

Emergence of WTO-Plus Provisions in RTAs

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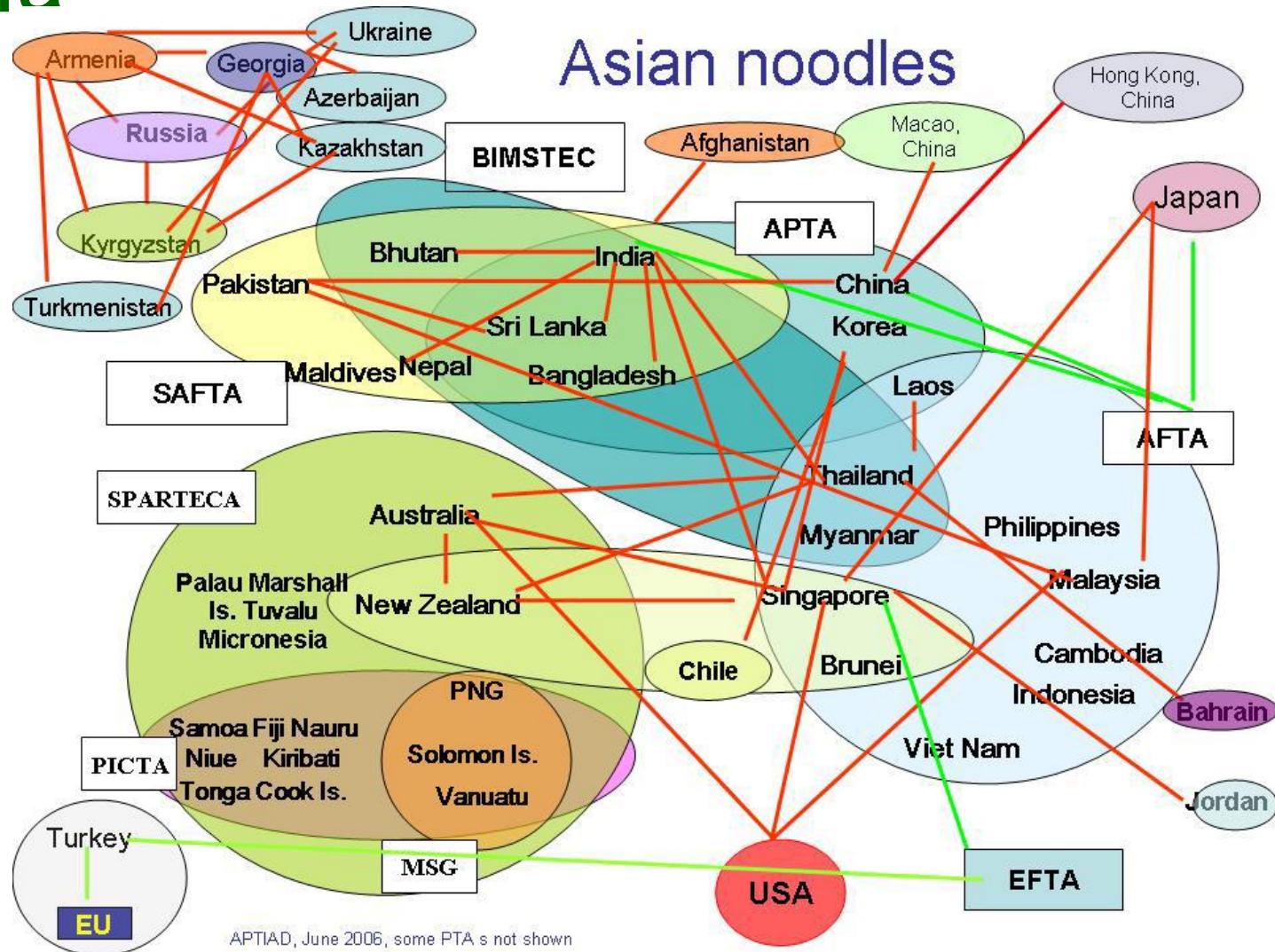
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Some Basic Facts

- WTO is a significant achievement in Multilateralism
- Regional Trade Agreements between 2 or more countries, result in fragmentation of trade;
 - **Discrimination/ less favourable treatment for non-parties to a RTA**
- Nevertheless, increasing number of RTAs is a reality:
 - **Pre WTO- 1948-1994: 124 RTAs**
 - **1994-January 2012: 511 RTAs**
- One of the key reasons- slow pace of WTO negotiations

Noodle/Spaghetti Bowl of RTAs in Asia



Legal Basis of RTAs under WTO

- **Article XXIV.5 of GATT** recognizes that preferential arrangements can be set up as a special exception, provided (a) duties and other trade regulations of commerce are reduced or removed on ***substantially all trade*** in the group, and (b) the RTA does not raise the overall level of protection vis-à-vis other WTO members.
- **Article V of GATS** provides for economic integration agreements in services, provided such an agreement has *substantial sectoral coverage*, in terms of number of sectors, volume of trade affected, and modes of supply.

What are WTO-Plus RTAs?

- Many RTAs provide rules in areas where the WTO has been silent.
- Examples include:
 - Environment
 - Labour
 - Investment
 - Competition
 - TRIPs-plus IPR provisions
 - Enhanced provisions on trade in services and movement of persons (over and above GATS)

Main issues for Developing Countries

- RTA context: Reduced bargaining power of developing countries
- US & EU have been the primary proponents of WTO-plus provisions in areas such as **Environment, Labour, IPRs, Investment**
 - These are areas on which Developing countries resisted during WTO negotiations
- Increasing focus now on Competition, Government Procurement

Focus of our Discussions

Examples of WTO-plus Provisions in RTAs in:

- Environment
- Labour
- Competition
- TRIPS-plus IPRs



Trade and Environment

Trade & Env: What are the Key Issues?

- Trade, as any other area of economic activity, has an impact on use of environmental resources
- However:
 - Should focus of trade liberalization be limited only to commercial issues- tariffs & market access?
 - Should trade policy be used as an instrument for addressing Environmental issues?
 - Should Environmental issues be addressed in separate stand-alone agreements?

Different Perspectives

Proponents of T-E Linkage:

- Free Trade lowers environmental standards;
- Firms whose main concern is to maximize profits move operations to developing countries where pollution control is inexpensive and lax- the 'pollution haven' hypothesis

Opponents of T-E Linkage

- Free trade → Economic growth, Better Income levels
- Investment in Higher Environmental Standards
- Lower env. regs do not lead to 'race to bottom'
- Trade instruments are not the first-best policy for addressing environmental problems: WTO Sectt. study

Environment Provisions under WTO Agts

- No binding obligations relating to Environment
- WTO Preamble- **Protection and Preservation of Environment**
- General Exceptions to trade obligations- Right to Measures
 - *Necessary* to protect human, animal or plant life or health
 - *Relating* to conservation of exhaustible natural resources
- Agreements on Technical Barriers to Trade (TBT) and Sanitary and Phytosanitary Measures (SPS)
- **WTO T&E Disputes:**
 - Multilateral solutions to environmental problems are preferred;
 - Unilateral measures to conserve environment outside territory possible only under very strict conditions.

Doha Declaration: Trade & Env.

- Enhance ‘mutual supportiveness’ between Trade and Environment; and Eliminate barriers to Environmental Goods and Services (EGS)
- Liberalization of trade in EGS was placed as part of the WTO’s agenda- No Agreement as yet
- Technical assistance and capacity building in the field of trade and environment for developing countries

Trade & Env.: Approaches in RTA

- Developed Country Proponents: US, EU, Canada, NZ
 - Adherence to 'high' environmental standards;
 - Enforcement of national environmental laws;
 - Sanctions for violation of environmental laws;
 - Exception: Australia
- Regional Groups of Developing countries/LDCs: MERCOSUR, ANDEAN Community, ASEAN, SAARC, CARICOM, SADC, EAC:
 - Env. provisions is NOT a part of RTAs
 - Env. Provisions in Stand-alone agreements/ MOUs.
- Major Developing Economies:
 - Brazil, India: Environmental objectives reiterated in Preamble of RTAs; no substantive obligations
 - China: Env. obligations in recent RTAs with NZ, Taipei-Panama, Singapore

Trade & Env.: Approaches in RTA

- U.S., Canadian and EU approaches represent a blend of binding obligations and non-binding principles
- Japan-Mexico: *Obliges* parties to ‘cooperate’. Nature of Cooperation Activities- open-ended
- New Zealand-Thailand: Agreement only a ‘political commitment’ and not binding on parties.
- Provisions on Technical & Financial Assistance & Capacity Building:
 - Mostly expressed as non-binding obligations.
 - No linkages between these and legally binding obligations



Trade and Labour

Trade and Labour: Conflicting Viewpoints

- Proponents:
 - Low labour standards → Lower costs of production → Unfair advantage over countries which provide for higher labour standards
- Opponents:
 - International labour standards in trade agreements is a protectionist measure in the guise of humanitarian concerns
 - Mandating unsustainably high labour standards will not improve average wages and working conditions in developing countries or even improve trade of developing countries
 - Will also not keep jobs in developed countries

WTO Secretariat Summary of Issues

- **The analytical question:** if a country has lower standards for labour rights, do its exports gain an unfair advantage? Would this force all countries to lower their standards (the “race to the bottom”)?
- **The response question:** if there is a “race to the bottom”, should countries only trade with those that have similar labour standards?
- **The question of rules:** Should WTO rules explicitly allow governments to take trade action as a means of putting pressure on other countries to comply?
- **The institutional question:** is the WTO the proper place to discuss and set rules on labour or to enforce them, including those of the ILO?

At the WTO

- No provision currently on labour standards
- WTO Ministerial Conference at Singapore in 1996 and Seattle in 1999:
 - Brazil, Egypt, India and Malaysia vehemently opposed the pressure from the developed nations to include labour standards within WTO
- Singapore Ministerial Declaration 1996:
 - Rejection of any use of labour standards for protectionist purposes, and
 - Acknowledgement of the key issue that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question under the WTO agreements.

Core Labour Standards at the ILO

- Elimination of Forced and Compulsory Labour
- Abolition of Child Labour
- Elimination of Discrimination in respect of Employment and Occupation
- Freedom of Association and Collective Bargaining

Approaches in RTAs

Two Broad Approaches:

- ***Conditional elements***: Legally enforceable provisions accompanied by incentives, sanction mechanisms as well as dialogue and monitoring.
 - **Mainly U.S. and Canada RTAs**
- ***Promotional elements***: Focus mainly on supervision and/or capacity building provisions in relation to labour.
 - **RTAs entered into by EU, and developing country RTAs: Chile, China, Philippines and Thailand**
- As of 2009, 17 RTAs with conditional provisions and 20 RTAs with promotional labour provisions.

ILO Discussion Paper of 2011 on T-L

- Impact of RTAs such as the NAFTA, which have elaborate labour provisions, has been rather limited.
- Recent RTAs (including those by developing countries such as China, Chile and MERCOSUR countries) have promotional language on labour, rather than binding provisions backed by sanctions.
- Inclusion of labour provisions in RTAs has an important function in promoting dialogue and cooperation.
- Capacity building through financial and technical support for institution building is important
- US-Chile PTA, US-CAFTA-DR: provisions on capacity building of domestic institutions, enactment of legislation



Trade and Competition

Trade and Competition

- EU, Japan and Canada proposed that competition agreement should be incorporated in WTO
- EU argued that some principles (MFN, NT, cartels etc.) should be binding and others (vertical restraint, M&A etc.) can be non-binding
- EU approach- EU model as the world standard

Trade and Competition

- U.S. opposed: Undue interference of WTO's panels and AB into activities of domestic competition authorities
- Developing countries opposed: Development policy (e.g., the creation of national champion industry etc.) will be restricted
- The Hong Kong Ministerial (2005) decided to drop it from the DDA

US Approach- A new Institution for Competition

- U.S. published the ICPAC Report which opposed introduction of competition agreement into the WTO.
- U.S. proposed, in stead, the proposal for International Competition Network (ICN), an informal forum in which Members can discuss with a view to converge competition rules.
- ICN – mainly a discussion forum- quite successful

RTAs and Competition Provisions

- **EU approach:** Commitment to Competition standards
- **US approach:** Each party decides its competition law and policy
- RTA provides for notification, exchange of information, mutual assistance in enforcement, positive and negative comity etc.

TRIPS-plus IPRs

TRIPs: Minimum Standards for IPRs

- TRIPs- A minimum standards Agreement
 - WTO Members may choose to implement laws which give more extensive protection than is required in the agreement, so long as the additional protection does not contravene the provisions of TRIPS
- Example: Article 27(3)(b)
 - Members may exclude from patentability “plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes”.
 - Protection of Plant Varieties through ‘effective *sui generis* system’

TRIPS-plus Provisions- Examples

- Grant patents on plants, plant varieties and/or animals;
- **Accede, (or commitment to accede), to the UPOV Convention for the Protection of New Plant Varieties (which is not mentioned in TRIPS)**
- Conform with "the highest international standards" of intellectual property protection, which by implication means that if there is a TRIPS-plus international standard, the contracting party would have to adhere to such agreement.
- **Data Exclusivity- beyond flexibilities of Art. 39(3)(b) of TRIPS**
- Narrower grounds for Compulsory Licensing
- **Stricter border control measures- based on 'suspicion' alone**



Discussion Points

Sovereignty Concerns

- To what extent can Trade Agreements dictate Domestic Policy choices?
- Can trade sanctions be used to shape domestic law on non-trade concerns?
- Will Developing countries have the ability to bargain for a fair position?

Recommendations for Negotiating positions in RTAs

- First instance- Oppose WTO-plus provisions in sensitive areas
- If there is a pressing requirement, then evaluate and understand implications in terms of domestic law and policy
 - Will the provisions require change of existing law and enforcement mechanisms?
 - Is such a change feasible?
 - What are the economic and political implications?

Recommendations for Negotiating positions in RTAs

- Evaluate how the RTA partner has negotiated with other countries
- Is technical and financial assistance required?
- Need for Capacity building?
- Negotiate for a phased approach
- Ensure to the extent possible, that these are non-binding provisions



Thank you!