

Negotiating trade agreements for the 21st century

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Division of International Trade and Integration

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Abstract

This paper was prepared as a stimulant to discussions at the workshop “Negotiating trade agreements for the 21st century: The case of the Trans Pacific Partnership Agreement”, organized jointly by the United Nations Economic Commission for Latin America and the Caribbean (ECLAC) and the University of Adelaide’s Institute for International Trade (IIT), with the generous financial support of the Australian Government’s Overseas Aid Program (AUSAid). The workshop, held at the ECLAC headquarters in Santiago from 26 to 28 March 2012, brought together experienced trade negotiators from Australia’s Department of Foreign Affairs and Trade (DFAT) and the eleven member countries of the Arco del Pacifico Latinoamericano group¹.

The paper reviews recent and current developments in regional trade agreements (RTAs), with a special focus on what has been happening in the Trans-Pacific Partnership (TPP) negotiations and the implications of those negotiations for other 21st Century negotiations, especially as they would pertain to negotiations between Latin American countries and those of the Asia-Pacific region. The paper focuses on a number of regulatory issues (investment, services, intellectual property, labor standards, regulatory coherence, environment, and competition policy) that feature in the agenda of modern trade negotiations. While most of the paper was written prior to the workshop, sections 6.0 (“Concluding remarks”) and 7.0 (“Issues for further research and discussion”) were written immediately after it, on the basis of discussions among participants.

¹ Colombia, Costa Rica, Chile, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, and Peru.

I. Introduction

In recent years, regional and bilateral trade agreements have played an increasingly important role in defining the norms of nations' trading relationships. These new agreements often reflect the desire of member countries to reduce transaction costs associated with the operation of global supply chains, as well as the participating governments' interest in using the new agreements to introduce and maintain important changes in governance that contribute to longer-term growth and security. Investment, competition policy and a range of other hitherto internal regulatory areas that today fall into the "WTO-Plus" category of issues are normally part of these 21st Century agreements.

Business has been very supportive of these new agreements, This is in part because they respond more adequately to the realities of 21st Century commerce than do the rules of the 20th Century multilateral trading system and also because the agreements, being negotiated and concluded between and among willing partners, have taken far less time to conclude and implement than those of the WTO system.

Increasingly, these new agreements have been inter-regional in nature. Instead of being agreements reflecting the geographic proximity of next-door neighbours, today's agreements increasingly reflect shared interests of like-minded governments seeking to further integrate into regional and global trade and investment relationships. Developing countries are key players in these new deals and in many cases we can find that the same developing countries that seem reluctant to undertake commitments on a multilateral level at the WTO are showing a willingness to go far beyond that in a regional trade agreement (RTA). At the most fundamental level this is done in the interest of developing a relationship that links their economy to other developing and developed economies that have shown the greatest potential for economic and trade growth in the early years of the new century. Developing countries in Asia and Latin America figure importantly in this trend.

A. Purpose and structure of the workshop

In the last 10 to 15 years a significant number of Latin American countries – especially those from the Arco del Pacífico group - have engaged in the negotiation of RTAs with extra-regional partners. The majority of those agreements have been concluded with developed countries, involving the adoption of ambitious commitments –often beyond the WTO’s multilateral framework- in areas such as intellectual property, investment, financial services, and labor and environmental standards. This has been especially the case of agreements negotiated with the United States.

Over the same period, a number of important changes have been taking place in the world economy. Featuring among them are the geographical fragmentation of production in global supply chains and the growing participation of emerging economies, especially in Asia, in world production, trade, and investment. These trends coexist with a continued acceleration of regionalism, as evidenced by the sustained increase in the number of RTAs across the world (see Section 3.0).

The workshop will review some of the most important regulatory issues (investment, services, intellectual property, labor standards, regulatory coherence, environment, and competition policy) that feature in the agenda of modern trade negotiations, with particular emphasis on the TPP process (see the workshop’s agenda in Annex 1). These issues have been chosen because of both their intrinsic importance in modern, “deep integration”- driven RTAs, and the profound implications their treatment in RTAs can have for the ability of national governments to conduct several public policies. The objective is to promote a dialogue about how best to address these issues, so that Arco del Pacífico member countries can maximize the benefits derived from RTAs while at the same time retaining adequate “policy space” to conduct important public policies. The ultimate goal of the workshop is therefore to improve the capacity of Arco del Pacífico negotiators to participate effectively in ongoing and future RTA negotiations.

The workshop will be structured around three broad sessions. The first will review the economic environment in which RTA negotiations take place from the viewpoint of Latin American economies, followed by a presentation on the history and state of play of the TPP process. During the second session the seven regulatory issues mentioned above will be taken up consecutively. There will be a brief presentation of each topic by a DFAT negotiator, followed by an interactive debate with Arco del Pacífico negotiators and officials from ECLAC’s Trade and Integration Division. Finally, the third session will be devoted to discussions on some cross-cutting issues.

II. The multilateral context

The Eighth WTO Ministerial Conference took place between 15 and 17 December 2011 in Geneva, Switzerland. Among the more significant outcomes of the Conference was a deal reached on 15 December by the 42 Parties to the Plurilateral Government Procurement Agreement (GPA) to improve the disciplines for this sector of the economy and expand the market access coverage valued at between 80 to 100 billion dollars a year. A number of important Observer governments to the GPA signalled their intention to join the agreement in 2012.

The Eighth WTO Ministerial Conference was the second successive “regular” and “non-negotiating” meeting of the global trade body since 2005² where discussions on the Doha Development Agenda (DDA)³ focused primarily on process and less on substance. Following a decade of negotiations since the launch in Doha in 2001, four Ministerial Conferences and countless informal mini-ministerial gatherings have failed to make significant progress on a handful of central issues that could unlock the Doha stalemate. Although the WTO Director-General frequently has argued that more than 80% of the Doha deal is done, it remains a fact that for the principal actors in the WTO the non-conclusion of the Doha Round, at least in its current form, has no negative domestic ramifications. Compared to the active and vocal involvement of business in WTO matters in the latter half of the 1990’s, such interest has all but disappeared⁴.

² Despite the frequent reference to these concepts since 2008, the Marrakesh Agreement establishing the WTO does not contain any such references.

³ It should be recalled that the DDA includes a number of work programs that do not fall under the negotiating mandates contained in the Doha Round.

⁴ It should be recalled that the DDA includes a number of work programs that do not fall under the negotiating mandates contained in the Doha Round.

It goes beyond the objective of this background paper to provide a comprehensive analysis of the substantive state-of-play in the Doha negotiations. However, a few specific observations with respect to the multilateral trade liberalization agenda are of contextual significance as we turn our attention more specifically to plurilateral trade initiatives in subsequent sections.

First, the Single Undertaking principle of GATT and WTO negotiations, whereby nothing is agreed until everything is agreed, has not only prevented any significant early harvest of key revisions to existing WTO agreements, e.g. trade facilitation, but has also led to a degree of negotiating fatigue and exasperation with a negotiating process which many believe is addressing yesterday's trade agenda. This impression has been reinforced by the exclusion from the WTO non-negotiating agenda of any discussion of issues related to competition and investment policies⁵.

Second, the on-set of the global financial crisis in 2008 combined with the absence of substantive progress on the Doha Round, led a number of WTO Members to push for a discussion about the role of the organization in the global economic crisis⁶. This systemic focus, while recognizing the centrality and contribution of multilateral rules to expose and combat protectionist policies also signalled a general acceptance among Members that, at present, the exclusive focus on the Doha Round negotiations was causing damage to the global trade body.

The above observations, although not exhaustive, provide some background on the overall state-of-play on the multilateral trade agenda, including on the current gridlock in the Doha Round⁷. More importantly, however, the above contributes, in part, to explaining the increasing pursuit of regional trade agreements (RTAs) by WTO Members. The significance of preferential trade in relation to the multilateral trading system was recognized in the Organization's World Trade Report 2011⁸ that takes an in-depth look at the evolution and nature of regional trade agreements and their coherence with WTO rules.

⁵ See Stoler (2011).

⁶ See Pedersen (2011).

⁷ Discussions at the informal meeting of trade ministers at Davos in January 2012 focused almost squarely on how to move the trade agenda forward in a piecemeal fashion as opposed to as a Single Undertaking.

⁸ See WTO (2011).

III. Motives and rationale for RTAs in general

The more than three-fold increase in RTA activity from some 70 operating agreements in 1990 to around 300 in 2010 has taken place through a combination of more and more countries taking an interest in reciprocal trade opening and a proliferation in the number of RTAs per country. All WTO Members have joined or are negotiating at least one RTA and less than half of existing agreements are not regional, in the strict sense of the word. In fact, the most recent surge in RTA negotiations has generally been characterized by their cross-regional nature. At the same time, the apparent consolidation of trade relationships resulting from, for example, the EU enlargement appears to be offset by the trend towards bilateral deals. Today, many RTAs are trans-continental in nature.

A. The political economy of RTAs

The overall motivations of governments for negotiating and entering into RTAs have been analysed extensively in the literature⁹. Similarly, the capacity of such agreements to distort and divert trade and therefore undermine the rules-based multilateral trading system has been the focus of several studies¹⁰. In these discussions, several authors have highlighted the potential of RTAs to i) increase the costs of doing business, e.g. due to complicated rules of origin; ii) facilitate protectionism; iii) produce miscellaneous ways of discrimination and exclusion; and, iv) undermine the multilateral trading system. The potential for confusion resulting from

⁹ For example, see Bhagwati and Panagariya (1996), Capling (2008), Baldwin (2006) and Baldwin and Low (2009).

¹⁰ See Baldwin (2006) and Baldwin and Low (2009).

differing and overlapping rules of origin has often been referred to as the “spaghetti bowl” effect. From the perspective of the multilateral trading system, these kinds of discrimination amongst WTO Members have led to a situation where the compatibility and consistency of RTAs with WTO rules represents one of the central issues that the World Trade Report 2011 sought to address¹¹.

Economic and political science theories provide a long series of explanations for why countries pursue regional trade agreements. In the case of the former, a significant section of the literature focuses on the increase in trade between member countries, the reduction in trade with third-countries and the subsequent net welfare loss for non-members, as significant reasons for the pursuit of RTAs. However, these observations are based mainly on the effects of merchandise tariff liberalisation alone because economic modellers have not yet been able to capture the effects of more modern trade agreement changes in policy.

Other economic theory reasons for why countries form RTAs include supply chain and vertical production arrangements, economies of scale issues, ensuring against preference erosion, and increasing predictability of trade policy issues, e.g. rules of origin. The political science point of view, unsurprisingly, encompasses a range of wider political economy considerations which include security and strategic issues, the erosion of multilateralism in different spheres, investment stability, domestic lobbying and the role of power relations. Generally speaking, the above appears to be relatively more important to smaller players in world markets. As mentioned above, changes in trade relationships may help explain how a potential loss of market share for non-members of an existing RTA stimulates them to form new RTAs or join existing ones. Until relatively recently an issue such as geographical proximity had played an important role in RTA formation and enlargement. However, this seems to have diminished in importance in the recent past¹². Finally, and as alluded to in the previous section, the case may be made that a lack of progress in multilateral trade negotiations may result in governments deciding, often as a result of lobbying from exporters, to pursue trade liberalization through the creation of RTAs¹³.

B. Deep integration RTAs

Generally speaking, trade agreements that focus primarily on border measures are often defined as “shallow”. In their most basic shape, such agreements provide non-discriminatory national treatment to foreign goods and companies. So-called “deep” agreements, in contrast, go beyond the basic granting of tariff concessions and often seek to address and harmonize domestic rules and regulations affecting trade. Some “deep” agreements also establish supranational structures that regulate certain policies among the RTA partners. Shallow and deep integration are complementary processes, as the former generates a demand for governance that the latter may provide.

A significant number of RTAs have moved beyond harmonizing border measures, such as tariffs, and have integrated a number of domestic policies and regulations. These include such diverse issues as product standards, competition policies, investment rules and intellectual property rights. The negotiation of deep integration agreements has been picking up speed precisely because harmonization of certain regulations may be a prerequisite for trade in specific sectors, e.g. services, or because a common competition policy is needed for comparative advantage to materialize among RTA partners.

It is generally accepted that the complexity of twenty-first century trade among other things owes much to the increased role of international production networks, the unbundling of production stages and the outsourcing of services tasks across borders. Increased international competition means that for cross-border production networks to operate smoothly, a number of national policies need to be harmonized

¹¹ Of course, the WTO rule set contains provisions governing the creation of PTAs, but these rules are vague and have been widely disregarded by WTO Members. Clarification and strengthening of WTO disciplines on PTAs is part of the Doha Round mandate and the preliminary adoption of a new Transparency Mechanism in 2006.

¹² For a comprehensive discussion of the motives driving countries towards signing PTAs see WTO (2011), pp. 94-118.

¹³ The DFAT TPP website contains a long list of specific submissions from business associations in support of the pursuit of this regional trade liberalization initiative.

across jurisdictions. This, in turn, generates a demand for deeper integration, as negotiating market access is no longer sufficient to address distortions of unilateral policy-making. To the extent that the multilateral trading system is perceived to only address traditional issues related to reciprocal market access opening, countries may seek other ways, such as RTAs, in which to address their coordination challenges.

C. Deep integration trade-offs

Deep integration, by its very nature, can require countries to adopt common policies and regulations, or alternatively, mutual recognition approaches to regulation. In some cases, agreement might entail a certain loss of national sovereignty. In the multilateral trading system countries frequently refer to this as a loss of “policy space”.

The comprehensive theoretical and empirical frameworks and analyses available in the context of regional trade liberalization are not yet available when it comes to deep integration agreements. Beyond the basic assumption that, like shallow agreements, deep agreements will reduce the costs of trade and therefore increase trade among members, the welfare effects of closer regulatory integration are inherently more complicated to measure – particularly in deep agreements between developed and developing countries. For the latter, deep integration may have certain advantages insofar as they are able to import already road-tested international regulatory systems from the more developed partner. On the other hand, developing countries may feel pressurized to adopt regulations, e.g. on intellectual property, environment and labour standards, which are inappropriate for their level of development. This, of course, goes to the core of the issue of the potentially weaker bargaining power of developing countries vis-à-vis their advanced trading partners. Although the theory might support concerns that common policy will shift away from the interests of the less developed member, the experience of several recently concluded deep integration RTAs as well as those under negotiation may be able to enhance the empirical basis upon which such agreements are evaluated¹⁴.

This section has sought to review some of the principal motives for establishing RTAs, including the potential consequences for members and non-members. While much analytical work in the past has focused on shallow trade arrangements and their focus on market access issues, today’s regional agreements cover a wider number of issues and involve more institutional and regulatory arrangements. The consistency and compatibility of these deep integration RTAs with the multilateral trading system will continue to occupy a central place in discussions at the WTO. This is particularly so because of the stalemate in the Doha Round and the remarkable proliferation of RTAs among countries which traditionally have been among the staunchest advocates of multilateral trade liberalization. Many of these countries maintain that negotiations on deep regional integration, such as the TPP, are complementary to rather than a substitute for the process of global integration. This issue, among others, will be examined in closer detail in the following sections.

¹⁴ See Rosales and Sáez (2010).

IV. Twenty-first century regional trade agreements

The early years of the new century have seen a proliferation of new regional and bilateral trade agreements that typically cover issues reaching far beyond the current agenda of the multilateral system at the WTO. These new RTAs tend to be referred to as “WTO-Plus” agreements and apart from eliminating tariffs and other barriers on merchandise trade tend to include “top-down” services liberalisation, investment establishment and protection provisions, competition policy, consumer protection, enhanced intellectual property, labour and environment protection clauses and provisions designed to ensure regulatory coherence amongst the parties. There are many examples of such agreements that have been concluded or are under negotiation. Perhaps the most topical for our purposes is the Trans-Pacific Partnership or TPP negotiations.

A. The Trans-Pacific Partnership (TPP)

1. From Pacific-4 to TPP

The TPP was previously known as the Pacific Three Closer Economic Partnership (P3-CEP) and was launched in 2002 by Chile, Singapore and New Zealand. Brunei became a founding member in 2005, after which the trade bloc became known as the Pacific-4 (P4). The P4 was the first multi-party free trade agreement linking Asia, the Pacific and the Americas and upon entry into force in 2006 it removed most tariffs on goods traded between member countries. The P4 agreement also includes provisions on rules of origin, quarantine rules and technical barriers to trade as well as measures to open up trade in services and government procurement. The agreement promotes cooperation on customs procedures, intellectual

property issues and competition policy. P4 agreements on environment cooperation and labour cooperation create forums to promote sound policies and practices in these areas. The P4 Agreement also includes a dispute settlement mechanism with provision for an arbitral tribunal in those cases where consultations fail.

In 2009, negotiations were launched to expand the agreement beyond its original four members. The shortened Trans-Pacific Partnership (TPP) title is being used for this process. Currently, five additional countries – Australia, Malaysia, Peru, United States, and Vietnam – have been negotiating to alter and expand the original agreement. At the APEC Leaders meeting in Hawaii in mid-November 2011, Japan, Mexico and Canada expressed interest in joining the TPP negotiation and in the run-up to the March 2012 negotiating round consultations with these countries have taken place¹⁵. Other countries, such as Colombia and Korea have supposedly also indicated an interest in joining the TPP in the longer term.

Existing and prospective TPP member countries are home to more than 500 million people, i.e. one fifth of APEC's population. The nine participating economies account for US\$17.8 trillion, or just over half, of APEC's Gross Domestic Product (GDP) and are responsible for 36 per cent of total goods trade and 47 per cent of total services trade in APEC. These economies also generated 62 per cent of outward Foreign Direct Investment (FDI) and 58 per cent of inward FDI in the APEC region.

In some ways it can be argued that the TPP negotiations are new territory for trade negotiations, as they must combine existing negotiated texts (the P-4 and bilateral agreements) with new or more advanced bilateral or TPP-wide (unified) texts¹⁶. One of the challenges facing negotiators will be how to take into account the legal obligations of existing bilaterals among the nine TPP participants¹⁷.

2. TPP negotiating rounds

Since the first round in Melbourne in March 2010, a total of 11 negotiating rounds have taken place among the nine countries¹⁸. On the sidelines of the APEC meeting in Honolulu in November 2011, Leaders of the nine TPP countries agreed on the broad outlines of an agreement and instructed negotiators to map out further negotiating rounds in 2012. The first TPP negotiating round of 2012 took place in Melbourne in early March. Although the TPP countries have not fixed a set date for conclusion of the on-going negotiations, various officials have indicated that the un-official target date is now somewhere at the end of 2012¹⁹.

Work in each of the 20 negotiation groups is normally being led by the host of each negotiating round. Notwithstanding a widely shared commitment to transparency and consultation in trade policy related processes, TPP negotiators in September 2011 were asked to release the letters setting out an understanding on the handling of negotiating texts and other documents exchanged in the course of the negotiations. This confidentiality agreement is normal negotiating practice and has allowed negotiations to proceed without significant leaks²⁰.

The perceived lack of transparency surrounding the TPP talks is being criticised by civil society organizations in most of the TPP countries. Various consultative processes with stakeholders are taking place, including on issues relating to the requests by other countries to join the TPP²¹.

3. Key features of the TPP agreement under negotiation

Although the original intention of the TPP negotiators had been to conclude a deal at the APEC meeting in November 2011, this goal proved too ambitious. Nevertheless, the nine rounds of talks leading up to

¹⁵ See Washington Trade Daily 2/21/12.

¹⁶ There are now more than 175 regional trade agreements that involve Asia-Pacific. In addition, 20 new agreements are awaiting implementation and 50 others are under negotiation (Froman 2012).

¹⁷ For a Latin American perspective, see Herreros (2011).

¹⁸ <http://www.ustr.gov/tpp>.

¹⁹ See Froman (2012).

²⁰ <http://www.dfat.gov.au/fta/tpp/111221-tpp-confidentiality-letter.html>.

²¹ <http://www.dfat.gov.au/fta/tpp/index.html>.

that meeting produced a broad outline of what was labelled a “21st-century trade agreement”. In endorsing this outline the TPP Leaders and their trade ministers identified a number of defining features that will provide the basis of further negotiations. These features include:

- Comprehensive market access through the elimination of tariffs and other barriers to goods and services trade and investment.
- A genuinely regional agreement with a focus on development and facilitation of production and supply chains.
- Cross-cutting trade issues which build on existing APEC work. These include regulatory coherence, competitiveness and business facilitation, issues and challenges for SMEs, broad development-related issues to assist all TPP countries to effectively implement and realize the benefits of the agreement.
- New trade challenges with the objective of promoting trade and investment in innovative products and services, including green technologies.
- A “living” agreement principle which allows for the updating of the agreement on substance as well as membership.

The TPP is being negotiated as a single undertaking. In terms of coverage it appears that all key trade and trade-related areas are on the table, including issues covered by previous free trade agreements and new and emerging trade issues and cross-cutting issues. The outline specifically mentions the need to promote trade networks between TPP partners and singles out the increased participation of small- and medium-sized enterprises in international trade as a crucial parameter of success. Finally, there is specific recognition of the need to ensure the sensitivities and challenges faced by developing countries are taken into account.

For this purpose, the negotiating groups are working to develop the legal texts of the agreement as well as the specific market access commitments. The issues under negotiation in these groups include: competition, cooperation and capacity building, cross-border services, customs, e-commerce, environment, financial services, government procurement, intellectual property, investment, labour, dispute settlement, market access for goods, rules of origin, SPS standards, TBT issues, telecommunications, temporary entry issues, textiles and apparel and trade remedies.

This paper will not seek to outline the state of play on the substance and process for each of the above groups. Instead, the focus of the following sections will be on investment, services, intellectual property, regulatory coherence, environment and competition policy. Each of these sections will provide a brief introduction to the overall motives and rationale for pursuing negotiations in the specific area.

V. The current TPP negotiating groups

A. Investment

As a share of the total number of RTAs in operation, only around 20 percent include a separate chapter on investment protection. Similarly, less than half of these RTAs include a reference to investment protection as a general objective. This is hardly surprising given that investment is a relative new issue in the context of RTAs. The majority of RTAs signed since 2005 include an investment chapter.

The issue of investment in the context of RTAs has been analysed quite extensively in the literature over the past five years. Of course, investment provisions have been negotiated and agreed for several decades in bilateral investment treaties (BIT). The total number of such treaties reached 2750 in 2009 and in that year alone more some 82 BITs were signed, easily exceeding the number of RTAs with investment provisions notified to the WTO. Hence, BITs have clearly been and still remain an important vehicle for guaranteeing investor protection and attracting Foreign Direct Investment (FDI). As such, the inclusion of investment chapters in BITs and RTAs perform similar roles in the spread of international production networks. Historically speaking, developed economies as the largest investors tend to push for and form RTAs that include stricter regulation on investment.

It is generally accepted that an investment chapter in a RTA should include a number of key elements that address coverage, non-

discrimination, standards of treatment, investor protection, temporary movement and dispute settlement²². All of these elements are being addressed in the context of the TPP negotiations and we shall therefore provide a brief introduction to them below.

(i) Coverage

The coverage fundamentally relates to the definition of investment and the kinds of disciplines contained in the chapter. Investment may be defined in a broad and asset-based way (including FDI and portfolio investment) or the definition may be more narrow and specific, for example comprising the establishment or acquisition of a business enterprise.

(ii) Principle of non-discrimination

The principle of non-discrimination in the investment chapter of a RTA is absolutely fundamental to foreign investors. The extent of liberalization depends on how broadly investment is defined, whether the principle is applied pre- and post-establishment and the number of reservations. Reservations may be indicated either by the positive list approach, as utilized in the WTO, or by the negative list approach as envisaged by the TPP. The negative list approach is generally accepted to yield greater investment opportunities.

(iii) Standard of treatment

Investment chapters in RTAs often specify other standards of treatment of foreign investors that relate, for example, to fair and equitable treatment²³ under international law and the freedom to transfer payments abroad.

(iv) Investor protection

Generally, investment chapters include provisions guaranteeing that investors are protected or will be compensated in the event of expropriation of an investment. Free movement of capital into and out of the host country is another important guarantee found in most agreements.

(v) Liberalization of capital flows

Many of the recent RTAs provide for a complete liberalization of capital flows, and reservations allowing policy space to governments to impose capital controls for prudential reasons, or in the case of a financial crisis, have often been a contentious issue.

(vi) Temporary movement

Most RTAs provide for the temporary entry of managers and key personnel of a foreign investor. Some agreements have no restrictions on nationality when it comes to hiring of top managerial personnel.

(vii) Dispute settlement

Some RTAs provide for the State-to-State settlement of disputes whereas others allow investor-State dispute settlement.

1. TPP investment group – state-of-play

The negotiating group on investment is working towards agreement on a text that will provide substantive legal protections for investors and investments of each TPP country in the other TPP countries. This will include provisions to ensure non-discrimination, a minimum standard of treatment, rules on expropriation, and prohibitions on specified performance requirements that distort trade and investment. The US in particular is pushing for development of special provisions for financial services

²² See WTO (2011), pp.137-138, and Elsig et al. (2011).

²³ “Fair and equitable treatment” in an international investment agreement, including in RTA investment chapters, has a complex and very important interpretation in international law and includes, inter alia, the idea that an investor has the right to expect that a host country will not materially alter the business environment that existed at the time the investment was made. Many investor-state dispute settlement actions are based on claims that obligations in respect of fair and equitable treatment have not been observed.

and for rules that will reduce and ultimately eliminate foreign-equity limitations. As for the important issue of capital controls, this remains very much a live issue in the negotiations and one which has been specifically nominated for discussion in the Melbourne round.

The investment text will include provisions for expeditious, fair, and transparent investor-state dispute settlement subject to appropriate safeguards, with discussions continuing on scope and coverage. All TPP countries have submitted and exchanged revised offers and are currently evaluating the quality of these offers and the approach required to make process during the next negotiating round in Melbourne. The investment text will protect the rights of the TPP countries to regulate in the public interest. The investor-state dispute settlement provision is one of the most contentious issues within the investment negotiating group and also seems to generate considerable interest and criticism outside the group.

Among US interest groups, labour unions and consumer groups are pitted against business associations in the industrial and service sectors who are advocating strong language guaranteeing independent international arbitration and judicial proceedings for investor-State disputes. On the other hand, Australia and New Zealand, on the back of strong petitions from domestic advocacy groups have expressed reservations about an investor-state dispute settlement mechanism. In April 2011, in a wide-ranging trade policy statement, Australia raised important questions concerning investor-state dispute-resolution procedures and announced that in the future it would discontinue them in RTAs with developing countries. At this juncture a range of arbitration options are being considered in the draft investor-State dispute settlement text, including ICSID and UNCITRAL and it remains to be seen how these discussions evolve at Melbourne

2. Services

In most economies, services now account for a far greater percentage of GDP and employment than do manufacturing and primary industries. Services have also become far more “tradeable” in recent years due to changes in information and communications technologies. Increased mobility of professional services suppliers in the globalized economy has made governments and professional associations more aware of the importance of devices such as mutual recognition agreements (MRAs) that can facilitate the provision of professional services in economies other than that where the original qualifications were achieved. Changing technologies and new products in areas such as telecommunications services and financial services make it important to ensure that trade agreements addressed to services incorporate “living agreement” provisions and institutions that allow the agreement’s obligations to keep pace with technological change and contribute to regulatory coherence over time.

Services obligations are usually included in comprehensive RTAs that cover not only trade in goods, but also, for example, investment, intellectual property and competition. The linkages between policies in the investment and services spheres, e.g. in Mode 3 (commercial presence) and financial services are particularly strong. In fact, several BITs, as briefly mentioned in the previous section, cover issues related to investor rights.

RTAs on services have become a central aspect of bilateral and regional trade agreements being negotiated outside the multilateral system. While only five services agreements involving 11 Members had been notified to the WTO before 2000, some 85 additional agreements have been notified since then, and various others are under negotiation and remain to be notified. As a result, the large majority of WTO Members are involved in at least one services RTA. Although about two-thirds of the RTAs currently in force do not cover services, the majority of RTAs between developed and developing economies do contain services commitments. Since 2009 half of all notifications under GATS Article V concern agreements involving solely developing Members²⁴.

Most services RTAs have some fundamental similarity with the GATS, in terms of disciplines such as national treatment, market access, domestic regulation obligations, exceptions, definitions and scope. In some of the services rules area, e.g. safeguards and subsidies, and in areas such as domestic

²⁴ See Roy (2011), 1-18.

regulation and transparency issues, RTAs have generally not gone beyond the GATS. Contrary to the situation in GATS, many RTAs do provide for services coverage under government procurement provisions. However, when it comes to the level of access guaranteed for foreign services and services suppliers the use of a negative list²⁵ modality in around half of the notified services RTAs goes a long way toward explaining why these services commitments go further than both current GATS commitments and even than GATS offers submitted in the Doha Round²⁶.

It is natural that services commitments in RTAs should go further than those in the GATS. RTAs are supposed to aspire to totally liberalized and non-discriminatory trade in services among countries committed to economic integration while GATS commitments, like GATT tariff commitments, aspire only to set ceiling bindings at a multilateral level. Inevitably, the respective economic size of RTA partners will also play a role in the extent of the commitments²⁷.

The overall trend of significant GATS+ commitments vary significantly among regions and depending on the choice of market access modality chosen, but an important overall trend is that services RTAs have contributed towards narrowing the gap in commitment levels between developed and developing countries. At the same time, difficult sectors in the GATS context often remain so in the RTA context²⁸. This may explain why GATS+ commitments are more significant in cross border supply (mode 1) and commercial presence (mode 3) than in other modes.

a) TPP services group – state-of-play

In the TPP several negotiation groups deal with services. In the context of cross-border supply, TPP partners have agreed on most of the core elements of the text. This consensus includes provisions aimed at securing fair, open, and transparent markets for services trade, including services supplied electronically. The agreement also includes provisions preserving the right of governments to regulate in the public interest. As in the case of investment, all TPP countries have exchanged revised offers and are in the process of preparing for the next negotiating round in Melbourne.

In the negotiating group on financial services, the current text related to investment in financial institutions and cross-border trade in financial services aims to improve transparency, non-discrimination, fair treatment of new financial services and investment protections. The negotiating parties are discussing the financial services chapter being subject to the general state-state dispute settlement provisions, with some modifications. There are also a number of proposals in the financial services chapter relating to investor-state dispute settlement.

The current text in the negotiating group on telecommunications aims to promote competitive access for telecommunications providers in TPP markets. In addition to broad agreement on the need for reasonable network access for suppliers through interconnection and access to physical facilities, TPP countries are close to consensus on a broad range of provisions enhancing the transparency of the regulatory process, and ensuring rights of appeal of decisions. Additional proposals have been put forward on choice of technology and addressing the high cost of international mobile roaming.

In the negotiating group on temporary entry, the general provisions of the text have been concluded. These have been designed to promote transparency and efficiency in the processing of applications for temporary entry, and ongoing technical cooperation between TPP authorities. Specific obligations related to individual categories of business persons are still under discussion.

²⁵ The positive-list approach means that the obligations in the agreement apply only to those services sectors listed in WTO members' schedules of commitments. The negative-list approach means that obligations in the agreement apply fully to all sectors, subject only to explicitly listed reservations. The negative list approach is both more liberalizing and more transparent than the positive list approach.

²⁶ See Roy, Marchetti and Lim (2007), 155-192.

²⁷ See WTO (2011), page 136.

²⁸ For example maritime and audio-visual services.

What seems to be a common thread in all the TPP negotiating groups dealing with services and services-related areas is the focus on providing market opening so as to benefit consumers and businesses regulations and to ensure greater transparency in the regulatory regime covering trade in services.

3. Intellectual property

Although the WTR 2011 does not include a separate section on intellectual property provisions, the study does observe that comprehensive RTAs that cover not only trade in goods, but also, for example, investment, services, TBTs and competition, generally also include provisions on intellectual property (IP). In fact, as noted previously, deep integration processes are the result of pressures to harmonize divergent national practices and the rule of law that transcend national borders.

Although a number of significant studies and papers deal with RTAs and IP²⁹ it nevertheless seems that the assessment of the economic impact of deep integration RTAs with IP provisions requires further research. For example, it is difficult to measure the costs and benefits of adopting common policies and regulations among countries at different stages of economic development³⁰. This is an area that also relates to other issues with cross-border regulatory ramifications, e.g. competition and investment policies. In addition, an economic analysis of RTAs containing IP provisions is complicated by certain economic features of intellectual property, which require particular solutions regarding the protection of IPRs and innovation.

Similarly, a fine balance between the interest of intellectual property owners and users is also required. Achieving such balance is complex when inventors, owners and users are located in different countries. Many of these issues are analysed in a forthcoming comprehensive study by R. Valdés & R. Tavengwaoy of the WTO that assembles detailed information about IP provisions in 193 active RTAs that had been notified to the WTO by September 2010³¹.

IP is an area of RTA negotiations where especially developing countries have sought not to go beyond the WTO TRIPS obligations, and to retain policy space for the protection of IP users, specifically in public-health related issues. Several ECLAC publications have addressed the questions which arose as a result of IP coverage in RTAs negotiated by Latin American countries³².

Although IP provisions in RTAs vary considerably in terms of nature, scope and depth it is possible to classify such provisions into three broad groups, namely (i) general IP provisions, (ii) provisions related to specific IPRs and (iii) provisions of special interest for public health and the pharmaceutical sector.

Under the category of general IP provisions, RTAs will generally include something general on the commitment to IP protection, TRIPS reaffirmation, references to WIPO conventions, MFN or national treatment declarations, statements on assistance, cooperation and coordination, enforcement procedures and border measures.

Many RTAs will contain provisions related to specific IPR categories, including patents, copyright and related rights, trademarks, undisclosed information, industrial designs, geographical indications, layout designs of integrated circuits, and new plant varieties. Finally, although provisions of special interest to the public health and pharmaceuticals sector exist in some RTAs, the majority of RTAs do not mention public health. Particular pharmaceutical provisions in RTAs include, for example, patent linkage, compulsory licensing, the patenting of life forms, regulatory approval and others. Considerable focus has been on this particular part of the RTA and IP debate and the extent to which IP provisions reaffirm the WTO Agreement or seek to go beyond it.

²⁹ See for example Horn, Mavroidis and Sapir (2009), Fink (2010) and Kampf (2007).

³⁰ See for example Elsig et al. (Op.Cit).

³¹ Valdés and Tavengwaoy (2012).

³² See Díaz (2008) and Roffe and Santa Cruz (2006).

The sample of RTAs studied by Valdés et al. illustrates that the proportion of RTAs containing pharmaceutical provisions fell in the five years after the TRIPS Agreement entered into force and that RTAs with pharmaceutical provisions are as common for agreements involving only developed economies as for agreements between developed and developing countries. At the same time, the study shows that a higher proportion of RTAs involving the Americas tend to include provisions relating to pharmaceuticals. Given the position taken by its pharmaceutical industry in relation to the negotiations on public health at the WTO, it is hardly surprising that RTAs negotiated by US contain pharmaceutical provisions on patentability criteria and exclusions, data exclusivity, and patent term extensions. For example, several RTAs involving the United States contain provisions that result in longer than normal periods of market exclusivity thus delaying market entry of generic drugs and impacting access to medicines.

a) TPP intellectual property group – state-of-play

As could be expected in the area of IP, the consolidated text under consideration is characterized more by its square brackets than by its commonly agreed elements. It is generally accepted that this particular chapter of the negotiations requires intense and specific focus at the negotiations in Melbourne in March 2012.

The work of the TPP negotiating group on intellectual property has reached an agreement to reinforce and develop existing WTO TRIPS rights and obligations to ensure an effective and balanced approach to intellectual property rights among the TPP countries. To that end, a number of proposals on trademarks, geographical indications, copyright and related rights, patents, trade secrets, data required for the approval of certain regulated products, as well as intellectual property enforcement and genetic resources and traditional knowledge are under discussion. TPP countries have agreed to reflect in the text a shared commitment to the Doha Declaration on TRIPS and Public Health.

The key outstanding question in the context of the TPP and intellectual property revolves around whether and to what extent the agreement will go beyond the existing WTO rules. As with the multilateral talks at the WTO, the negotiation on intellectual property rules in the TPP is complicated by the differences among domestic constituencies in some countries as well as among TPP partners. Several TPP negotiating countries, which have already subscribed to an ambitious TRIPS+ IP chapter in a previous RTA with the US, are reluctant to go beyond these obligations in the TPP.

The most important differences are related to patents, particularly new provisions for increased data exclusivity during pharmaceutical patent terms, rules for patent extension, and other provisions that would make it considerably more difficult for generic manufacturers to quickly compete against expiring patents. In this context, it should also be noted that the US, in a number of its FTAs, has demanded language that attempts to limit FTA partners' use of the TRIPS health exceptions.

Intellectual property is also a controversial issue for other national negotiators with New Zealand tabling a paper in January 2011 that directly challenges key fundamental assumptions behind US arguments for a strong IP patent system. New Zealand has argued that overly strong protection beyond TRIPS could impede innovation in developed countries and would harm economic development in developing TPP countries. The paper also recommends that TPP negotiations not go beyond the WTO TRIPS provisions.

In the first quarter of 2011, the US submitted more detailed proposals regarding copyrights, the Internet, and geographic indicators (GIs). On the latter, the US is pushing a proposal that would expand and legally protect the use of generic names³³. On copyrights, the US is seeking the right to stop imported products that have allegedly violated a copyright holder's rights. In addition, it would limit the so-called fair-use doctrine. Finally, the US seeks to introduce a legally enforceable "secondary liability" provision that would hold Internet providers responsible for carrying copyrighted material over the Internet. This last provision is very controversial, even within the United States, where Internet companies oppose this exposure to costly lawsuits.

³³ This proposal is directly the opposite of what the EU has been pushing in the WTO since before the Doha conference in 2001.

In terms of the submissions and commentary regarding the TPP by non-governmental organizations it is clear, but hardly surprising, that the negotiations on intellectual property are proving to be controversial during the Melbourne round and beyond³⁴. Australia maintains that the objective is to develop high-quality IP standards that appropriately balance the interests of rights holders and rights users, but discussions are still ongoing. Generally speaking, most TPP countries are aware of the debate in the US and elsewhere about two bills introduced into the US Congress (the Protect Intellectual Property Act (PIPA) and the Stop Online Piracy Act (SOPA)). However, according to some observers it seems that consideration these has been postponed by the US House Judiciary Committee. It is not entirely clear if these proposed US bills will have implications for the TPP.

4. Regulatory coherence

In any trade agreement that seeks to foster deep economic integration, it is critically important that an effort is made to ensure regulatory coherence in areas that affect the behind-the-border barriers to trade among the partners to the agreement. Regulatory coherence is important in a wide range of subject areas including financial services, investment, competition policy, technical barriers to trade, intellectual property rights protection, consumer protection and recognition of professional services qualifications. Coherence can be assisted through a variety of devices that may be incorporated in a trade agreement such as harmonized rules and regulations, mutual recognition agreements and “living agreement” provisions and institutions, such as financial services working groups that seek to develop common approaches to regulating new “products” in the sector. A modern RTA that did not make a serious effort to achieve regulatory coherence would not make much of a contribution to genuine economic integration and the creation of an environment that fosters and supports modern production-sharing supply chains in the region.

a) TPP regulatory coherence – state-of-play

Earlier sections of this paper have discussed ways in which TPP negotiators are attempting to achieve regulatory coherence in investment, services and intellectual property. Coherence in regulatory approaches is also an important aspect of the TPP negotiations on environment and competition policy discussed below. In addition to those policy areas singled out for more detailed treatment in this paper, a number of other TPP negotiating groups deal with areas that would fall under the broad heading of regulatory coherence.

The negotiating Group on Rules of Origin has agreed to use the “change in tariff classification” approach to determine whether a product originates in the TPP region. All TPP countries have submitted initial proposals and discussions so far have also emphasized that the rules of origin must be objective, transparent and predictable. A number of proposals on creating a system for verification of preference claims that is simple, efficient and effective are also being discussed. Some TPP countries clearly look for the outcome on RoO as a key element to complement the level of ambition in terms of regional integration and market access.

The Negotiating Group on Sanitary and Phytosanitary Standards (SPS) has agreed to reinforce and build upon existing rights and obligations under the WTO SPS Agreement so as to enhance animal and plant health and food safety and facilitate trade among the TPP countries. It appears the SPS text will contain a series of new commitments on science, transparency, regionalization, cooperation and equivalence. A number of recent bilateral and multilateral cooperative proposals on import checks and verification are also being considered by the negotiating group.

The Negotiating Group on Technical Barriers to Trade (TBT) has agreed to reinforce and build upon existing rights and obligations under the WTO TBT Agreement so as facilitate trade among the TPP countries and assist regulators in protecting health, safety, and the environment. It seems the text will include commitments on compliance periods, conformity assessment procedures, international standards, institutional mechanisms, and transparency. The group is addressing proposals regarding

³⁴ An interesting discussion and comparison of IP discussions in ACTA and the TPP can be in Weatherall (2011).

conformity assessment procedures, regulatory cooperation, trade facilitation, transparency as well as proposals covering specific sectors.

The Horizontal Issues Negotiating Group is considering stand-alone text proposals relating to regulatory coherence which would be in addition to specific provisions in other individual chapters. It is still unclear if this text will eventually be a stand-alone chapter or part of a broader chapter covering several horizontal issues.

The proposals under consideration relate to good regulatory practices, recognising that consistent and efficient regulatory practices contribute to the business environment in an economy. The foundation for this discussion is made up of past and present work in APEC³⁵. Generally, it seems that proposals relate to the coordination of regulation making, assessing proposed or existing regulations, and transparency in these processes.

5. Environment

It is impossible to imagine a modern trade agreement that does not address some aspects of the trade and environment nexus. By law, the United States negotiators must insist on trade and environment provisions in RTAs, however, even in agreements that do not include the US, the insistence of civil society groups, an increased focus on sustainability in development and the attention given in the media to climate change, all ensure that RTAs include provisions relating to the environment. In addition, as with several other issues, the stalemate in the Doha Round, including on the issue of environment, has prompted several countries to seek the inclusion of environmental provisions in RTA negotiations.

As noted, the reasons for including provisions on environment in RTAs vary, as does the scope of these provisions. One of the primary reasons is to contribute to the overarching goal of sustainable development. Another is to ensure that there is a level playing field among parties to an agreement in terms of environmental protection and legislation. Some countries seek to include environmental cooperation provisions so as to limit the possibility of trans-border environmental spill-over effects. Some developed countries see the negotiation of a trade agreement as a unique opportunity to pursue global environmental policies and often come along armed with parliamentary mandates requiring the inclusion of environment in such an agreement³⁶. Stakeholder pressure also plays a part in explaining the inclusion of environmental considerations in RTAs.

Traditionally, developing countries have been cautious about incorporating trade and environment in RTAs for fear that high environmental standards or strong enforcement mechanisms would create new barriers to their exports. At the same time, many developing countries have not been opposed, per se, to the inclusion of environmental considerations in a trade agreement, but have still seen them as an obstacle to the rapid conclusion of an agreement. It is not surprising that while trade agreements between developed and developing countries increasingly include environmental chapters, relatively few trade agreements between developing countries do so³⁷.

In the context of relatively narrow trade agreements, environmental considerations are generally included to ensure that the new trade framework does not undermine the ability of governments to protect the environment. Deep integration RTAs, on the contrary, tend to include environmental concerns not only through fine-tuning traditional trade rules, but also through more robust approaches that seek to address specific environmental problems that trade liberalisation can create, such as potential effects on the environmental regulatory capacity of a RTA member. Product-specific issues, such as environmental labelling by developed countries which could become new trade barriers, have not yet been directly addressed in RTAs.

The most ambitious RTA agreements, from an environmental point of view, tend to include a comprehensive environmental chapter, or are accompanied by an environmental side agreement, or both,

³⁵ For example the 2005 APEC-OECD Integrated Checklist on Regulatory Reform.

³⁶ The US Trade Act of 2002 is a case in point.

³⁷ However, agreements signed by Chile with Colombia and Panama are among the exceptions.

detailing the environmental commitments or objectives of the members. In these agreements, environmental commitments are placed practically on an equal footing with trade commitments. At the other extreme are those agreements that deal with environment only in the form of exception clauses to general trade obligations under the agreement. Between these two poles is a whole range of more or less detailed approaches to environment. In addition, environmental elements typically found in many RTAs are environmental co-operation and consultation mechanisms.

a) TPP environment – state-of-play

The TPP negotiations on environment reflect the shared view that the environment text should include effective provisions on trade-related issues that would help to reinforce environmental protection in all member countries. To this end, negotiations so far have focused on developing effective institutional arrangements to oversee implementation and a specific cooperation framework for addressing capacity building needs.

Reflecting many of the issues included in a number of recent RTAs, discussions are also addressing proposals on new items, such as marine fisheries, illegal trade in wild life and plants, biodiversity, invasive alien species, and climate change.

The elimination of tariffs on environmental goods and services also features prominently in the on-going discussions.

6. Competition policy

If member countries are to enjoy the benefits of reduced barriers to trade and a non-discriminatory environment fostered through an RTA, it is critically important that steps be taken to ensure competition in the participating national markets. In GATT dispute settlement, the doctrine of reasonable expectations posits that exporters have a right to expect that the removal of a tariff or other barrier to trade should lead to increased market opportunities. Where this is not the case, perhaps due to the introduction of a new subsidy to producers, we find a situation of nullification and impairment. To deal with this issue more broadly in the context of an RTA, participants in modern agreements typically include provisions on competition policy that normally require participating national authorities to employ their own national laws and policies to maintain and enforce a competitive market. These sections of the RTA usually also provide for cooperation on consumer protection issues.

Unlike most other provisions found in a modern RTA, competition policy commitments are often voluntary in nature and the obligations in the RTA are not enforceable through dispute settlement. Part of the explanation for this is the preference of competition policy authorities for addressing bilateral cooperation on competition through positive comity agreements. Another explanation is that violations of competition law in many countries carry criminal penalties and competition authorities are reluctant to mix criminal prosecutions with trade agreements. That said, notwithstanding the lack of legal enforceability, competition policy provisions in an RTA can still lead to meaningful consultations and cooperation and should not be undervalued.

In 2004, as part of the compromise of including trade facilitation in the Doha Round, all work on competition policy ceased in the multilateral trading system. This anomaly seems all the more grotesque given that the 1948 Havana Charter of the International Trade Organization actually included provisions that recognized the link between trade liberalization and competition law.

The inclusion of competition rules in RTAs has been the subject of considerable research over the past few years and the WTR 2011 highlights a number of important conclusions reached in these studies³⁸. The previous discussions of investment and services highlighted how rules in these areas help reduce policy-created market distortions. The introduction of competition policies can play a significant role in the prevention of market power abuse.

³⁸ See for example Teh (2009). See also Anderson and Evenett (2006) and Silva and Álvarez (2006).

As noted above, among the principal obligations found in the competition policy chapters of RTAs are the adoption or application of competition law and closer cooperation among competition authorities of RTA partners. Mostly such cooperation is restricted to the exchange of information, notification and various consultative measures and procedures³⁹. As a result, some observers have argued that those competition provisions that appear in specific sectors may have stronger and more explicit pro-competitive effects than a general competition policy chapter⁴⁰. A significant number of RTAs with competition policy provisions have chosen to exclude these from dispute settlement, however. Nevertheless, the number competition policy provisions in RTAs have increased over time and particularly since the late 1990s⁴¹.

Much of the debate on competition policy in the multilateral trading system focused on the extent to which certain countries would export or impose their regulatory regimes to RTA partners and whether there were distinguishable trends in terms of the type of rules preferred. Some studies have looked at this phenomenon in more detail⁴² and a few overall conclusions may be drawn as to the preference of the US for the inclusion of competition provisions in certain sectoral chapters on telecoms or investment as opposed to the preference of the EU for specific competition policy chapters⁴³.

A final observation before turning the state of play in the TPP discussions on competition policy relates to the extent which such rules, applied on among RTA partners, in fact have the potential to discriminate against non-members. As mentioned previously, a significant objective of competition policy is to establish a greater degree of transparency of a regulatory regime. Such transparency will almost inevitably guarantee the non-discrimination of non RTA members.

a) TPP competition group – state-of-play

The TPP negotiating Group on competition policy has generated significant interest among business seeking to level the playing field in the RTA in terms of transparency and in terms of enforcement. There appears to be agreement that a competition text should focus on a competitive business environment and consumer protection. Significant progress has been made with respect to commitments on the establishment and maintenance of competition laws and authorities, procedural fairness in competition law enforcement, transparency, consumer protection, private rights of action and technical cooperation. The US has submitted proposals regarding State-Owned-Enterprises in the competition chapter, but these proposals have yet to be discussed in any detail by the competition group.

³⁹ Often specific anti competitive actions will be mentioned in agreements. These include concerted actions, abuse of a dominant position and state aid. Monopolies, state enterprises and undertakings with special or exclusive rights are addressed.

⁴⁰ The study by Teh (2009) shows how several PTAs include competition disciplines in the chapters on investment, services, government procurement and intellectual property. Over a quarter of the 74 PTAs in his study have provisions which address anticompetitive practices in the telecoms area. Around one-fifth of the PTAs have an intellectual property chapter preventing abuse or anti-competitive behaviour by IP rights holders.

⁴¹ WTO (2011), pages 142-145.

⁴² Solano and Sennekamp (2006).

⁴³ Ibid.

VI. Concluding remarks

The workshop held at ECLAC headquarters on 26-28 March 2012 was characterized by a sophisticated level of discussion and substantive exchange between expert presenters and participants from the Arco del Pacífico group. Invited participants commented that they felt they were now better informed on complex aspects of modern PTAs. The workshop was seen to have provided considerable “food for thought”.

It is apparent from the experience of recent years that regional integration efforts in Latin America and around the world are in a constant state of evolution. In current negotiations, such as those aimed at producing the TPP agreement, many draft provisions are considerably different from those participants agreed to in other PTAs just a few years ago.

In order to reduce the transaction costs faced by firms participating in regional or global supply chains, deeper regional integration agreements increasingly require action on behind the border measures. Prominent among these are those addressed to investment, competition policy, services regulation, regulatory coherence and intellectual property. Often modern agreements include provisions aimed at harmonizing the regulatory regimes of participant countries in the above areas. However, the inclusion of such substantive obligations on governments raises complex – and sometimes politically problematic – interactions with the public policy space governments need to preserve. A “one-size-fits-all” approach is often inappropriate, particularly in agreements including participants from both developed and developing countries.

Against the above background, the TPP negotiations appear as an especially interesting case. On the one hand, they had from the outset very ambitious goals, reflected in the concept of a “high quality, 21st century agreement”. On the other hand, the results of this process must be

acceptable to a very diverse group of countries, in terms of their development levels, institutional capacities, and political and legal systems, among other variables.

In terms of their potential eventual participation in the TPP, several “Arco” workshop participants were of the view that it is not clear that the TPP would be the best vehicle to realize their desire for increased integration with Asian economies. In this connection, several participants stressed the need to have greater clarity on two aspects of the TPP process. One is what the concept of a “high quality, 21st century agreement” entails in precise, operational terms. The other is where the likely gains from participation in the TPP would lie for Latin American countries. This second aspect is critical, as today the perceived costs appear relatively clearer in comparison. This is particularly the case with some new disciplines being negotiated –notably in intellectual property- that would explicitly go beyond the existing FTAs between Latin American countries and the United States.

Several “Arco” workshop participants felt that there would be little additional economic benefit to them from joining with the nine countries now negotiating the TPP, given that most Arco member countries already have –or will soon have- FTAs in force with their largest export market, the USA⁴⁴. Greater potential economic gains would likely come from a next phase TPP that included economies such as Japan, Korea and possibly China, although the real prospects for Chinese accession appear unclear at present. Moreover, the lack of clear procedures for interested countries to join the TPP can in itself act as an entry barrier for potentially interested Arco members, in particular the majority of them which are not members of APEC. Against this background, “Arco” workshop participants agreed that there is a need to closely monitor developments within the TPP negotiations and to reflect strategically on how best to proceed.

⁴⁴ Of the 11 Arco del Pacifico members, only one (Ecuador) has not signed an FTA with the USA. Of the remaining ten members, eight have their respective FTAs in force as of April 2012. The Colombia-USA and Panama-USA FTAs are expected to enter into force during 2012.

VII. Issues for further research and discussion

Discussions in the course of the March 2012 workshop suggest the need for further research and discussion in the following areas:

A. Investor-State Dispute Settlement (ISDS)

ISDS is clearly one of the most politically problematic features of 21st Century trade agreements. Some governments, such as that of the United States, regularly insist on the inclusion of ISDS in PTAs. Others resist ISDS either because they are concerned about its potential to engender “regulatory chill” or because they have had a bad experience with ISDS in operation. The experience of some Latin American countries (the Plurinational State of Bolivia, Ecuador and the Bolivarian Republic of Venezuela) has been so problematic that they have denounced the ICSID treaty. It would be instructive to undertake more research on the actual experience of a selected number of governments with the operation of ISDS provisions in the RTAs they have signed (as opposed to the non-RTA ICSID experience).

B. Intellectual property

Intellectual property appears today as probably the most contentious issue of the TPP agenda for Latin American countries, regardless of whether they already participate in the negotiations or are considering joining them. This stems from two elements: (i) the generalized perception that the countries from the region had to make politically and economically costly concessions in this area in the context of their existing FTAs with

the USA; and (ii) the stated goal of that country to use the TPP to further raise the level of protection of IPRs. Along with more “traditional” concerns such as the impact of a strengthened IP regime on access to generic medicines at affordable prices, the TPP has brought new issues to the fore. Among these are discussions about new disciplines restricting the ability of internet providers to post content that could be infringing copyrights. Against this background, and understanding that TPP negotiations are an ongoing process, further research would be helpful in clarifying the extent and implications of the new substantive provisions currently under discussion.

C. Provisions addressed to trade and labour standards

Many governments resist provisions in RTAs addressed to labour standards because they see these as either unacceptable interference in their internal affairs or are concerned that they could be the basis for protectionist actions in their RTA partner. In his presentation to the workshop, Pablo Lazo suggested that there had been some cases where RTA obligations had brought on positive reforms in their domestic labour markets⁴⁵. Additional research in this area would help to de-mystify governments’ experience with labour standards obligations in RTAs.

D. Overlapping RTAs

There are many instances of governments concluding several trade agreements with the same trading partners and where leaving each of the agreements in legal force creates a situation of overlapping and different obligations. Some workshop participants see this as a serious problem while others suggest that it is not problematic. Be that as it may, the issue has attracted considerable attention in the context of the TPP, due to the large number of existing agreements among its current participants (including the original P4 agreement). Two aspects of this situation could benefit from further research: (1) the extent to which different rules of origin create practical problems for traders seeking to benefit from tariff preferences; and, (2) the degree to which other overlapping obligations (for example, in respect of services and or investment) differ from one agreement to another.

E. “Living Agreement” provisions

A number of experts at the workshop stressed the importance of so-called “living agreement” provisions and institutions in 21st Century RTAs. It would be useful and instructive to undertake research into the extent to which these provisions and institutions have contributed to the development of MRAs, resolution of SPS and TBT problems and facilitated other improvements in RTAs’ operation.

F. Facilitation of value chain integration

Latin American participants in the March workshop stressed that an important consideration in their negotiation of RTAs was the extent to which such agreements would facilitate the integration of their businesses in regional value chains. Additional research could take the form of a survey of manufacturers aimed at ascertaining the provisions of trade agreements they regard as most important in reducing their transaction costs and facilitating their integration in regional value chains.

⁴⁵ Pablo Lazo is a Chilean senior negotiator on trade and labour.

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Annex

Annex 1 Agenda of the Workshop “Negotiating Trade Agreements for the 21st Century: The Case of the Trans Pacific Partnership Agreement”

Workshop “Negotiating trade agreements for the 21st century:

The case of the Trans Pacific Partnership Agreement”

Enrique V. Iglesias Auditorium, ECLAC building (Av. Dag Hammarskjold 3477, Vitacura)

Santiago de Chile, 26-28 March 2012

Monday 26 March

10:00 – 10:30 hrs. Opening remarks

- H.E. Virginia Greville, Ambassador of Australia to Chile
- Mr. Osvaldo Rosales, Director, International Trade and Integration Division, ECLAC
- Mr. Andrew Stoler, former Director, Institute for International Trade, University of Adelaide

I. Setting the scene

10:30 – 11:15 hrs. The changing environment of trade negotiations in Latin America (Presentation by Osvaldo Rosales followed by discussion)

11:15 – 11:30 hrs. Coffee break

11:30 – 12:15 hours. From the P4 to the TPP: History and state of play (Todd Mercer, DFAT)

12:15 – 13:00 hours. Discussion

13:00 – 15:00 hours. Lunch

II. Selected topics from the current negotiating agenda

15:00 – 15:40 hrs. Trade in services (Steven Deady, former trade negotiator at DFAT)

15:40 – 16:20 hrs. Discussion

16:20 – 16:40 hrs. Coffee break

16:40-17:20 hrs. Competition policy (Todd Mercer, DFAT)

17:20 – 18:00 hrs. Discussion

Tuesday 27 March

9:30 – 10:15 hrs. Investment (Cathy Raper, DFAT)

10:15 – 11:00 hrs. Discussion

11:00 – 11:20 hrs. Coffee break

11:20 – 12:00 hrs. Regulatory coherence (Todd Mercer, DFAT)
12:00 – 13:00 hrs. Discussion
13:00 – 15:00 hours. Lunch
15:00 – 15:45 hrs. Trade and Labor (Pablo Lazo, DIRECON, Chile)
15:45 – 16:30 Discussion
16:30 – 16:45 Coffee break
16:45 – 17:20 hrs. Trade and Environment (Cathy Raper, DFAT)
17:20 - 18:00 hrs. Discussion

Wednesday 28 March

9:30 – 10:15 hrs. Intellectual Property (Cathy Raper, DFAT)
10:15 – 11:00 hrs. Discussion
11:00 – 11:20 hrs. Coffee break

III. Cross-cutting issues

11:20 – 12:00 hrs. Revisiting the rationale for FTAs in Latin America (Sebastián Herreros, ECLAC)
12:00 – 13:00 Discussion
13:00 – 15:00 Lunch
15:00 – 15:45 hrs. Institutional challenges of the TPP process (Andrew Stoler, former Director, IIT)
15:45 – 16:30 Discussion
16:30 – 16:45 Coffee Break
16:45 – 18:00 hrs. Roundtable: Strategic implications of the TPP process for economic integration initiatives in Asia Pacific, Latin America and the WTO (ECLAC, IIT, DFAT)



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