (palm kernel oil, vegetable fats and oils, margarine, cocoa products, coffee, soap, stearic acid, erasers and glass envelopes). The Framework Agreement contains guidelines for negotiating an FTA in goods, services and investment and identifies other areas for economic cooperation, including provisions on dispute settlement.

ASEAN-Japan FTA: The Comprehensive Economic Partnership (CEP) between ASEAN and Japan was signed in October 2003. The Work Programme includes trade and investment facilitation and liberalisation as well as cooperation in other areas, such as science and technology; HRD, SMEs, ICT, tourism and hospitality; transportation and logistics; and energy. A two-track process is envisaged for FTA negotiations: first, the bilateral FTAs between Japan and selected ASEAN countries with a common set of rules of origin, and second, a region-wide CEP to be implemented by 2012.

ASEAN-India FTA: Main elements of this Framework Agreement provide for negotiations to establish an FTA in goods, services and investment; contains an Early Harvest package on goods and trade facilitation measures, and identifies areas for cooperation activities aimed at capacity building.

ASEAN-Republic of Korea FTA: Negotiations under way.

Trans-Regional EU-ASEAN Trade Initiative (TREATI): In April 2003, ASEAN and EU Ministers agreed to work toward the establishment of TREATI to enhance the ASEAN-EU economic partnership. The main areas of cooperation include trade and investment facilitation, technical barriers to trade, sanitary and phytosanitary (SPS) measures, customs and tourism. The implementation of TREATI could pave the way for a future preferential trading agreement between ASEAN and the EU.

With an FTA with the United States, Singapore seized the role of "first mover" in the region. As a major trading country with very low tariff protection and a negligible agricultural sector or poorer sections of the population requiring special support, it was in an ideal position to adopt what has been termed a "promiscuous" approach to FTA negotiations. It found that multilateral trade liberalisation was blocked by the inability of the WTO members to agree on issues of little relevance to Singapore, such as agricultural subsidies and industrial tariff-cutting formulae. Singapore thus became a trendsetter by default, creating a domino effect for future Asian FTAs as well as being the most active country in the region pursuing bilateral trade pacts. Thailand has followed suit, but its different socioeconomic and political structure has made the foray a much more complex process, as is examined in the next section.

The European Union's ambitions in seeking preferential markets through FTAs in Asia are less explicit than those of the United States. The EU is not against FTAs as long as they complement, and not substitute, multilateral approaches. It also views the two tracks as mutually supportive to the extent they both improve trading conditions, promote growth and employment, and build upon WTO rules and framework to foster more openness and integration than is possible multilaterally. While it has recently stated that the possibility of FTAs with ASEAN will be pursued, its primary emphasis is on signing agreements with MERCOSUR and the GCC. The EU recognizes that, "there is a clear downside to standing on the sidelines while others scoop the markets."[14]

[14] See "Europe's Global Trading Challenges and the Future of Free Trade Agreements," speech at the Foreign Policy Centre Debate, Brighton, U.K., 26 September 2005, by Peter Mandelson, EU Trade Commissioner.

Negotiating FTAs with multiple partners raises a wide variety of issues, but the involvement of civil society is essential: The example of Thailand.

The experience of Thailand demonstrates how a more active role for civil society can strengthen a country's negotiating leverage in bilateral trade negotiations with more powerful trading partners. Thailand was the second ASEAN country to enter into extra-regional and North-South FTAs. Its situation, however, is very different from that of Singapore, illustrating the spectrum of issues that arise in conducting FTA negotiations with a variety of countries in different time zones, and especially at different levels of development. As these FTA negotiations with multiple partners have progressed and intensified, there had been calls for greater involvement of civil society and of the legislative branch of Government. Recent statements by Thai officials, as reported in newspapers, indicate a degree of frustration with the FTA negotiations with Japan and the United States and a shift of priority back to ASEAN.[15] Concern also exists over the growing trade deficit. Thailand embarked on a programme of negotiating bilateral FTAs with the following selected developing countries both within and outside the Asia-Pacific region and pursued a regional FTA within the framework of BIMSTEC.

Bahrain: The Thai-Bahrain "Closer Economic Partnership" has been effective since December 2002, under which tariffs were set for elimination on 626 products by January 2005 through the Early Harvest scheme.

China: In the context of the ASEAN Framework Agreement, Thailand reached an Agreement on 1 October 2003 for mutual tariff elimination on fruits and vegetables. This Agreement has led to substantial increase in trade in these products. Some Thai producers (of onion, garlic, apples,

[15] "Thai Focus on ASEAN Trade," Asia Times, 9 August 2005.

pears) have been seriously affected, and complaints were aired that stakeholders had not been consulted during the negotiations or even made aware of the outcome. However, exports of other products, notably cassava, have prospered. Both partners have tightened SPS requirements on a large number of Early Harvest products.

Peru: Negotiations were launched in January 2004 with the goal of forming a comprehensive FTA that would eliminate tariffs on all products by 2015. SPS regulations have been a major issue, and both countries are guided by strategic concerns for each country; it is the first FTA with a country in the other's region. Thailand sees the Peru FTA as an entry point to the Latin American market.

India: Thailand began negotiations in January 2004. The Thai-India FTA follows the three-stage model (Early Harvest, normal track and sensitive track) and includes commitments on services, investment, TBT and MNP (business visas), as well as a provision for cooperation in areas including health, education and fisheries. Rules of origin became an issue, with Thailand insisting on a straight 40 percent domestic content requirement, while India pressed for more than 40 percent under a four-digit tariff heading.

BIMSTEC: This Thai initiative in 2004 envisaged a bridging link between ASEAN and SAARC; negotiations are under way on two lists of tariff elimination: "fast 2009" and "normal 2011" tracks, with a separate deadline for LDCs set at 2017. BIMSTEC also provides for negotiations on trade in services, and investment and cooperation in a wide range of areas including energy, fisheries and health.

Thailand also is pursuing FTAs with developed countries. In 2003, the volume of Thai exports to four of its developed trading partners (Australia, New Zealand, Japan and the United States) exceeded US$27 billion, representing 34 percent of the country's total exports. Several analyses of Thai FTAs with developed countries tend to stress the

difficulties that it may face in achieving balanced agreements from which it could derive significant benefits for the majority of its population. The following paragraphs highlight the main issues.

Thai-Australia FTA: Thailand signed an FTA with Australia in October 2003, its first with a developed country. Australia clearly viewed an FTA with Thailand as part of its strategy to ensure that it is not left out of regional integration in Asia. It also aimed at access for its competitive agricultural and dairy products. Australia further wished to acquire an advantage over its competitors in service exports, particularly education services, where it has a strong export capacity. The FTA with Australia provoked major protests from the dairy and livestock industries in Thailand. As in the FTA with China, the negotiations gave rise to criticism that the involvement of civil society had been inadequate.

Thai-New Zealand FTA: This Agreement came into effect on 1 July 2005 following on the heels of the Australia FTA, so the concessions on dairy were less controversial; dairy products make up 58 percent of New Zealand's exports to Thailand. New Zealand has reduced tariffs to between zero and 5 percent for imports of Thai tuna, shrimp, cereal, cosmetics, electrical appliances, glass and plastic.

Thai-Japan FTA: The product coverage of this FTA, to come into force in September 2006, has been a major issue. Japan succeeded in excluding rice, Thailand's major export (although 16 to 20 percent of rice consumed in Japan comes from Thailand), but opened itself at negligible tariff rates to shrimp (zero percent), chicken (3 percent) and scores of other agricultural products. The Thai private sector has taken a position against the 60 percent domestic-content rule of origin requirement sought by Japan, believing that this will make a large number of exports to Japan ineligible for duty-free treatment. Thailand's largest trade deficit is with Japan (more than US$8 billion in 2004) – but having agreed to lower tariff on Japanese vehicle parts and fully built cars of 3000cc or more, Thailand expects to consolidate its position as the automobile hub of the

region, even aspiring to be the "Detroit of the East."[16] Japan has responded with proposals to provide technical and financial assistance to help Thai producers meet SPS requirements and to upgrade technology in industry.

Thai-USA FTA: The experience with the China and Australia FTAs has underlined the need for greater public and parliamentary involvement in the negotiating process.[17] Negotiations with the United States are attracting considerably greater involvement of civil society. Reaction has been strong to the usual WTO-plus elements of the U.S. FTA model. The access of the poor to drugs has become a major issue, drawing protests in favour of eliminating IPRs from the agenda altogether. It has been pointed out that HIV/AIDS patients in Thailand currently can obtain the necessary drugs for US$30 per month, while those produced by U.S. pharmaceutical firms sell at US$250-750. The Government has committed to protecting these patients' health care schemes and to including Health Ministry officials on the negotiating team. Concerns also exist over another U.S. WTO-plus objective, to obtain patent protection for plant varieties, which is not required by the WTO. The Thai side is pressing for provisions to "shield" against bio-piracy.

Thai negotiators also have challenged another element of the U.S. model on services, the "negative list" approach, insisting that the GATS-style positive list that Thailand was successful in including in the FTA with Australia be adopted. In the most recent round of negotiations, while the two parties agreed on the basic definition and transparency conditions around financial sector liberalisation, they differed over the Government's power to regulate capital outflow, remittances and transactions in certain situations. Lastly, concern has grown that sugar, a major Thai export, will be excluded from liberalisation, given strong

[16] "A break in the negotiations," The Sunday Bangkok Post, 21 August 2005.

[17] "FTA Talks, and the Right to Know," The Bangkok Post, 2 April 2005.

political pressures within the United States. Overall, Thailand is showing considerable resolve in resisting negotiating pressures from a powerful trading partner, which can be attributed to an ever-increasing involvement of Thai civil society in FTA negotiations.

In South Asia, sub-regional economic integration has progressed much slower than in ASEAN for political reasons, but Bilateral Trade Agreements have provided dynamism.

In South Asia, sub-regional integration is taking place against a less auspicious political background and generally high levels of MFN tariffs. The South Asian Preferential Trade Agreement (SAPTA) was an attempt to use a largely political entity, SAARC, to host a preferential tariff agreement among the seven member countries – India, Pakistan, Sri Lanka and the four LDCs of Bangladesh, Bhutan, Maldives and Nepal. SAPTA was established in 1993, and the first round of concessions came into effect in December 1995, with the latest round completed only in December 2002; LDC member countries were offered larger concessions (62 percent) vis-à-vis the three non-LDC countries. The depth of tariff cuts was mostly restricted to 10 percent to non-LDCs. SAARC's intra-regional trade as a percentage of its total trade is one of the lowest among regional groupings (under 5 percent), mainly because of two factors: First, most South Asian countries have a comparative advantages in similar products, and second, political tensions between the two largest countries of the region have stalled intra-regional progress.

Individual SAARC members have, however, pursued sub-regional integration through bilateral FTAs. India has a free trade regime with Nepal and Bhutan and has entered into negotiations with Bangladesh. It negotiated an ambitious FTA with Sri Lanka that is now being deepened into a "Comprehensive Economic Partnership Agreement." Sri Lanka itself negotiated an FTA with another SAARC member, Pakistan. In 2004, Bangladesh, Bhutan, India, Myanmar, Nepal, Sri Lanka and

Thailand signed the "framework" agreement of BIMSTEC, which straddles ASEAN and SAARC.

Parallel to these bilateral negotiations, SAARC countries agreed to a Framework Agreement on a South Asian Free Trade Area (SAFTA) in January 2004 to supersede SAPTA. Over 12 rounds of negotiations, the four contentious issues -- rules of origin, list of exclusions, technical assistance, and creation of a fund for compensation of the Least Developed Countries for the loss of trade-based revenue -- were finally agreed on 1 December 2005. SAFTA takes effect on 1 January 2006. Implementation of the new tariff regime offers three sets of deadlines: India and Pakistan will complete SAFTA implementation by 2012; Sri Lanka, as a "small economy," is granted one year more, until 2013, to bring its tariffs down to zero to 5 percent; Bangladesh, Bhutan, Maldives and Nepal, with the status of Least Developed Countries, have a longer deadline, until 2015. The Agreement provides for the elimination of quantitative restrictions, but it does not cover trade in services yet.

Small countries struggle within the maze of agreements to protect their vital trading interests: The example of Sri Lanka.[18]

Of the top 50 exports of Sri Lanka to the sub-region, 24 received concessions under SAPTA, of which only 11 are of actual trade relevance to the country. In addition, other barriers exist, such as import licensing requirements that nullify tariff concessions. Under SAPTA, exports from Sri Lanka registered impressive figures only with respect to India and Pakistan. SAPTA exports as a percentage of total exports to Bangladesh, Nepal and Maldives have been minimal, and there were no exports to Bhutan. Although the number of concessions looks generous, some are in products not actively traded, and some tariff preferences for Sri Lanka duplicated preferences granted under the Bangkok Agreement, and later under the Indo–Lanka FTA.

[18] Draws on Jayasekera (2004), prepared for UNDP Asia Trade Initiative.

India and Sri Lanka accelerated their economic engagement process by signing a bilateral FTA in 1998 that became operational in March 2000. Out of a total of 4,919 tariff lines on which India offered concessions, 1,348 tariff lines are listed for 100 percent reduction in the first year; in the rest, this is to be effected in a phased manner. India committed to grant duty-free access, within three years, to all Sri Lankan exports except tea, textiles and other items listed in the negative list; some 196 items are excluded from tariff reduction on the grounds of injury or threat of injury to domestic industry, as well as national security reasons. Although this negative list hinders the effectiveness of FTA, it eases adverse political pressures by delaying the exposure of domestic industry to international competitors. Tariff quotas are applied to imports of tea from Sri Lanka on a preferential basis and are subject to annual maximum tariff quota of up to 15 million kilogrammes on a fixed-tariff concession of 50 percent.

The first two years of the FTA were rather quiet – but 2002 saw the agreement take off. Sri Lankan exports jumped from US$38 million in 1998 to US$245 million in 2003, a 640 percent increase. Indian exports to Sri Lanka also shot up by more than 200 percent, from US$539 million to US$1,093 million during the same period. Sri Lanka has now emerged as India's No. 1 business partner in South Asia. In 2002, preferential exports to India were 68 percent of total exports; preferential exports grew by 62 percent in 2002, compared with 54 percent in 2001. The import/export ratio, which was 11–1 in favour of India in 2002, is now down to 4.9-1 in India's favour. By 2004, trade between the two countries reached US$1.8 billion, with more than 70 percent of Sri Lankan exports covered under Indian preferences.

There is, however, a significant protective element in the negative lists of the two countries.[19] It has been estimated that items in the negative list of Sri Lanka represent more than one-third of India's total exports to Sri Lanka. The Indian negative list accounted for nearly 6 percent of Sri Lanka's total exports to India. Some items on the Sri Lanka negative list that India exports are onions, vegetables, masoor dhal, fruits, wheat, rice, sugar, paper products, motor vehicles and auto parts. Sri Lankan exports on India's negative list include rubber, plastics, printed labels, polyester and nylon yarn. Imports from India are diverse, consisting of motor vehicles, pharmaceuticals, cement, food items, fruits, cotton yarn and so forth. While Sri Lanka has been able to send new export items to India (namely, memory modules, ink, cosmetics, medicaments, glue and plastic products), there have been murmurs of protest from Sri Lankan industrialists: Manufacturers of local refrigerators, for example, who enjoyed a tariff edge of 17.9 percent, are predicting plant closures when the zero-duty rate comes into effect in 2008. Agricultural items, by and large, are on the negative list.

The FTA does not contain obligations on investment but nevertheless has stimulated foreign direct investment in rubber-based products, ceramics, electric and electronic items, wood-based products, agricultural commodities and consumer durables. India is the third-largest investor in Sri Lanka; Indian companies have invested more than US$400 million in the country, or about half of India's total investment in the SAARC region. Investment flows from India to Sri Lanka on the capital account

[19] Garment items under ITC-HS Chapters 61 and 62, while remaining in the negative list, are given 50 percent tariff concession under a tariff quota. Other items on the negative list are rubber products, plastic articles and manmade filaments. Edible fruits and nuts, coffee, spices, oilseeds, lac and gum, animal and vegetable fats, rubber articles, copper articles, and zinc articles are some of the items that fall under phased reduction of 50 percent in the first year and duty-free in the third year. The main item scheduled for duty-free treatment in the first year is pulpwood (Chapter 47).

appear to counterbalance the trade deficit that Sri Lanka has with India.[20] Indeed, the two countries are now moving to a Comprehensive Economic Partnership, which will deepen the integration achieved in the FTA primarily by including wider coverage of goods, all service sectors and removal of regulatory and operational constraints to investment. Commitments also are being made on trade facilitation and Mutual Recognition Agreements.

The Sri Lankan experience under the Indo-Lanka FTA shows that if the regulatory framework – as well as the time frame for tariff phase-out, rules of origin, and negative lists – is properly designed to accommodate the disparities between the two countries, then a smaller country could gain from an FTA (Jayasekera 2005). It has to be noted, however, that it is the sectoral interests that are usually the driving force behind FTAs in smaller developing countries. In Sri Lanka, exports are highly concentrated in a limited number of sectors; its priorities in negotiating FTAs are thus to obtain duty-free treatment for such products (even though both tea and garments face restrained imports in India).

After its experience with the FTA with India, Sri Lanka has negotiated an FTA with Pakistan, which came into effect in June 2005. Pakistan has pledged to grant duty-free entry to 206 products, including 10,000 metric tonnes of tea. Sri Lanka will grant similar access for 102 Pakistani products, including 6000 metric tonnes of Basmati rice. Access for tea appears to have been one of the main motives in Sri Lanka signing a preferential trade agreement with Iran in November 2004, as well as seeking an FTA with Egypt. Garment exports also are vital, especially after the full implementation of the WTO Agreement on Textiles and Clothing on 1 January 2005. Sri Lanka is facing increased competition,

[20] About a dozen Sri Lankan companies have set up operations in India; its largest furniture manufacturer, Damro, has more than 20 retail stores; Ceylon Biscuits also has taken over Bakeman's, India's third-largest biscuit maker.

and because textiles and clothing are not covered by the U.S. GSP, it continues to face high duties in America, its main market. The reduction or elimination of duties on Sri Lankan exports of garments to the United States, under which Sri Lankan exporters would enjoy a margin of preference over competitors such as India and China, would seem to be the main motivation for Sri Lanka seeking an FTA with the United States.

PART III
CARVING UP ASIA

The world's growing and major economies – China, India, Japan and the United States – have joined the free trade maze in Asia, each trying to carve out its sphere of influence with distinct political-economic strategies.

China

China has recently become active in negotiating FTAs. Its first FTAs were with the SARs of Hong Kong and Macao in 2003, supplemented in-depth by CEPA II on 27 October 2004. China entered into a framework agreement with ASEAN as of 1 July 2003. An Early Harvest agreement includes all ASEAN countries in principle, although some negotiated exclusion lists are Annexes to the Agreement. China negotiated an Early Harvest list with Pakistan in May 2005 (China's list provides duty-free entry to 767 items, including textiles, surgical and sports goods, vegetable, fruits, rice, citrus and mangoes from January 2006, while Pakistan's contains primarily machinery and raw materials). Beijing also has virtually completed FTA negotiations with New Zealand, its first FTA with an OECD country, and is negotiating with Australia, as well as with trading partners outside the Asian region. FTA negotiations have been completed with Chile, and are ongoing with Peru, SACU, the GCC and Iceland. Most importantly, China is making overtures to Japan, Republic of Korea and India, seemingly positioning itself to become the hub of the largest FTA ever.

A central element of China's FTAs is that its FTA partners agree not to apply those provisions contained in its terms of accession to the WTO; these permit WTO members to impose discriminatory restrictions against China that would otherwise be prohibited by WTO rules. Included are post-ATC restrictions on textiles and clothing, "selective" emergency safeguard actions and "non-market economy" criteria for anti-dumping actions. For example, the relevant provision from the

Agreement on Trade in Goods of the Framework Agreement on Comprehensive Economic Co-operation between ASEAN and China, which entered into force on 20 July 2005, states: "Each of the 10 ASEAN Member States agrees to recognise China as a full market economy and shall not apply, from the date of the signature of this Agreement, Sections 15 and 16 of the Protocol of Accession of the People's Republic of China to the WTO and Paragraph 242 of the Report of the Working Party on the Accession of China to WTO in relation to the trade between China and each of the 10 ASEAN Member States." The same paragraph is included in the agreement between Pakistan and China.

India

India, a member of the Bangkok Agreement since its inception, has accelerated the sub-regional integration process beyond SAPTA by negotiating FTAs with four of its five immediate neighbours: Nepal, Bhutan, Bangladesh (negotiations under way) and Sri Lanka. Recently it took new initiatives at the intra-regional level by signing a Draft Framework Agreement for an FTA with ASEAN, under which an FTA has been negotiated with Singapore and Thailand; this already has resulted in an Early Harvest scheme covering a modest number of products for tariff liberalisation. In addition, India is a member of BIMSTEC, with which FTA negotiations have begun. In the inter-regional context, it has been a member of the GSTP, and a PTA has been signed with MERCOSUR, which already is yielding positive results. Initiatives that are in the process of studies, negotiations and implementation include India-Singapore CECA, India-Sri Lanka CEPA, India-Bangladesh FTA, Bangladesh-Bhutan-India-Nepal Growth Quadrangle, IOARC, India-China Economic Cooperation, India-GCC Economic Cooperation, India-Brazil-South Africa (IBSA) Initiative, India-Mauritius and India-Egypt Economic Partnerships. India also is pursuing the idea of a pan-Asian economic cooperation initiative known as the Asian Economic Community (AEC).

A major highlight of some of these attempts at economic cooperation is in terms of a broadening of scope and emphasis, ranging from trade to investment cooperation and services. Intensive work is being done on issues like rules of origin, Mutual Recognition Agreements, anti-dumping provisions, revenue compensation mechanisms, safeguards, dispute settlement modalities and others. In short, India has placed considerable emphasis on making Agreements as comprehensive as possible. It has adopted a "coalition building" strategy, preferring to enter into "framework" agreements with developing-country sub-regional groupings within and outside Asia, including ASEAN, MERCOSUR and SACU, rather than with their individual members. Its recent overtures to discussing possible FTAs with developed countries such as the EU and the United States could be limited to services, a possibility foreseen in Article V of GATS.[21]

Japan

Japan traditionally was a strong advocate of multilateral trade liberalisation and an opponent of regional trade agreements. The Government White Paper on International Trade 1999 "grudgingly" admitted the positive aspects of regional trade agreements for complementing and improving the multilateral trading system. It was only in 2000 that Japan fully embarked on its dual-track policy – as witnessed by its speedy negotiation of the Japan-Singapore FTA (JSEPA). Singapore was a strategic first choice – it has negligible tariff protections and agricultural exports to Japan, which meant that political opposition to the deal would be less significant. The Japan-Singapore FTA was used as a tactic to "soften up" those interests in Japan opposed to moving from a strict commitment to multilateralism.[22] Following this strategy, Japan is negotiating FTAs with other ASEAN countries. An FTA has been reached with Thailand, and negotiations are under way with Malaysia,

[21] "India Inc. wants FTA in Services with EU," India Online News, 5 September 2005.

[22] Aoki, Maki, "New Issues in FTAs: the Case of Economic Partnerships," Paper submitted to APEC Study Center's Consortium Meeting, Vina del Mar, Chile, 26-29 May 2004.

Indonesia and Philippines. An FTA was reached early with Mexico to enable Japanese exporters to compete on an equal basis with Mexico's other FTA partners, notably in NAFTA and the EU. Tokyo also is pursuing an FTA with the Republic of Korea, but has remained cool to the idea being promoted by China of a trilateral FTA among the three countries.[23]

Japan has encountered difficulties in agreeing to free trade in sectors that it deems sensitive, notably agricultural products.[24] As noted above, rice was excluded from the Thai-Japan FTA, even though it is Thailand's largest export item, and very stringent rules of origin were imposed on fishery products. This resulted in reduced concessions in favour of products of export interest to Japan; other potential FTA partners might not accept such exclusions. These considerations have led Japan, the world's second-largest economy, to adopt a flexible and pragmatic approach to FTA negotiations, in contrast to strict adherence to a model approach pursued by the world's largest economy, the United States. While future FTAs would be based on the FTA with Singapore, "Singapore-plus" and "Singapore-minus" agreements could be contemplated.[25]

Also sensitive to Japan is the liberalisation of the movement of natural persons. In the negotiations with Philippines, where labour remittances are of crucial importance, there appears to be a wide gap between the offer of Japan to allow entry to a few hundred health care and IT professionals, and that of Philippines, which is requesting quota-free entry for these occupations.[26] Energy security also is a priority – Japan is

[23] "China urges movement on trilateral FTA," Yomiuri Shimbun, 7 May 2005.

[24] "Sticky situation for Japan's rice policy," Asia Times, 28 July 2005.

[25] Ministry of Foreign Affairs of Japan, Economic Affairs Bureau, "Japan's FTA Strategy," October 2002.

[26] "No Quota," Manila Bulletin, 27 July 2005.

seeking security for supply commitments in its FTA negotiations with Indonesia, an OPEC member.[27]

United States[28]

Since 2001, the United States has negotiated FTAs with Chile, Jordan, Singapore, Bahrain, Australia, Morocco, Dominican Republic and Central American states, and has engaged in negotiations with other countries (e.g., Thailand, SACU, Oman, UAE, and Kuwait). If all of these negotiations are successfully concluded, the number of FTA partners will have increased in a few years from the original three (Canada, Israel, and Mexico) to at least two dozen. The United States also has undertaken an Enterprise for ASEAN Initiative that could produce a series of new FTAs in Southeast Asia; it has proposed FTA negotiations with the rest of the Middle East; and it has explored potential negotiations with the Republic of Korea and Chinese Taipei. In these FTA negotiations, the United States seeks that its partners accept a more or less standard model aimed at achieving clearly defined systemic and sectoral objectives; in addition, its choice of partner is strongly dictated by strategic foreign policy objectives, rather than the value of the trade involved. While its neighbours in NAFTA account for one-third of U.S. exports, the other FTA candidates are much smaller partners. FTAs seem to be employed to influence other partners in larger negotiations – for example, the Free Trade Area of the Americas (FTAA) – or in multilateral negotiations, and to establish precedents that consolidate the U.S. position on issues where it has serious differences with its trading partners (such as on GMOs, geographical indications or audio-visual services). FTAs also are used to assist U.S. industries in transition, support countries that cooperate with the United States in the fights against drugs and terrorism, and encourage partners in other foreign policy initiatives. The United States thus is

[27] Asia Pulse/Nikkei, 14 April 2005.

[28] Draws on VanGrasstek (2004), prepared for UNDP Asia Trade Initiative.

actively employing FTAs as a tool of coalition building and coalition busting, as elaborated in the next section.

Table II: The United States FTA Model

In its negotiation of FTAs, the United States has adhered as closely a possible to a model that includes some essential elements highlighted below:

Agriculture	Investment	IPR	Services	Other
Coverage of all products, with the exception of "sensitive" ones like sugar No commitments on anti-dumping or agricultural subsidies	Compensation for expropriation; national treatment and non-discrimination including pre-establishment rights Investor-state dispute settlement provisions Prohibition of several performance requirements	Limitation on compulsory licensing and prohibition of parallel imports "Patentabilty" of plant varieties; membership of UPOV Linkage of IP drug approval bodies Long data exclusivity reign; extended patent terms to account for approval delays Precedence to trademarks over GIs	Negative list for commitments on trade in services Broad coverage for service commitments with priority for telecom, e-commerce, financial services, audio-visuals, and legal and professional services Departure from the GATS "four-mode" system	"Yarn forward" rules of origin for textiles and clothing Provisions of competition law Provisions on labour standards and core rights (association, bargain, minimum age and decent working conditions) Effective enforcement of environment laws; invoking of dispute settlement for redresses

Source: Informal compilation by authors with supplemental information from World Bank (2005)

Strategic choice of partners

The great majority of U.S. FTA negotiations initiated since 2001 are with countries that fall into one of two categories. The first consists of Middle Eastern countries that cooperate with the United States in the regional peace process. The United States reached FTAs in the past with Israel and

Jordan and has recently concluded agreements with Morocco and Bahrain; now it is negotiating with Oman and UAE. The second, larger category consists of countries that support the U.S. war efforts in Iraq by participating in the "Coalition of the Willing." For example, all countries in Latin America that joined the Coalition have become FTA negotiating partners. The only non-Coalition countries in Latin America with which the United States has initiated FTAs are former G-20 members. The United States and the European Union encountered opposition on agriculture negotiations from a group of non-subsidising developing countries during the Fifth WTO Ministerial Conference. Originally called the Group of 20, this coalition soon attracted additional adherents. The United States sought to reduce the size of this coalition, and hence its influence, by inducing some of its members to reach separate FTAs with itself. Those efforts have met with some success; several countries have left the G-20.[29] It has been noted that the United States has entered into an FTA with Australia, but not its neighbour New Zealand, whose anti-nuclear policy had given rise to frictions with Washington.[30] Outside of Latin America, the United States is negotiating FTAs with two Asian and African countries that remain part of the G-20. In the case of Thailand, however, other issues are at stake; the country is cooperating with the United States in Iraq.

Sectoral and systemic objectives

The United States also has used FTAs as a mechanism for structural adjustment in the textiles and clothing industry. It recognises that it cannot indefinitely sustain a large apparel industry because of labour-intensive nature, but hopes to maintain market opportunities for textile fibres (especially cotton) and producers of fabrics. Several key initiatives

[29] The current membership reportedly consists of the following 19 countries: Argentina, Bolivia, Brazil, Chile, China, Cuba, Egypt, India, Indonesia, Mexico, Nigeria, Pakistan, Paraguay, Philippines, South Africa, Tanzania, Thailand, Venezuela and Zimbabwe.

[30] "Failure to lift ban on nuclear ships a tragedy," ACT New Zealand, 27 July 2005; see also New Zealand parliamentary debate of same date on www.parliament.govt.nz

have been designed to promote a "soft landing" for apparel producers by encouraging offshore production, while also crafting "yarn forward" rules of origin that support the use of U.S. fibres and fabric in the offshore facilities. Only Israel and Jordan have escaped the "yarn forward" provision in their FTAs. The preferential trade programmes offered to the Caribbean Basin, Andean partners and sub-Saharan Africa have been designed to set up captive markets of this nature. Under this approach, trade with the Americas is promoted at the expense of Asia, especially China. Compared to trade with the Americas, apparel imports from Asia are not nearly as beneficial for U.S. producers. While some Asian countries import significant amounts of U.S. fibre, some of which comes back in the form of fabric or apparel, they import very little fabric or semi-finished apparel from the United States. By contrast, much of the apparel imported from the Americas – and especially Mexico and the Caribbean Basin – consists of goods assembled in offshore plants from U.S.-made components.

The apparel and energy sectors help to explain the current selection of FTA partners, but the sensitive agricultural products (sugar, certain fruits, vegetables and dairy products) are especially troublesome for U.S. negotiators. The United States previously interpreted the "substantially all the trade" criterion of GATT Article XXIV as meaning "all" trade, and insisted that all products be made duty- and quota-free in an FTA.[31] This interpretation came under strain when the United States began to negotiate FTAs with some major sugar suppliers. The first step came in the U.S.-Chile FTA negotiations, where the two sides essentially agreed to a non-aggression pact on this commodity.

The United States also is attempting to circumvent the constraints of the WTO by incorporating systemic issues in the FTAs. The most significant, particularly from a human development angle, is the inclusion of TRIPS-plus provisions as well as the pursuit of strong disciplines for investment,

[31] With the exception of dairy trade with Canada.

antitrust, labour and environmental standards, and trade in services, including electronic commerce and audio-visuals. According to Das (2005), this serves as a reminder of a historical strategy: During the early 1980s, the United States engaged in bilateral agreements and understandings with several developing countries aimed at reducing their subsidy options. Most of these got consolidated in the subsidies agreement in the Uruguay Round. During this round of negotiations, the United States also contracted bilateral agreements with several developing countries in the area of IPRs that eventually smoothed the process of having an effective IPR protection regime in the Agreement on TRIPS.

PART IV
PLAYING WITH CAUTION

Agriculture

FTAs should provide meaningful access for key agricultural exports from developing Asian countries, shield poor producers from disruptive surges in imports and reflect food security concerns unambiguously. While trade distortions caused by agricultural subsidies in developed countries cannot be effectively addressed in FTAs, they can include provisions to assist poor producers to meet sanitary regulations.

Agriculture remains a mainstay of the Asian rural economy for incomes, employment, nutrition and food security. Although its relative importance varies with countries, agriculture is a key sector, contributing more than 25 percent of the GDP in South Asia and more than 15 percent in East Asia. Nearly 6 in 10 Asians are employed in the agriculture sector, and the degree of their reliance on agriculture is quite *systematically correlated* with the depth of poverty. Issues of nutrition and food security also are related to agriculture, with 4 in 5 malnourished children in the developing world living in Asia. The incidence of hunger and poverty is high in areas characterised by weak agricultural production systems and the absence of effective control by poor people over resources, such as land ownership and tenure, credit, public infrastructure, and access to domestic and international markets. The latter is where pro-poor trade negotiations, rules and policy can intersect to contribute to human development.

In agricultural trade negotiations Asian developing countries have demonstrated different positions. A significant number are members of the Cairns Group of developed and developing countries seeking a market-oriented agricultural trade system, while others are active proponents of measures, such as the "development box," to ensure their

ability to protect certain products where imports could undermine the livelihood of vulnerable people. The participation of both categories of Asian countries in the G-20 demonstrated their political will to overcome these differences when confronting the subsidised exports of the EU and the United States. The same issues that arise in the WTO need to be confronted in FTAs: high tariff protection, export and production subsidies, safeguard clauses and special lists of products vital for food security and poverty alleviation. FTAs may provide a better opportunity for dealing with issues whose technical complexity impedes action at the multilateral level, such as SPS and free access for agricultural products of special export interest. However, major distortions caused by subsidies are difficult to address in a bilateral or regional context.

These concerns have been reflected in FTAs among developing countries in Asia. In some cases, agriculture exports have been in the vanguard of regional cooperation, such as the Early Harvest of fruits and vegetables (and other products in HS 1-8), contained in FTAs negotiated under the umbrella of the China-ASEAN Agreement. Vietnam and Cambodia have negotiated exceptions lists from this Early Harvest, and China is negotiating such lists with Lao PDR, Malaysia and Philippines. The China-Pakistan and Thai-India agreements also include agricultural products in the Early Harvest. On the other hand, some regional FTAs have excluded key agricultural products or scheduled them for a long phase-in period, such as tea in the Indo-Lanka FTA. Within ASEAN many agricultural products have been placed on the CEPT-AFTA Sensitive List with a longer period for tariff cuts (2003 to 2010). Understandably, Singapore is the only country that does not have this list.

The inclusion of agriculture in FTAs with developed countries also has been problematic. The two most active, Australia and New Zealand, have used the FTAs to obtain access for their highly competitive agricultural exports targeting dairy products, a sector characterised by high levels of

protection in most OECD markets. However, they have been willing to accept a lengthy phase-in period in the FTA with Thailand where the duty-free treatment and the elimination of tariff quotas have been staged until 2020, with a further five-year delay for milk, cream and milk powders (Findlay 2005). The U.S. FTAs aim at obtaining access for a wide range of agricultural exports, although certain products defended by strong lobbies in the United States (notably sugar) are excluded, thus creating the potential for imbalances in the agreement. Similarly, Japan insists on excluding rice in any FTA.

The main issue affecting agricultural trade – the massive subsidies applied by developed countries to their production and export – does not lend itself to bilateral solutions. The Chile-USA FTA has attempted to deal with export subsidies to the effect that the partners will refrain from subsidising exports to each other, but may do so when faced with export subsidy competition from third parties, unless the other party takes countervailing measures. However, the deeper problem of overproduction caused by subsidies also is not addressed; under NAFTA, even though Mexican exporters of fruits and vegetables have benefited, imports of subsidised corn and soybean from the United States have had devastating effects on poor farmers in terms of hundreds of thousands of jobs displaced (Carlsen 2005).

Developing countries attempt to identify products deemed most crucial for food security and ensure that they are included on a list of exceptions. Many FTAs include, in addition to the standard safeguards, a special agricultural safeguard clause that borrows elements of Article 5 of the WTO Agreement on Agriculture; the Thai-Australia FTA, for example, contains a special list of agricultural products for which a "trigger volume mechanism" applies. Agreement has been reached in the Doha Round negotiations on agriculture that developing countries will have recourse to the "special safeguard mechanism" and will be able to exclude a list of "special products," although details remain to be worked out. It would

seem unlikely that developing countries would give up these rights in bilateral FTAs.

FTAs can provide a mechanism for dealing more effectively with SPS regulations that often present insurmountable trade restrictions on exports by poor producers. Although disciplines exist in the WTO SPS Agreement, a trend is evident toward more stringent regulations, particularly with respect to food safety. FTAs thus can provide more country- and producer-specific cooperation to prevent poor producers from being excluded from the market of the partner country. Developed partners can provide technical and financial assistance, special facilities for testing and quality control, and more transparent and inexpensive procedures. SPS provisions are found in almost all Agreements in Asia, although forms of assistance may not be reflected in the text. Many FTAs include such mechanisms, going beyond the WTO SPS Agreement, designed to facilitate approval and to minimise the trade-disruptive effect of non-approval. The Thai-Australia FTA, for example, sets up an Expert Group on SPS "to facilitate safe trade." Japan likewise has agreed to establish special facilities to assist Thai producers meet food safety requirements.

However, FTAs can be used to establish precedents in agriculture, where there remain many unresolved issues on the multilateral agenda. U.S. FTA partners are being asked to drop their opposition to the use of GMO products, or at least to refrain from applying the precautionary principle cherished by the EU. According to newspaper accounts, Thailand relaxed its restrictions on genetically modified crops after U.S. companies made the case to the USTR of using the U.S.-Thai FTA negotiations as a window to serve the Southeast Asian market with biotechnology-induced crops.[32]

[32] "Thais lift ban on GMO planting," USA Today, 23 August 2004.

Rules of Origin

Restrictive rules of origin can frustrate trade within FTAs and particularly disadvantage LDCs with weak manufacturing capacity. At their worst, they can create captive markets for suppliers of rich-country inputs and undermine the competitiveness of poorer trading partners.

Rules of Origin (RO) ensure that imports from third parties do not benefit from negotiated preferential treatment. There are three basic methods of determining RO for goods, namely, value-added, changes in tariff classification and process definitions, and often combinations of these. Each method has an economic impact, often peculiar to specific sectors. The World Bank considers that restrictive rules of origin can easily wipe out any margin of preference generated by an FTA (World Bank 2005, 68-70). In extreme cases, as in textiles and clothing, ROs can be used to create captive markets for exporters of raw and semi-finished products. There is no single rule of origin found in FTAs; rates are set at between 30 and 60 percent (of local content or value-addition requirements), depending on the products. This product-specific approach is complex, with a range of formulae and tests applying to thousands of different products in the parties' tariff schedules. Such an approach may provide opportunities to impose protection at every point.

The Japan-Singapore Economic Partnership Agreement employs mainly the "tariff jump" requirements and the local content requirements for its RO. The former are set at the HS 4-digit basis,[33] which means stricter RO because products must jump across tariff classifications by undergoing additional processing and change. These are complemented by 60

[33] Hamonised System (HS) numbers are normally six to 10 digits long. Most countries use the same six digits for most products; these HS numbers are universally used to determine tariffs and tariff preferences, certification and shipping document requirements, and so forth.

percent local content requirement, which also is at the higher end of the scale for comparable FTAs. The U.S.-Singapore FTA introduces a new concept of the Integrated Sourcing Initiative (ISI), which applies to non-sensitive, globalised sectors such as IT. Under the scheme, certain IT components and medical devices are not subject to RO when shipped from either party – the objective is to encourage MNCs to take advantage of each ASEAN country's competitive advantage.

Because LDCs generally lack manufacturing and processing capacity, relaxed rules of origin can provide meaningful Special and Differentiated Treatment (S&DT) in their favour. They tend to respond favourably to such concessions, as indicated by the response of four Asian LDC apparel exporters to Canada after its Market Access Initiative for LDCs was launched in 2003 (UNDP-RCC 2005, 26). Within Asia, LDC members of SAPTA were permitted to enjoy a local content requirement that was 10 percentage points less than stipulated for more advanced parties (40 percent vs. 30 percent). But generally, rules of origin have been very contentious in FTA negotiations. The India-Thailand Framework Agreement provides interim RO for the Early Harvest list, but leaves the final RO for future negotiation. The difference between the parties is that Thailand is insisting on an across-the-board 40 percent value-added rule, while India seeks that this be supplemented by an HS 4-digit tariff jump approach (similar to its FTA with Singapore). Rules of origin also have frustrated Thai FTA negotiations with Japan, where Japan is seeking more stringent criteria in the agriculture and fisheries sectors: for example, fish would have to be caught in Thai or Japanese waters, with 75 percent of crew members of Thai nationality.

The variety of RO on services appears as complex as for goods. RO for the services sector are based on the definition of service provider or natural person involved in the provision of the services.[34] Under GATS Article V:6, a service supplier of any other member that is a juridical person in one of the parties shall be entitled to the treatment under the FTA, provided that it engages in substantive business operations in the territories of the parties. However, paragraph 3(b) of the same Article gives developing countries the right to grant more favourable treatment to juridical persons owned or controlled by natural persons of the other party, if the FTA involves only developing countries. The objective is to avoid third-party enterprises benefiting from the FTA when they have not previously engaged in such substantial business operations. The criterion of incorporation of nationality must be given to genuine companies that are engaged in substantive businesses in the country. Therefore, nationality should not be accorded to corporations that are incorporated in a country for tax avoidance or related purposes or do not have business or assets in those countries. For a natural person, the definition is based on nationals or permanent residents of a country. It should be noted that the India-Singapore FTA paraphrases GATS Article V but provides more stringent rules for sensitive sectors such as audio-visual, financial, education and telecommunications services, where the additional criterion of citizenship is added. Article 804 of the Thailand-Australia FTA permits the parties to deny the benefits of this Chapter to a service supplier of the other Party, where the Party establishes that the service supplier is owned or controlled by persons of a non-Party.

[34] Exports of services under GATS Mode 3 are those services supplied by a commercially owned or controlled by a natural juridical person of another member. Owned is defined as more than 50 percent of equity interest, while controlled means that the persons of the other member have the power to name the majority of the directors or otherwise control its actions.

Regardless of the stringency of the rules of origin, an additional barrier to trade is presented simply by the use of different rules of origin in different FTAs.[35] The levels of local content and the use of tariff jump criteria vary considerably. Thus, one customs administration can be obliged to apply many different rules of origin to assess whether the same product qualifies for preferential treatment, depending on its source.

[35] The International Chamber of Commerce has highlighted this confusion in rules of origin as a major impediment to business in its submission against FTA.

Textiles and Clothing

Some Asian countries have sought FTAs with developed countries as a means of acquiring specific preferential access for their textiles and clothing exports, and to obtain the same terms as FTA partners in other regions. However, tariff preferences do not seem adequate if supplying countries are hampered by restrictive rules of origin. Unilateral preferences combined with relaxed rules of origin seem to be the best ways of assisting LDCs and their small suppliers.

Textiles and clothing industries in Asia have lifted millions of people, especially women, out of poverty in different countries at different periods of time. They also have served as a steppingstone for diversified industrialisation in many East Asian nations, and as major labour-absorbing light manufacturing bases in other, less industrialised countries. Global export of textiles and clothing (T&C) exceeds US$350 billion per year, and Asian economies, excluding Japan, produce about half of that. It is worth noting that the major gainers from the quota-based world trade in T&C (until 31 December 2004) were some of the poorest countries in Asia (Bangladesh, Cambodia, Nepal and Lao PDR); they and other small exporters are now in need of special international preferences to preserve their shares in world trade and national employment. Tariff preferences have been seen as crucial to being able to compete with those countries in other continents that already enjoy such preferential access, or to obtain advantage vis-à-vis the large competitive exporters like China and India. The focus has primarily been on the United States market because of the dynamism of its T&C imports and the fact that T&C products, even those exported by LDCs, do not benefit from GSP treatment there.[36] Many countries enjoying duty-free access to the United States for clothing, either through FTAs or special outward

[36] In 2002 only 2.5 percent of apparel imports into the United States received GSP treatment, even when the definition of apparel used was broad, including certain plastic items.

processing arrangements, have demonstrated spectacular export growth, which Asian countries believe they could emulate.

There are two basic elements, however, that might frustrate such emulation. The first is that it may not have been the tariff preferences that stimulated the export growth, but rather the "quota preferences" – the fact that the main potential competitors were still subject to quotas that had been negotiated under the MFA, up until their abolition with the full implementation of the ATC on 1 January 2005. The second is that, with two exceptions, these preferential arrangements with the United States include the yarn-forward rules of origin requiring the use of U.S. yarn and fabrics as a condition for made-up or clothing products to enjoy duty-free entry. This tends to create a captive market for U.S. exporters of yarns and fabrics and increases the cost of products incorporating these inputs that are exported by countries benefiting from duty-free entry. The WTO Agreement on RO does not discipline rules of origin used in the granting of preferences, and thus there exist no binding multilateral rules governing their use. ROs are also technically complex[37] and administratively burdensome. It has been pointed out that these strict ROs could play some role in deterring both upstream investments in textile production, by distorting incentives to use imported yarn, as well as in raising the input costs of apparel production by mandating usage of U.S. or EU yarn and fabric. Usually, the FTA partner is given a quota under which fabric and yarns from third countries can be used without losing preferential status, but these quotas are phased out over a period, the result being that their impact on the competitiveness of the exporting countries only becomes apparent over time.

[37] As examples, the recent U.S.-Singapore FTA has a 284-page-long Annex 3A only on "product-specific Rules of Origin." Similarly, the annex on RO in the U.S.-Chile FTA is 95 pages.

The most recent trade data, since the full implementation of the ATC, indicates a drop in market share of countries benefiting from FTAs or outward processing arrangements. Comparing the first seven months of 2005 against the same period in 2004, the share of U.S. imports from China increased from 16.8 percent to 25.1 percent in value terms. In contrast, the share of Caribbean Basin Initiative (CBI) countries plus Mexico declined from 22.1 percent to 19.9 percent, and African countries under the African Growth and Opportunity Act (AGOA) declined from 2.0 percent to 1.6 percent (Adhikari and Yamamoto 2005). This growth trend of imports from China, albeit often from low levels, has provoked the United States and the EU to invoke the discriminatory textile safeguard clause accepted by China in its terms of accession to the WTO. The restrictions applied against China appear aimed more at preserving trade flows with FTA partners than protecting domestic producers. However, a relaxation of rules of origin would seem the best means of enabling smaller partners to preserve market shares.[38]

Regional free trade agreements among Asian countries should present increased opportunities for T&C trade. If rules of origin are accompanied by lax regional cumulation[39] requirements, Asian countries could gain in the form of a stronger supply chain, from regional integration efforts among SAARC, ASEAN, Japan and China. There is a need to reduce dependence on Northern markets and promote South-South trade. In this regard, the recently re-launched Agreement on GSTP,[40] administered by UNCTAD, could contribute to deepen the scope of tariff preferences

[38] See statement by the Executive Director ITCB to UNCTAD Meeting on Strengthening Participation of Developing Countries in Dynamic Sectors of World Trade, 9 February 2005.

[39] Cumulation refers to a flexible provision in trade agreements whereby inputs imported for production from other countries party to a common preferential agreement (or even another agreement) can be factored in to determine national origin of a product.

[40] http://www.unctadxi.org/templates/Press____897.aspx; 10 Asian countries have ratified the Agreement on GSTP.

amongst developing countries. Such schemes should provide low-income countries with special treatment to enable them to build up competitive enterprises and safeguard clauses to protect against import surges. Textiles and clothing have been treated differently in various FTAs among Asian countries. In its FTA with Sri Lanka, India made commitments to grant a 25 percent tariff reduction for 528 textile items but restricted apparel on a preferential basis; a 50 percent tariff reduction exists for import of up to 8 million pieces, of which a minimum of 4 million pieces should contain Indian fabric.

Trade in Services

Commitments on services in FTAs can further regional integration; however, a different approach is required in North-South FTAs incorporating transfer of technology and social obligations. FTAs should not be permitted to undermine development objectives in key sectors such as public health, environmental, energy and cultural services. FTAs provide an opportunity to obtain greater liberalisation for the movement of persons in various occupations and different skill levels, and to include obligations to protect foreign workers, particularly women, against exploitation and abuse.

Since 1980, trade in services has grown faster than trade in goods, despite the former being subjected to complex non-tariff barriers (WTO 2003, 9). Partly because of possibilities created by IT-enabled technologies, trade in services today includes sectors that are the drivers of modern economic growth; however, it also includes sectors where commercial motivations are secondary to the human development objective of ensuring basic well-being through decent health, education, energy, and water and sanitation supplies, among others. As public institutions come under great strain in coping with increasing development claims, they are compelled to explore options to fill glaring gaps through domestic revenue mobilisation, recourse to overseas aid and transfers, and international trade through the four modes of supply.[41] For the poor men and women in Asia, opportunities to temporarily migrate across borders as service suppliers could dramatically increase earnings and upgrade skills. Remittances also feed extended family safety nets, enhancing access to health and education and financing small local businesses.

The entry into force of GATS at the WTO in 1995, which recognised the development role of services, actually overtook most regional FTAs then

[41] Mode 1 (cross-border supply); Mode 2 (consumption abroad); Mode 3 (commercial presence); Mode 4 (movement of natural persons)

in existence because they did not include provisions on services. Thus, until recently the only commitments on trade in services among Asian countries were those incorporated into their GATS schedules. Now countries are endeavouring to incorporate services into the regional integration process. ASEAN moved ahead with the AFAS, under which the member countries negotiated GATS-plus commitments on a positive-list basis. Members also are negotiating Mutual Recognition Agreements (MRAs) for a variety of professions within this framework.

The share of services in GDP is seen to systematically correlate with levels of per-capita income. In developed countries, such shares typically exceed 70 percent of national output (73 percent in the United States), while in developing countries it is around 50 percent (lower in the Least Developed Countries, down to 25 percent in Lao PDR). Not surprisingly, the developed countries have placed high importance on the liberalisation of services in their FTAs. In the case of the Singapore-Japan, Thailand-Australia and Singapore-Jordan Agreements, this is a positive GATS-plus list, under which the two countries go beyond their respective GATS commitments. In contrast, the Singapore-Australia and Singapore-USA FTAs adopt a negative-list format, with Singapore specifying sectors not covered by the Agreement; this reflects the U.S. approach aimed at moving to a negative list. Although it could seem logical to use the negative-list approach in the FTA context, it has the obvious disadvantage for the developing-country partner of automatically liberalising new services that might evolve from new technologies. Services of traditional interest to the developed countries, notably telecommunications and financial services, are targeted in these FTAs. Japan accepted a positive-list approach in its FTA with Singapore, but has preferred to adopt a negative-list approach to liberalising trade in services with partners like Malaysia, whose officials have admitted having to spend substantial negotiating capital to incorporate safeguard modalities.[42]

[42] Based on unofficial remarks made by Malaysian negotiators at the Asian Regional Workshop on Bilateral Free Trade Agreements, Kuala Lumpur, 26-28 August 2005.

The main goal for developing countries in North-South negotiations is to obtain transfer of technology commitments and access to networks, as well as access for natural persons, all foreseen in GATS. With developing regional partners, however, opportunities exist for export of tourism, professional services and construction. The emphasis of AFAS on MRAs reflects such a strategy. To overcome the four-mode positive-list structure of GATS, which favours poor countries, developed countries have introduced a new approach by breaking up services trade into various components and putting these in different chapters. The chapter on services mostly covers cross-border trade, for example, while Mode 3 is put in the investment chapter, Mode 4 in movement of natural persons, and financial services in a separate chapter. This breaking up of the services mode of trade allows separate treatment for each component of the services sector; in turn, this weakens the negotiating position of the developing-country partner and creates incoherence in the country's international commitments.[43]

Developing countries may find themselves under pressure to open up key service sectors central to human development (e.g., health, environment, energy and audio-visual/cultural services) to foreign participation in FTA negotiations. While such liberalisation, if properly channelled to support development strategies, can be beneficial, it is essential that FTAs not infringe on the sovereign rights of partners to implement regulatory rules or measures that are in the public interest (TDRI 2004, 115). National objectives in these sectors should be firmly embedded in legislation before entering into negotiations. One example of the impact of negative listing is the audio-visual sector, where most countries have carved out their "cultural exception" by not making commitments in GATS. The United States has been keen to use the FTA approach to achieve an objective that has proven infeasible in the multilateral context (e.g., elimination of local content regulations on films and TV programmes). Most of the countries entering into FTAs have sought to

[43] Abidin (2004) prepared for UNDP Asia Trade Initiative.

preserve their cultural identity and have made reservations in their negative lists. The recent adoption of the UN Convention on the Protection of Cultural Contents and Artistic Expression should strengthen their hand in this respect.[44] However, these reservations soon may become technologically out of date and be nullified in practice by the special provisions in the FTAs regarding electronic commerce (Bernier 2004).

Electronic commerce is an area where FTAs can be the avenue to set new rules for trade, given that internationally recognised conventions have yet to be established. The United States is seeking to consolidate in FTAs the temporary moratorium of taxes on electronic commerce transactions. Some FTAs could set the pattern for a future global framework governing such activities. Indeed, the Japan-Singapore FTA has set the protocol for e-commerce trade between the two countries. Because the United States has "bound" Mode 1 in most sectors, it already has committed to an open market for outsourcing of service activities, so not much need be sought in the FTA context.

In GATS, the negotiation of MFN commitments going beyond the standard provisions for technical experts, traders and inter-corporate transferees has proven difficult. Improved access on Mode 4 is one area where gains could be made by a poorer trading partner in an FTA by incorporating commitments with respect to sectors or occupations of its interest. Meaningful access for temporary migrants can result in real economic gains for developing- country partners in North-South FTAs – and this has the potential of inserting more balance into bilateral agreements. FTAs can provide mechanisms to permit a freer movement of persons in a wider range of categories and at different skill levels. They also can facilitate movement through special visa provisions. Importantly, FTAs should include obligations to protect foreign workers, especially women, from exploitation and abuse.

[44] See Choike Report on UNESCO Convention: www.choike.org

Often a tendency exists to confine provisions on Mode 4 to movement of business persons, not going much farther than the horizontal commitments in most countries' GATS schedules. However, this misses a major opportunity for developing countries' export of labour-intensive services to go beyond the constraints of multilateral negotiations. For example, Philippines, a major exporter of services under Mode 4 and a dependent on labour remittances, is seeking meaningful commitments from Japan, including freer access for certain specialised categories (such as nurses and caregivers). An area where FTAs can provide advantages to developing countries is in the negotiations of Mutual Recognition Agreements. GATS encourages members to enter into MRAs, and to the extent possible, permits other members to accede to such Agreements (Zarrilli 2005). FTAs can include provisions for the negotiation of MRAs in key professional service sectors, as well as for the provision of technical assistance to assist partner countries in meeting their standards. Some FTAs, such as the Australia-Thailand FTA, have set up a mechanism for the negotiation of MRAs that will subsequently be included in an Annex as concrete obligations under the Agreement. Singapore also has placed top priority on including meaningful provisions for the negotiation of MRAs in its many FTAs. In AFAS negotiations, the current focus is on a series of sectoral MRAs.[45]

[45] ACCSQ Working Group on MRAs, its role and activities towards MRAs in ASEAN. <http:/www.aseansec.org/14886>

Investment

Provisions to promote investment can constitute an important component of both South-South and North-South FTAs, but some provisions in the latter undermine WTO rights relating to the use of performance requirements and favour foreign over domestic investors.

Many investment measures that are targeted for restriction or prohibition in free trade agreements seem to have been conceived with clear human development goals in mind, such as protecting the environment or the interests of disadvantaged social and ethnic groups, reducing gender and regional inequalities, providing stable and improved employment opportunities, enhancing skills and access to technologies, and facilitating access to world markets. Measures that contribute to these goals include screening of entry of investment, limitations of control and ownership, and performance requirements (e.g., transfer of technology, export performance, employment). For example, measures that seek to limit foreign ownership and control are designed to empower people to have more control over vital economic decisions that can affect their lives. Limitations on foreign ownership also help to ensure that a robust, competitive, domestic private sector can emerge and provide the basis for sustained national development. Investment measures aimed at redressing inequities in access to opportunities include regional and sectoral investment incentives for SMEs; employment- and gender-related performance requirements; and public service obligations.

The developed countries had attempted to bring investment policy fully under multilateral trade rules by introducing the concept of trade in services and "trade-related" investment. However, this was not fully possible because the TRIMs Agreement did not establish any new obligations, leaving WTO Members free to restrict access and national treatment (except for sectors specifically committed in GATS). They also could impose a variety of performance requirements on foreign investors, including transfer of technology conditions. Through FTAs, developed

countries now seek to include those provisions they were unable to incorporate in the multilateral framework.

Developed countries have since moved to impose bilateral obligations on investment in Bilateral Investment Treaties and FTAs. The U.S. model, for instance, includes six core principles: (a) prohibition on a variety of performance requirements permitted by TRIMS and GATS; (b) the right of establishment, unless excluded in a negative list; (c) the right to expropriation compensation; (d) selection of top management; (e) assured access to investor- state arbitration; (f) the right to free transfer of all transfer related to the investment, e.g., interest, dividends, proceeds for exports, needed imports and so forth.[46] Like in TRIPS, the longstanding objective has been to set up a system under which trade sanctions can be applied legally to protect property rights. Bilateral FTAs thus include a goal that was missed in the WTO: of linking investment obligations and trade commitments. These elements are also included in BITs. However, there is no link to trade commitments or tariff protection, and this makes them easier to negotiate, because they are less prone to challenge from local businesses.

Many developing countries believe that entering into an FTA with a major developed country will result in increased investment flows, but the empirical basis for this view is unconvincing. The World Bank points out that "countries that had concluded a BIT were no more likely to receive additional FDI than were countries without such a pact" (World Bank 2005, 98 and 129). UNCTAD's World Investment Report 2003 also posits that an aggregate statistical analysis does not reveal a significant independent impact of BITs in determining FDI flows. However, a study[47] cited in the Report on the determinants of FDI in CEE found that

[46] Remarks by Randall K. Quarles, Assistant Secretary for International Affairs, U.S. Treasury Department, before the U.S. Chamber of Commerce and the Association of American Chambers of Commerce in Latin America, 5 May 2005.

[47] The study mentioned is Grosse and Trevino (2002)

"bilateral investment treaties, the degree of enterprise reform and repatriation rules tended to stimulate FDI." China and the ASEAN countries have been major recipients of FDI, despite their use of a variety of performance requirements. However, the "fear of exclusion" works well in this area, as those outside the FTAs are concerned that FDI will be concentrated in those countries that sign FTAs with the developed countries. Nobel Laureate Joseph Stiglitz has remarked, however, that for most countries, bilateral FTAs merely represent "false hopes and dreams" for a torrent of inward investment.[48]

Investment chapters of FTAs can determine the quality of the entire agreement. Granting of national treatment at the pre- and post-establishment phase would imply that foreign investment is treated no less favourably than domestic investment with respect to the establishment, acquisition, maintenance, sale or disposal of investment. The new wave of BITs in Asia is different from the previous set signed between the 1950s and 1980s.[49] The old investment treaties served a protective function against nationalisation or excessive interference in the post-colonial period. However, new investment provisions in BITs or FTAs go beyond the protective function by conferring rights of commercial value and widening the definition of investment to include any type of right or asset of economic worth, including IPRs. If countries were to liberalise pre- and post-national treatment for investment, they must put in place measures to ensure that the domestic economy and participants can benefit from a more liberalised investment regime. The inclusion of across-the-board national treatment obligations undermines the position of developing countries in GATS, where national treatment can be bargained for other reciprocal commitments.

[48] The Bangkok Post, 10 January 2005

[49] The first modern BITs in Asia were concluded by Germany with Pakistan (in 1959) and then with Malaysia, Thailand, Sri Lanka and Republic of Korea in the 1960s.

Recent FTAs in Asia that contemplate forms of investment liberalisation (pre- as well as post-establishment rights) are: Japan-Singapore, Japan-Mexico, Thailand-New Zealand, Republic of Korea-Chile and India-Singapore. From a human development angle, countries may need exceptions to national treatment provisions to meet social objectives (say, positive discrimination in favour of a disadvantaged group), and it would be unwise to surrender the policy option of affirmative action.[50]

The United States' FTAs go farther to include provisions on expropriation and mechanisms for investor-state dispute settlement. These have proved to be problematic in the NAFTA context, however, where foreign investors have successfully challenged Government activities and public policies, such as those aimed at environmental protection. As of February 2005, foreign investors have been awarded compensation in five cases (worth US$35 million), often over claims that might not have been allowed under domestic courts.[51] In Asia, according to Halle and Peterson (2005), investment treaties vary in their scope of exposure to international arbitration; while Chinese treaties tightly circumscribe external arbitration, others offer easy exit for foreign investors from the local judicial system, e.g., U.K.-Sri Lanka BIT. The important point here, nonetheless, is not so much the mechanism of international arbitration, but the scope of rights that investors enjoy.

FTAs that include compensation provisions for expropriation of investment by direct or indirect means could lead to claims against Government regulations aimed at enhancing public welfare, if they are perceived to affect an investor's profitability. While in recent disputes

[50] For example, the Thai-New Zealand FTA allows measures to treat its indigenous Maori people favourably. Earlier, during WTO negotiations on financial services in 1998, Malaysia successfully resisted requests for commitments that it deemed would undermine its national policy of favouring Bumiputra enterprises.

[51] For analysis based on 42 claims under NAFTA Chapter 11 Investor-State Cases, please see Public Citizen (2005).

(especially under NAFTA), legitimate, non-discriminatory regulations have not been interpreted as expropriation, some countries have been rightly concerned about the potential pitfalls of similar clauses: the 2003 BIT between Japan and Viet Nam, for example, makes an effort to clarify that legitimate tax measures will not constitute a form of expropriation. Another risk of such expropriation clauses is that they may lock in private delivery of goods and services, given that moves to dislodge foreign-owned private operators (say, in attempts to universalise aspects of health care) could be interpreted as a form of expropriation (Halle and Peterson 2005).

Most recent Agreements include investment as a reflection of deepening integration at the regional or bilateral level (ASEAN or Indo-Lanka CEPA). Indeed, countries seem to increasingly contemplate the inclusion of investment provisions together with services. In Asia-Pacific, except for the Trans-Pacific CEP, all new FTA agreements that include services also cover investment. In most cases, the commitments on investment have been left to future negotiations under framework FTAs, and the outcome of many such negotiations is not yet known.

Intellectual Property Rights

Provisions in FTAs that nullify the rights of developing countries under the WTO TRIPS Agreement and the Declaration on TRIPS and Public Health restrict the access of the poor to essential medicines. This is particularly grave when such provisions restrict the use of compulsory licensing and prevent parallel imports of patented products.

Conventional Intellectual Property Rights (IPR) categories include patents, copyrights, trademarks, industrial designs, layout designs of integrated circuits, and geographical indications. The basic principle behind IP protection is to award exclusive rights for exploitation of information to innovators and creative thinkers so as to give them the incentive to create and commercialise ideas, while ensuring that society as a whole benefits from the pursuit of knowledge, through public dissemination. This necessitates a balance between the commercial end of profit, moral recognition of the personality of the creator, and the human development objective of enhancing capabilities of users in societies at large. When FTAs are used to upset this balance and obtain commitments that go contrary to the thrust of current initiatives in multilateral fora that permit flexible uses of TRIPS, they undermine the rights of developing countries. Civil society groups have been particularly critical of FTAs negotiated by the United States that seek to dilute the rights of governments to issue compulsory licenses authorising companies to produce generic drugs without the patent holder's permission. They also limit the ability of poor countries that do not have the capacity to produce generic drugs to avail of imports from countries with such capacities.

Low-cost generic versions of patented drugs have been of tremendous value to poor countries for decades, especially the introduction of generic antiretroviral drugs for treating HIV/AIDS, which made antiretroviral therapy available at costs as low as US$140 per person per year compared

to about US$12,000 in industrial societies. This transformed HIV from a fatal disease into a manageable, chronic illness.[52] While new laws on product patents will not eliminate the supply of generic drugs, companies will be required to pay royalties to patent holders, which could push up prices. Because only a few countries like India and Thailand have a sophisticated generic industry in Asia-Pacific that produces cheap drugs for the large home market and export to poorer countries in Asia and Africa, any disruptions to existing supply would affect thousands of poor and diseased lives. The best response for countries facing difficult public health situations is to make use of TRIPS flexibilities and have the political will to act in the national interest by issuing compulsory licenses as and when necessary. Countries in Asia, however, have tended to underutilise TRIPS flexibilities. After the Doha Declaration on TRIPS and Public Health, only Malaysia and Indonesia have issued compulsory licenses or opt for government use to secure required medical supplies at affordable prices.[53]

It is this important policy flexibility that is under threat in bilateral FTAs (see, for example, FTAs between the United States and Singapore, Morocco and Australia).[54] When grounds for issuing compulsory licenses are restricted to national emergencies or are made conditional on other factors, such as adherence to anti-competitive laws, they unduly circumscribe the TRIPS and Public Health Declaration, which gave countries the "freedom to determine the grounds upon which such licenses are granted." Other TRIPS-plus provisions incorporated in FTAs with the United States include the prohibition of parallel imports, patent term extensions beyond the 20-year limit in TRIPS Agreements, and prevention of the use of clinical trial data by generic producers. The lack of respect for human life implied by these provisions has attracted severe

[52] Briefing Note on "Trade Regimes and HIV in Asia Pacific," by HIV/AIDS Practice Group, UNDP RCC, 2005.

[53] For specific examples from Malaysia and Indonesia, see Chee Yoke Ling (2005)

[54] Article 16.7 of US-Singapore Bilateral FTA

criticism not only in ongoing FTA negotiations, but also by third countries and the U.S. Senate.[55] Recently, 16 Thai NGOs have requested the United Nations Special Rapporteur on the Right to Health to appeal to the Thai Government, including trade negotiators, to take account of their obligations under the right to health when they negotiate IPRs in trade agreements.

Stringent FTA provisions on the scope and duration of data exclusivity and the so-called "linkage" between patenting and regulatory processes also potentially pose barriers to accessing of essential medicines. There is a strong market-failure reason to regulate medicines through a registration process that checks for safety, quality and efficacy, which is distinct from a patent process, where issues of novelty, innovation and potential for industrial application are verified. But if these processes are linked and the marketing approval bodies are made to police whether drugs are under patent or not, this obstructs the market entry of cheaper generic drugs and could render the compulsory license provision redundant. Countries could thus follow the European example of de-linked processes and the placing of the onus on companies themselves to not infringe on patents. Similarly, while TRIPS Article 39.3 requires the protection of undisclosed data on new chemical entities, especially from commercial use, pressures to enforce protracted data exclusivity delay generic drug availability in markets and create patent-like monopoly even when a drug is not under a patent (MSF 2004, 2).

Although U.S. trade negotiators are bound by the Bipartisan Trade Promotion Authority Act of 2002, which on trade-related intellectual property dictates that one negotiating objective is to "reflect a standard of

[55] European nations like France, which have large pharmaceutical companies, have publicly criticised conditions imposed by the United States on developing countries on the production and use of generic antiretroviral drugs; see, for example, letter from the President of France to the 15th International Conference on AIDS, Bangkok, 2004. Massachusetts Sen. Edward M. Kennedy has also declared the U.S. Administration's IPR policies on FTAs "outrageous."

protection similar to that found in U.S. law," an analysis of characteristic provisions in FTAs with the United States has led to the observation that they are not only TRIPS-plus but often "U.S.-plus." This places a tremendous burden on weaker FTA partners in the form of added compliance costs and restricted policy options. The U.S.-Jordan FTA, for instance, noted for its brevity (only 19 pages) still devotes half the content to intellectual property issues.

Another TRIPS-plus trend pursued in FTAs by developed countries like the United States is to request the developing-country partner to accept patenting of life forms and of plant varieties, and to accede to the International Union for the Protection of New Varieties of Plants (UPOV).[56] The option provided by Article 27.3 (b) of the TRIPS Agreement is to protect plant variety through an effective *sui generis* system. This flexibility is designed to protect the interest of subsistence farmers whose livelihoods depend greatly on farm-saved seeds. The UPOV system in its current form does not allow farmers to save, exchange or sell seeds of the varieties it protects, thereby subjecting poor farmers to overt dependence on commercial breeders.

A less publicised area where TRIPS agreement could be further undermined by FTAs is in the area of geographical indications (Articles 22-24 of TRIPS). Geographical indications have the advantage of being permanent and community-owned, thus providing one of the mechanisms for the protection of some forms of traditional knowledge and culture. Some FTAs insist on a "first to file" trademark approach, which permits developed-country firms to expropriate traditional knowledge and the interests of communities by registering a trademark

[56] Countries like Singapore and Jordan that have signed FTAs with the United States have been obliged to become UPOV members; Singapore joined in June 2004 and Jordon in October 2004. For further details, see Adhikari (2005).

for products made, grown or nurtured by traditional communities.[57] In fact, attempts already have been made to exploit the reputation of well-known Asian geographical indications, such as Ceylon tea or Basmati rice, on which varietal patents were issued.[58]

[57] The King of Thailand has recently expressed concern that the Thai-U.S. FTA could usher in threats to the GI protection of his country's famous Hom Mali rice, according to The Bangkok Post, 29 June 2005.

[58] See Wagle (2004) for details on GIs; in September 1997, the Texas-based Rice Tec Inc. was awarded patent no. 5663484 on Basmati rice lines and grains by the United States Patent Office. Rice Tec had made 20 patent claims covering i) rice plants with characteristics identical to Basmati; ii) grain produced by such plant; and iii) methods of selecting rice plants based on a starch index test. Following on Indian challenge in March 2001, the USPTO rejected the main claims but approved three varietal patents to market the types of Basmati developed by Rice Tec.

Looking Forward

If one conclusion can be drawn from discussions in the preceding pages, it is that Asia is witnessing the beginnings of the twin phenomena of *deep* North-South bilateral Free Trade Agreements and *wide* South-South Regional Trade Agreements. The characteristic contents and coverage of these agreements have been described in preceding sub-sections. While it is too early to conclude what long-term development results are likely, the emerging trend offers broad guidance for countries in Asia-Pacific. In particular, the regional process in Southeast Asia, as well as the intensity of bilateral trade activity occurring there, have lessons for South Asia, where countries are signalling interest in bilateral trade agreements with extra-regional industrialised nations, even as regional integration moves forward more slowly.

In all cases, it must be remembered that the world of trade negotiations is fluid. It consists of diverse theatres and actors – at the multilateral, regional, bilateral and unilateral levels – but all initiatives underpin most countries' intention to secure meaningful political and economic roles by embracing a liberal enlargement of all forms of freedom. The unfettered exchange of goods, capital, ideas and people across borders holds tremendous promise to generate unprecedented prosperity. But the development challenge is that, in the absence of conscious national policies or fair global rules, no guarantee exists that these benefits will be equitably shared among nations and sub-groups. This challenge is most stark in trade negotiations, where the interests of narrow sectoral lobbies could exert such a concentrated influence upon governments that they offer reciprocal concessions to trading partners in sensitive areas such as services trade, intellectual property standards, and investment measures – with widespread impact.

Not all pursuers of Free Trade Agreements are driven by mercantilist motivations, however. Political considerations prevail, especially when Government leaders are eager to make a statement about their emerging clout, political alliances and identity through strategic associations with

powerful countries. While this Paper highlights the non-trade content of trade agreements, it does not judge the motivations. This is up to the national constituency to identify and articulate, and this is where the role of non-state institutions is important – to demystify the technical trappings of trade and macroeconomic policies. There is a need not only for different arms of the government to talk to each other, but also to open the debate in the media and civil society fora. Recent experiences in Asian democracies on this issue are worth emulating, not only because they help expand and deepen understanding of what different Free Trade Agreements mean for development, but because they also lend citizens' voices to negotiating processes where egregious proposals can be legitimately resisted.

While relatively advanced developing countries may have several products that can gain through preferential market access, potentially translating into greater national incomes and jobs, less developing countries must remain cautious. Even though these poorer countries may have little to gain but much to offer, they should proceed warily into asymmetric bilateral trade agreements, especially with partners not in the immediate neighbourhood. The best option for poor and small countries in the international trading system is still to expend their scarce negotiating capital in furthering regional integration efforts. At the same time, they can work to secure fair and universally acceptable multilateral rights and obligations at the WTO that discipline trade and promote development.

Appendix

The Relevant WTO Articles on Regional Integration and FTAs
[Reproduced from WTO (1999) and Schiff and Winters (2003)]

Article XXIV of GATT

4. The contracting parties … also recognise that the purpose of a customs union or of a free trade area should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories.

5. (a) with respect to a customs union … the duties and other regulations of commerce imposed at the institution … shall not on the whole be higher or more restrictive than the general incidence of the duties and regulations of commerce applicable in the constituent territories prior to the formation of such union ….

   (b) with respect to a free trade area … the duties and other regulations of commerce maintained in each of the constituent territories and applicable at the formation of such free trade area … shall not be higher or more restrictive than the corresponding duties and other regulations of commerce existing in the same constituent territories prior to the formation of the free trade area ….

   (c) any interim agreement … shall include a plan and schedule for the formation of such a customs union or of such a free trade area within a reasonable length of time.

7. (a) Any contracting party deciding to enter into a customs union or free trade area … shall promptly notify the CONTRACTING PARTIES and shall make available to them such information ....

8. (a) A customs union shall be understood to mean the substitution of a single customs territory for two or more customs territories, so that: (i) duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated with respect to … substantially all the trade in products originating in such territories ….

   (b) A free trade area shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated on substantially all the trade between the constituent territories in products originating in such territories.

9. The preferences referred to in paragraph 2 of Article I shall not be affected by the formation of a customs union or of a free trade area but may be eliminated or adjusted by means of negotiations with contracting parties affected. This procedure of negotiations with affected contracting parties shall, in particular, apply to the elimination of preferences required to conform with the provisions of paragraph 8 (a)(i) and paragraph 8 (b).

10. The CONTRACTING PARTIES may by a two-thirds majority approve proposals which do not fully comply with the requirements of paragraphs 5 to 9 inclusive, provided that such proposals lead to the formation of a customs union or a free trade area in the sense of this Article.

The Enabling Clause

(Decision on differential and more favourable treatment, reciprocity and fuller participation of developing countries)

This decision by signatories to the General Agreement on Tariffs and Trade (GATT "CONTRACTING PARTIES") in 1979 allows derogations to the most-favoured nation (non-discrimination) treatment in favour of developing countries. In particular, its paragraph 2(c) permits preferential arrangements among developing countries in goods trade. It has continued to apply as part of GATT 1994 under the WTO:

1. Notwithstanding the provisions of Article I of the General Agreement, contracting parties may accord differential and more favourable treatment to developing countries, without according such treatment to other contracting parties.

2. The provisions of paragraph 1 apply to the following: … (c) Regional or global arrangements entered into amongst less-developed contracting parties for the mutual reduction or elimination of tariffs and, in accordance with criteria or conditions which may be prescribed by the CONTRACTING PARTIES, for the mutual reduction or elimination of non-tariff measures, on products imported from one another; ….

The Uruguay Round Understanding on the Interpretation of Article XXIV of GATT 1994

2. The evaluation … of the duties and other regulations of commerce … shall … be based upon an overall assessment of weighted average tariff rates and of customs duties collected …. For this purpose, the duties and charges to be taken into consideration shall be the applied rates of duty. It is recognised that for the purpose of the overall assessment of the incidence of other regulations of commerce for which quantification and aggregation are difficult,

the examination of individual measures, regulations, products covered and trade flows affected may be required.

3. The "reasonable length of time" referred to in paragraph 5(c) of Article XXIV should exceed 10 years only in exceptional cases. In cases where Members parties to an interim agreement believe that 10 years would be insufficient, they shall provide a full explanation to the Council for Trade in Goods of the need for a longer period.

Article V of GATS

1. This Agreement shall not prevent any of its Members from being a party to or entering into an agreement liberalising trade in services between or among the parties to such an agreement, provided that such an agreement: (a) has substantial sectoral coverage, and (b) provides for the absence or elimination of substantially all discrimination, in the sense of Article XVII, between or among the parties, in the sectors covered under subparagraph (a) ….

3. (a) Where developing countries are parties to an agreement of the type referred to in paragraph 1, flexibility shall be provided for regarding the conditions set out in paragraph 1, particularly with reference to sub-paragraph (b) thereof, in accordance with the level of development of the countries concerned, both overall and in individual sectors and sub-sectors ….

4. Any agreement referred to in paragraph 1 shall be designed to facilitate trade between the parties to the agreement and shall not in respect of any Member outside the agreement raise the overall level of barriers to trade in services within the respective sectors or sub-sectors compared to the level applicable prior to such an agreement.

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