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Regional trade agreements and the poverty agenda

Chin Leng Lim

[epigraph]Oh, East is East, and West is West, and never the twain shall meet

(Rudyard Kipling)¹ **[/epigraph]**

[a]INTRODUCTION

Regional trade agreements (RTAs) comprise customs unions and free trade agreements (FTAs).² The difference lies in the absence of a common customs border in the case of customs unions. Thus, countries A and B, which are FTA partners, will nonetheless impose different duties on third-country imports, while at the same time granting preferential treatment to each other. A major criticism is that all RTAs, customs unions and FTAs alike, discriminate against non-parties. In contrast, most favoured nation (MFN) treatment operates in the multilateral system to extend concessions made by any member of the World Trade Organization (WTO) to any other economy to all members.

RTAs are not, however, the only kinds of selective trading arrangement. At the height of the Cold War, the developing countries secured two temporary waivers before finally

¹ Rudyard Kipling, “The Ballad of East and West”, *Pioneer*, 2 December 1889.

² I use the term “RTA” to refer to the genus, of which customs unions and FTAs are but species.

securing a permanent GATT (General Agreement on Tariffs and Trade) decision (the so-called “Enabling Clause”³) to allow developed nations to offer better terms of trade to the developing nations than they would offer to other developed nations – i.e. preferential market access.

The developing countries had sought two conceptually distinct modifications to global trade rules – (a) non-reciprocity and (b) preferential market access. Both these concepts have become contemporary features of the trading system. But while non-reciprocity continues to be contentious in global trade policy debate and in the current Doha Round multilateral negotiations, preferential market access for developing and least developed countries (LDCs) has become a widespread, well-established feature of the global trading system.⁴ Developing country preferences comprise both those unilateral preferences granted by developed nations and, more prominently, preferences granted under the Generalised System of Preferences (GSP).⁵

This chapter takes the reader through the evolution of developing country preferences under the GSP scheme (Section 1). Section 2 then deals with how the growth of RTAs has intersected with GSP programmes, paying particular attention to the current, gradual replacement of GSP and similar programmes with FTAs and so-called “Economic Partnership Agreements” (EPAs). Examples include the replacement of US preferences granted to Latin American nations by US-style FTAs in the past decade or so (e.g. with Peru, the Central American nations, Dominican Republic, etc.), and also the replacement of European preferences for African, Caribbean and Pacific (ACP) countries by a new EPA regime – a European approach which is now being extended to the EU’s trading partners in

³ GATT B.I.S.D. (26th Supp) 203–04 (1980).

⁴ During the Uruguay Round negotiations which led to the establishment of the WTO, developing countries acceded to developed country demands for services liberalization and increased global protection for intellectual property rights in exchange for greater access to developed country textiles and agricultural markets.

⁵ See the Enabling Clause, note 3 above; and the *India – GSP* case, *European Communities – Conditions for the Granting of Preferences to Developing Countries*, WT/DS246/AB/R (4 April 2004).

Africa and Latin America. Section 3 goes on to look at how “special and differential treatment” (“S&D treatment”) for LDCs has been applied within the design of contemporary FTAs; particularly in those Asian FTAs which include a mix of more developed, developing and least developed countries. Section 4 explores how addressing poverty under the multilateral trading system fits into a larger landscape of global developmental policies. Section 5 in turn discusses how preferential access granted by rich countries to poor countries now risks erosion by the global proliferation of RTAs, while Section 6 addresses some conceptual and practical difficulties encountered in translating S&D treatment into workable principles of RTA design. In the concluding section, we ask whether preferential arrangements for poor countries, which proceed from a distinct set of assumptions about global justice, are now threatened by the growth of RTAs.

[a]1. A SHORT HISTORY OF PREFERENCES FOR POOR COUNTRIES UNDER THE GATT (1947–1994)

[b]1.1. The Rise and Fall of the MFN Clause

The multilateral trading system embraces non-discrimination between trading partners in the form of the most favoured nation (MFN) treatment (GATT Article I). Generally speaking, any trading concession given by one member nation of the GATT/WTO to another is simultaneously and unconditionally given to all the other GATT-WTO members.

The United States (US) was the architect of the GATT’s MFN rule. Although the idea of a simultaneous and unconditional grant to treaty partners of concessions made to a third nation had been a well-established feature of European economic relations by the 19th century, the idea of *worldwide* MFN treatment owes its origins to the inclusion of such MFN clauses in Cordell Hull’s pursuit of bilateral treaties with US trading partners, and subsequently the inclusion of such a clause by the US in the negotiations leading to the

creation of the GATT.⁶ Such a clause was not enthusiastically accepted by Britain and France which sought to preserve their imperial preferences instead.⁷ Subsequently, the creation of the European Economic Communities (the “EEC”) in 1957, and particularly the preferences which the EEC wished to accord to African nations (under various Association Agreements) dealt a further blow to the MFN idea. The EEC sought to characterise these special arrangements as free trade agreements within the meaning of GATT Article XXIV; some GATT members balked at the idea but the GATT membership eventually compromised, for political reasons, and agreed to grant the EEC a waiver from its MFN obligations instead.⁸

[b]1.2 The MFN Idea and What the Poor Nations Wanted

Subsequent events have been even more complex. The developing countries sought S&D treatment in the form of greater flexibilities and exceptions to their existing legal obligations under the GATT. From the 1960s onwards, their numbers also rose dramatically. The ill-fated proposal to establish an International Trade Organization after the war would have provided poor countries with preferential concessions from its inception. This idea was not thereafter reintroduced during the GATT’s 1954–5 Review Session.⁹ Instead, the focus of that Review Session turned towards the ability of poor countries to escape their GATT obligations, albeit temporarily, when confronted with balance of payment (BOP) problems instead. However, the original conditions for invoking these developing country exceptions were too stringent and the Review Session succeeded only in relaxing that stringency (GATT Articles XII and VIII.B). That period also included a relaxation of the requirement that developing countries should be required to reciprocate during negotiations, but this was only

⁶ Dam (2004).

⁷ See e.g. British Imperial Preferences, “grandfathered” or reserved under GATT Art. 1(2)–(4).

⁸ Hudec (1990): 211–14.

⁹ Hudec (1987): 26.

vaguely stated; and a slight relaxation of the requirement regarding poor countries' ability to plead the need to develop their infant industries under GATT Article XVIII was accepted.¹⁰

In other words, the developing countries were, at the time, focused on obtaining special permission to (a) derogate from their GATT obligations in the face of BOP difficulties, (b) develop their infant industries, and (c) be relieved of the need for full reciprocity during trade negotiations.

The Haberler Report of 1958 soon marked a different turn, namely, a call for developing countries to achieve greater market access instead, particularly for cotton textiles and tropical products. Thus the stance of the poorer countries turned from a defensive posture to an offensive one, characterised by the search for larger markets abroad. As has been mentioned, eventually the GATT Contracting Parties enacted the Enabling Clause, thus placing previous waivers from the stringent application of the MFN rule to developed country concessions to poor nations on a more stable legal footing.

[b]1.3 Developing Country Demands from the GATT to the WTO Era

Importantly, the Enabling Clause became the basis for a Generalised System of Preferences (GSP) for developing countries. The US wanted one, global “generalised” system, but on this the EEC and the US could not agree. This led to one European system of preferences, and another US-led worldwide system. Essentially, the system is non-obligatory. With the US GSP system, for example, preferences are granted to listed beneficiary countries in respect of specific listed products. In addition, the US system applies the concept of graduation and also that of competitive need limitations. The former serves to remove poor nations which have made progress from GSP treatment, while the latter caps the concessions made to specific

¹⁰ *Ibid.*, 26–32.

beneficiaries for specific products during each year. In the scholarly literature and in activist circles, critical attention has long been focused on the qualifications required for inclusion as a GSP beneficiary. One recurrent criticism is directed at the need on the part of developing nations to fulfil stated preconditions even though these do not always appear to be directly trade related.¹¹

In any event, GSP programmes are far from evincing a simple recognition of the moral-political demands of global redistributive justice. A similar criticism is sometimes heard in relation to other aspects of the WTO's regime for S&D treatment. For example, Part IV of the GATT is said to be largely unhelpful to poor countries and ineffective since it requires poor nations to renegotiate their commitments themselves;¹² while the requirements for exercising the BOP exception (discussed earlier) are simply too difficult to fulfil.¹³

The crux of the issue for developing countries in the context of the Doha Round of negotiations is that the Uruguay Round had delivered too little to developing country WTO members. The Uruguay Round had been based on a grand compromise. Poor countries would have better access to markets for their textiles and tropical products in exchange for granting market access to rich countries in services and for granting better protection to intellectual property.¹⁴ However, the developing country complaint has been that the promises made to the developing country nations have not been fulfilled. The current Doha Round is proving difficult precisely because it promises to rectify this imbalance which – developing countries

¹¹ UN ECOSOC, "The Realization of Economic, Social and Cultural Rights: Globalization and its impact on the Full Enjoyment of Human Rights," Preliminary Report submitted by J. Oloka-Onyango and Deepika Udagama, in accordance with Sub-Commission resolution 1999/8, E/CN.4/Sub.2/2000/13 (15 June 2000), para. 17.

¹² First, critics have pointed out that Part IV is not "obligatory" but "declaratory" in nature. See Lee (2008): 3–[redacted], 8–10, 14–16. Secondly, "non-reciprocity" has become a negotiation issue in practice. See Hoda (2001): 56 *et seq.* In short, developed countries are not legally obligated, indeed they cannot in practice be simply subjected to a legal obligation, to negotiate successfully with developing countries on the basis of less-than-full reciprocity.

¹³ For more background on how developing country participation in the GATT-WTO evolved, see Hoekman and Kostecki (2001): 385–91; Kessie (2007): 12–[redacted].

¹⁴ See also Bhala (2008): 34–5, 60–62 (on the Uruguay Round "Grand Bargain" and its subsequent "breakdown").

claim – exists within the world trading system. Sceptics say the Round, which at the time of writing is widely acknowledged to be in grave jeopardy, was doomed to failure from the outset.

Against the background of the controversies just described, the GSP system itself has become the object of litigation. Thus, in the India – GSP case,¹⁵ India’s complaint was that the European Communities (the name by which the European Union was known in the WTO until recently) should not discriminate between developing country beneficiaries, giving better treatment to some as compared to others. The preference system – so the argument went – is, after all, a “generalised” system. While the WTO panel agreed, the Appellate Body reversed the panel’s ruling on the basis that differential treatment is nonetheless allowed where such treatment is at least “rationally related” – in lawyer-speak – to the different economic, financial and developmental needs of the developing country beneficiaries. An earlier high-profile series of cases serves as a second, further example. The US and Latin American banana-exporting nations had challenged European preferences for ACP banana-producing countries and won.¹⁶ Such tensions, arising from preferences given to one set of developing country nations and not to another, are as old as the GATT itself. Indeed, it formed a reason for Latin American pressure to be put on the US in the face of EEC preferences for African nations.¹⁷

Thus the present-day proliferation of FTAs takes place against a complex background of dissatisfaction over GSP, the deadlock in the Doha negotiations and a whole host of lawsuits. Yet these trade-related debates are only a part of a much larger debate about global development – this is discussed further, below.

¹⁵ *European Communities – Conditions for the Granting of Preferences to Developing Countries*, WT/DS246/AB/R, (4 April 2004).

¹⁶ For the long-running saga of the *EC – Bananas III* dispute, see the WTO website at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds27_e.htm.

¹⁷ McCulloch (1974). Another earlier case worth mentioning in this context is Uruguay’s famous “test case” which was brought during the GATT era; for which, see further Hudec (1987): 46–7.

[a]2. COMPARING PREFERENTIAL MARKET ACCESS UNDER GSP AND FTA PROGRAMMES

What both developing country preferences and RTAs have in common is that they each form a different kind of exception to the MFN rule. However, there the similarity ends. First, the motivations for entering into an RTA and for granting developing country preferences differ. Admittedly political, strategic and other considerations may apply in the case of both, but RTAs – unlike the argument for developing country preferences – are ostensibly and legally about achieving trade liberalisation which cannot otherwise be achieved, or is not sought, multilaterally.

GATT Article XXIV imposes stringent conditions (at least on paper) on the formation of RTAs. It requires the liberalisation of substantially all the trade between the RTA partners (the General Agreement on Trade in Services (GATS) Article V has a similar requirement in the context of services trade). Thus, one of the most important preconditions for the creation of a lawful RTA is that, unlike a rich nation granting some degree of preferential access to a poor nation, the parties to an RTA must all, co-equally, liberalise substantially all the trade between them.¹⁸ While in some cases in an RTA between more than two parties what one party grants to another may be different from what it grants to the third or other members on a reciprocal basis,¹⁹ the amount of liberalisation required of *all* the parties is – broadly speaking – equally demanding in order to achieve a requisite “balance” in the negotiations.

In terms of the modalities of RTA negotiations too, reciprocity (i.e. exchanging roughly equal concessions) is what RTA negotiations are, at least in principle, all about.

¹⁸ Ironically, Japan was recently criticised in the WTO for liberalising “less” than its developing country partners in its EPAs; Crawford and Lim (2011): 391.

¹⁹ See also Lim (2009).

Businesses at home will not support a trade deal which opens up markets domestically without sufficient market access and other gains in the other RTA trading partner's markets. In this sense, RTA negotiations are often hard-fought. Here, justice is defined in terms of an equality of concessions, not the needs of the poorer partner. Recent controversy over the ratification of certain Bush era treaties in the United States has been about inadequate labour disciplines against the backdrop of severe joblessness in the United States, notwithstanding the developing country status of countries like Colombia and Panama.²⁰

Developing country preferences, on the other hand, are ostensibly based on less than full reciprocity on the part of the non-developed trading partner. The political difficulty encountered in selling such a deal to developed country, import-competing businesses is overcome in three ways. *First*, preferential access, unlike less than full reciprocity for MFN concessions, is entered into at the expense of other, third country, trading partners and their own developing country beneficiaries. Thus, in the *Bananas III* case, the US was not saying that the EC was discriminating against it, but that the EC was discriminating against other developing countries, namely, Latin American banana producers.²¹ GSP programmes are limited in what they offer developing countries and may be used selectively to enable cheaper inputs to be sourced from developing countries without making the same concession to developed country rivals. Thus, the sudden non-renewal of the US GSP scheme in late 2010 was caused by domestic competition between US producers. A US sleeping bag manufacturer had complained about the ability of an out-of-state competitor in the US to source cheaper inputs under the US GSP scheme.²²

²⁰ See e.g. Max Baucus and John Kerry, "The Colombia Trade Deal: A Different Kind of Jobs Bill", *Wall Street Journal*, 4 April 2011. For the background issues, see Editorial, "No Way to Run a Trade Policy", *New York Times*, 2 February 2011; "Republicans Blocking U.S. Plans for Trade", *International Herald Tribune*, 2 March 2011.

²¹ See Bhala (1999–2000): 843, 848–52, 968–71.

²² Editorial, "Mr. Sessions and the Need to Trade", *The Washington Post*, 12 February 2011.

Secondly, the size of the deal is different. GSP programmes grant preferential treatment not only to specific countries but also only to specific goods. Recall that RTAs would need to liberalise substantially all the trade between the parties in order to fulfil the criteria in GATT Article XXIV. A good illustration of this was the controversy in the late 1950s over the GATT Article XXIV legality of the EEC's Association Agreements with African nations due to the limited amount and scope of the EEC concessions granted to these nations. The justification for the stringent GATT requirement that "substantially all the trade" between the parties should be liberalised lies in the original view supporting GATT Article XXIV's exemption of RTAs from the application of the MFN rule, namely, that RTAs can serve as building-blocks for even wider, global trade liberalisation.

Thirdly, and most importantly, RTAs are typically justified on purely economic grounds (trade liberalisation) while GSP programmes are, at least publicly, justified on the basis that some principle of global redistributive justice demands it. In the case of GSP programmes, the animating principle involved is to provide market access for developing country exports as a means of promoting their growth and development.

There is every sign today that both the US and EU have shifted the trade relations governed under their GSP programmes towards regulation under a range of newly emerging FTAs and EPAs. The reasons for this shift differ in their exact detail. In the case of US FTAs with Latin American former GSP beneficiaries, a search for so-called "NAFTA parity" is evident, particularly against a background of fear of increased competition from Mexico. It is also a rational, long-term policy choice for the developing countries in question since beneficiary status under the US GSP system is more precarious than the enjoyment of a treaty right of access to rich country markets under an FTA. As for the EU's EPAs with ACP countries, this was prompted by external pressure in the form of an adverse WTO ruling in

the *Bananas III* case. Consequently, the EU's developing country partners now have a choice between having a "modified" GSP preference scheme or entering into an EPA with the EU.

This is not to say that FTAs cannot incorporate S&D (i.e. developing country-orientated) provisions too. China and the Southeast Asian nations have sought FTAs (e.g. the ASEAN FTA and China-ASEAN FTA) that would *complement* an investment-friendly, export-oriented policy of growth and development. As with the EU's EPAs, China and ASEAN's treaties contain S&D provisions to the extent that Cambodia, Lao PDR, Myanmar and Vietnam are allowed longer phase-in periods for trade liberalisation, and so on.²³ This is unsurprising considering the regional context of these treaties and the status of China and the more developed Southeast Asian nations themselves, generally, as developing countries.

[a]3. CAN FTAS ACCOMMODATE SPECIAL AND DIFFERENTIAL TREATMENT?

In short, FTAs can attempt to address poverty issues and they should.²⁴ The North American Free Trade Agreement (NAFTA) and the US FTAs with Latin American nations are, in a sense, instruments for addressing the developmental needs of Mexico and Latin America, in the sense that they are said, and strongly believed, to provide the best option for promoting growth through trade and investment liberalisation. The Mexican and Latin American maquiladoras are presented as an illustration of this policy perspective.

Clearly, such a viewpoint is not uncontroversial however. It faces the same objections as those which have been raised for more than a half century against the deleterious effects that trade liberalisation can have on poorer countries. Historically, the criticism goes back to Australia's GATT position in leading what was then considered to be the "developing

²³ For the ASEAN treaties, including ASEAN-China, see a negotiator's account in Chin (2010). For the EU's current approach, see Bormann et al. (2006): 118.

²⁴ For China's and Australia's proposals in this regard, see *ibid.*, 118.

country perspective”. Australia’s view was that liberalisation would freeze the existing international division of labour.²⁵ Recall also Raúl Prebisch’s arguments in favour of import substitution policies.²⁶

Since then, we have witnessed the subsequent disengagement of developing countries from those earlier perspectives, starting in the 1980s with the rise of the newly industrialised countries. The latest twist in the tale is contemporary disappointment over the actual results of the Uruguay Round on the part of developing countries, the stalemate in the Doha Development Round negotiations and the rise of the “BRIC” nations (Brazil, Russia, India and China) today.

Currently, non-US FTAs have also embraced the idea of S&D treatment within their treaty design. The EU’s EPAs with its Caribbean trading partners include longer time-frames for those partners, going beyond the bounds of the GATT-WTO’s requirement that substantially all the trade between the FTA parties should be liberalised within ten years. In 2005, the EU went further and also accepted the idea of lower liberalisation thresholds. The principal difference between an ordinary FTA and the EU’s EPAs is that while trade liberalisation remains the aim, the EU’s poorer trading partners are allowed to liberalise at a slower pace.²⁷ The same idea had been adopted even earlier in the ASEAN Free Trade Area, and in ASEAN’s subsequent FTAs with China, Korea, Japan, India, and with Australia and New Zealand.²⁸

In addition, a panoply of poverty reduction tools ranging from aid-for-trade and similar financial provisions,²⁹ as well as provisions for technical assistance and capacity-

²⁵ See Capling (2001): chapter 1.

²⁶ For the well-known report written under Prebisch’s direction, see “Industrial Exports from the Developing Countries and Preferences”, in *Towards a New Trade Policy for Development: Report of the Secretary-General of UNCTAD*, E/CONF.46/3, Part 2, Chapter II (New York: UN, 1964): 59–78.

²⁷ See Bormann et al. (2006); EU delegation website at <http://www.intereconomics.eu/downloads/getfile.php?id=473>.

²⁸ See Chin (2010).

²⁹ See e.g. Massimiliano Cali et al., “Does Aid for Trade Work for Small Vulnerable Economies?”, *Trade Negotiation Insights*, 10 (2), April 2011.

building can often operate in conjunction with RTAs and be made an integral part of the RTA itself.

[a]4. GLOBAL DEVELOPMENTAL POLICIES AT THE PRESENT TIME AND HOW THE WTO AND RTAs FEATURE

There is presently a mass of development-orientated institutions and policies. There are the Millennium Development Goals,³⁰ and – more recently – the G20’s Seoul Development Consensus.³¹

RTAs and preferential trading arrangements are situated within this rolling landscape of institutions, policies and aims. A deep difficulty which developmental institutions face (and RTAs and preferential trading arrangements put to the service of development will also, indirectly, confront) is that there has never been a single theory of development. William Easterly once described how it is that whenever a new development theory emerges, existing policies and arrangements are quickly re-organised in the search for “the Big Plan.”³²

What of these theories themselves? A long-standing view, compatible with touting RTAs as developmental tools, is the so-called “investment gap” theory. According to this

³⁰ See the Millennium Development Goals website at <http://www.un.org/millenniumgoals/>.

³¹ Seoul Summit Document: Framework for Strong, Sustainable and Balanced Growth, paras. 46–54, G20 Seoul Summit Leaders Declaration, 11–12 November 2010.

³² On the fascination with “Big Plans,” see Easterly (2006): 3–30; William Easterly, “Beware the Man with the Big Plan,” *Guardian Weekly*, 22–8 April 2005. Reviewing Jeffrey Sachs’ *The End of Poverty*, Easterly writes:

[quotation]He seems unaware that his Big Plan is strikingly similar to the ideas that inspired foreign aid in the 1950s and 60s. Just like Sachs, development planners then identified countries caught in the “poverty trap,” did an assessment of how much they would need to make a “big push” into growth, and called upon foreign aid to fill the “financing gap” between the countries’ own resources and needs. This legacy has influenced the bureaucratic approach to economic development that has been followed since – albeit with some lip service to free markets – by the World Bank, regional development banks, national aid agencies and the UN development agencies. Spending \$2.3 trillion (measured in today’s dollars) in aid over the past five decades has left most aid-intensive regions wallowing in continued stagnation; it is fair to say this approach has not been a great success.**[/quotation]**

view, poor countries are poor because they have inadequate capital to invest in supporting their growth. Thus, the growth potential of each country can be promoted by filling these gaps in the supply of capital. The theory then bifurcates. According to one branch, this is therefore the precise role of foreign aid. Institutions such as the World Bank should calculate the requisite amount, loan it, and governments will allocate it accordingly. This simple and attractive theory about how countries might escape poverty assumes an important role for government, but it does not tell us how such money ought to be used. Its failure, according to one criticism at least, has led to today's calls for debt forgiveness. An alternative branch (which, coincidentally, comes closer to the underlying aims of current-day FTAs) is to have the capital gap filled by private foreign direct investment instead; growth would be driven by export earnings, and "growth equals development".

While these distinct approaches have emerged separately over time, they can also be combined together. Recognition that "one Big Plan does not fit all" counsels their combination. On this view, aid and trade have therefore become "aid for trade".

There are yet other approaches, such as the need for technology (and thus technology transfer arrangements) to be put in place. FTA chapters on intellectual property protection impinge on such concerns. To become developed, poor countries need better access to technology, but to assure foreign direct investors who are concerned that their trade secrets and intellectual property will be protected by law, developing countries have had to abandon the technology transfer laws of a previous era and enact industrial property protection laws in their place instead.³³

Another approach is to foster education, the institutions of contract and property law, the rule of law more broadly (and human rights protection).³⁴

³³ For the example of Mexico, see McKnight and Muggenberg (1992).

³⁴ Trubek and Santos (2006): 5–9; Easterly (2006): 96–108.

When combined, these varying approaches form a mass of issues which could and do already intersect with the design of today's FTAs. As we have already seen, the primary orientation of a quintessential US-style FTA is neo-liberal and tends to emphasise trade and investment liberalisation. Insofar as developed country FTAs or EPAs tend to assume – or claim – that trade and investment are amongst the most important developmental tools around, this gives support to the not uncontroversial, secondary claim that FTAs do not neglect distributive justice concerns. But if the claim stops there, it risks the charge of ideology no different from the kinds of conditionalities which the international financial institutions imposed at the height of the widespread acceptance of the Washington Consensus.³⁵

To be fair, some FTAs do address technical assistance and capacity-building even if such assistance may be limited to getting the developing country partner to fulfil its FTA commitments.³⁶ Technical assistance and capacity-building provisions in FTAs remind us of those approaches to development which emphasise aid (as opposed to foreign direct investment), technology transfer (albeit now in the guise of technical training and assistance) and the broad role that education plays (i.e. human capacity-building) in developmental theory. As for contract and property laws, and the rule of law generally, FTA provisions on investor and investment protection accomplish much of that. FTAs can also include the establishment of legal regimes that are aimed at correcting market failures. One prime example is the common inclusion in US FTAs of competition chapters, some of which have required the enactment of generic anti-trust laws by FTA partners for the first time.³⁷

³⁵ See e.g. Einhorn (2002). See further Lim (2008a): 235–6.

³⁶ In the case of the ASEAN Free Trade Area, for example, the “Bali Framework” of the Declaration of ASEAN Concord II, Part B (ASEAN Economic Community), para. 4 states that: “The ASEAN Economic Community shall ensure that deepening and broadening integration of ASEAN shall be accompanied by technical and development cooperation in order to address the development divide and accelerate the economic integration of Cambodia, Lao PDR, Myanmar and Viet Nam through [the Initiative for ASEAN Integration] and [the Roadmap for the Integration of ASEAN] so that the benefits of ASEAN integration are shared and enable all ASEAN Member Countries to move forward in a unified manner.”

³⁷ See e.g. Naing Oo (2004).

Yet FTAs and EPAs are very different from the original idea of developing country preferences. What they seek to achieve stands in marked contrast to the earlier post-war import substitution policies of many developing countries, and both preferential trading arrangements and today's FTAs underscore a "growth through trade" policy. A crucial difference is that FTAs expect growth to be a near-automatic result of trade liberalisation. The way such RTAs are to be achieved is through the modality of reciprocal trade negotiations. In contrast, developing country preferential schemes seek out preferential trade terms on a non-reciprocal (or less than fully reciprocal) basis. It is this doctrine of "non-reciprocity" that makes up the redistributionist credentials of developing country preferential schemes, while the strict reciprocal nature of FTAs seems to push FTAs in an opposing direction and in this way risks eroding the non-reciprocal gains achieved through developing country preferential schemes.

The problem, however, is not unique to RTAs. Trade liberalisation of any sort – be it multilateral, regional or bilateral – would tend to erode preferential market access for developing countries. This is one important issue for those developing countries which do not wish to see preference erosion in the context of the current Doha Round negotiations. However, it is precisely because of the GATT's, and subsequently the WTO's record – in contrast with, for example, the international financial institutions – in fostering developing country participation in redistributionist rule-making that makes the Doha negotiations so hard fought at the present time. RTAs are seen as eroding not just developing country preferences which are granted unilaterally by developed nations, but also the multilateral system itself, which for long has presented itself as the principal forum for the renegotiating of the basic terms of global trade between the developed and the developing nations.³⁸

³⁸ On the importance of the multilateral trading system to poor countries, see Lim (2008a).

[a]5. RTAs AND THE DOHA ROUND

How then do RTAs feature in broader debate at the WTO? The following account describes the fear that RTAs are an alternative to multilateral trade liberalisation and that the replacement of multilateral with bilateral and regional trade negotiations threatens to undermine the gains in special and differential treatment which have been achieved in stages in the development and modification of global, multilateral rules over the course of several decades.

Recall that the principles that embody S&D treatment in the GATT-WTO process fall into three categories: (a) special permission or flexibility in trade rules to protect developing country markets (“permissive protection”), (b) non-reciprocity and (c) preferential market access.³⁹ Recall how the developing countries had fought for and gained preferential market access, and recognition of non-reciprocity as important principles in the multilateral trading system.

Permissive protection for poorer countries is in fact as old as the GATT’s “BOP exception”. It is nothing new. During the Uruguay Round, permissive protection shifted from the more basic idea of straightforward exemptions from the GATT rule obligations of developing members to recognition that, notwithstanding the desire to integrate the poorer countries, there should be longer transition periods before the obligations incurred by WTO members should fully apply to developing country members. This was combined with the idea of technical assistance and these “new” ideas – longer phase-ins and technical assistance

³⁹ Trachtman (2003): 11–13.

– were then interspersed across a whole spectrum of subject-specific WTO agreements emerging out of the Uruguay Round.⁴⁰

Today, permissive protection has come back to the fore. In the Doha negotiations the most prominent example of a major negotiating difference is the divide over a special safeguard mechanism (SSM) which developing countries claim is needed to deal with import surges. The problem is that the exact “price trigger” for that safeguard mechanism to come into operation has proven elusive,⁴¹ as is the list of developing country “special products” which will be exempted from tariff cuts on grounds of food security and rural development.⁴²

How the proliferation of RTAs is likely to relate to developing country concerns in the Doha Round cannot be understood independently of an appreciation of these debates in Geneva.

The Doha Round had commenced in 2001 after a failed attempt to launch a new trade round in Seattle.⁴³ As a direct result of that failure, the Round includes a commitment to address the needs and interests of developing countries. Paragraph 44 of the Doha Ministerial Declaration of 2001 stipulates the review and strengthening of all S&D treatment provisions to make them more precise, effective and operational. Here then lies the clear mandate to address the issue of poverty in the Doha negotiations.⁴⁴

While initially competition policy, investment and transparency in government procurement had been included in the Doha negotiations, these have since been dropped from the agenda – i.e. by the time of the “July 2004 Framework Package”, following the failure in Cancun the previous year to agree upon a “framework agreement”. The 2004 Framework

⁴⁰ Hoekman and Özden (2006): xxix.

⁴¹ “WTO Mini-Ministerial Ends in Collapse”, *Bridges Daily Update*, Issue 10, 30 July 2008; Wolfe (2009); cf. Ismail (2009) for a broader view of the causes of the collapse of the negotiations in 2008. See also Bhala (2008): 116 on how SSM featured in the Hong Kong Ministerial and the effort by Indonesia and the G-33 to settle the issue of a price trigger.

⁴² See e.g. Mehnaz Azmal, “Special Products and Special Safeguard Mechanism in WTO Agriculture Negotiation: In Search of a Common South Asian Position”, *CUTS International Briefing Paper*, SAFIT-II 1/2007.

⁴³ Schott (2000).

⁴⁴ WT/MIN(01)/DEC/1, 20 November 2011.

Agreement is intended to provide a basis for guiding the negotiations forward in the areas of agriculture, non-agricultural market access (NAMA), services and trade facilitation.⁴⁵

Thereafter, in 2005, the Hong Kong Ministerial Meeting had achieved incremental negotiating results.⁴⁶ Many of the outcomes were conditioned upon the successful, eventual conclusion of the Doha Round. Amongst the more notable outcomes was agreement on the elimination of agricultural subsidies by 2013, despite earlier calls for a 2010 deadline instead by the United States and developing countries. Another important result was the final declaration's call for eliminating cotton subsidies by 2006. This was especially important to the Cotton-4 countries (Burkina Faso, Benin, Mali, Chad) as well as Senegal.⁴⁷ Perhaps the most noteworthy feature of the Hong Kong outcome was the commitment to provide duty-free, quota-free (DFQF) agricultural market access to 32 of the least-developed countries by 2008, or no later than the implementation of an eventual Doha deal. This should extend DFQF treatment to around 97 per cent of products, permitting only some exceptions such as the sensitive sugar and textiles sectors in the US. Other agriculture-related outcomes included agreement on the need for disciplines on export credits and guarantees, and on state trading enterprises by April 2006 in order to meet the now-broken 2006 deadline for concluding the Doha Talks (i.e. originally, before the expiry of the US President's fast-track authority in 2007). Little progress however was made on reducing trade-distorting domestic support for farmers and agricultural tariffs generally.⁴⁸ The Hong Kong meeting also called for establishing the modalities for tariff cuts in relation to industrial goods.⁴⁹

⁴⁵ For background, see Ismail (2009): 298. *See also* the website of the Australian Department of Foreign Affairs and Trade: http://dfat.gov.au/trade/negotiations/doha_framework_package.html; Bhala (2008): 69–72.

⁴⁶ Bruce Odessey, "Agreement Reached on Incremental Advances in WTO Negotiations", *Washington File*, 19 December 2005, available at www.usinfo.org. Bhala (2008): 105–16.

⁴⁷ This concession on the part of the US follows an adverse WTO ruling in the *US – Cotton Subsidies* case; United States – Subsidies on Upland Cotton – Report of the Appellate Body, WT/DS267/AB/R, 03/03/2005.

⁴⁸ A principal obstacle here has been European agriculture's demand to exclude 8 per cent of agricultural products (designated "sensitive") from tariff cuts, Europe's high levels of domestic support

The Round suffered recurrent relapses thereafter between 2006 and 2007 before facing another massive 2008 collapse.⁵⁰ During the run-up to the 2008 “mini-Ministerial” meeting involving the countries of the G7, two draft texts on agriculture and NAMA were released (the so-called “May 19th” texts). The Indian Commerce Minister Kamal Nath pointed out that industrial countries refused to cap agricultural tariffs even at 100–150 per cent while expecting developing countries to cap agricultural tariffs at 26 per cent or below. Other issues included sensitive products in agriculture, with Canada’s insistence on protecting its dairy and poultry sectors.⁵¹ A surprising issue which was to emerge as a principal cause of the collapse of the 2008 meeting concerned SSMs – as well as the special products list which developing country nations required in exchange for cuts in agricultural tariffs. As for industrial tariffs, countries like Argentina and India objected to linkages being drawn by the developed countries between agricultural liberalisation and corresponding liberalisation in market access for (developed country) industrial goods.⁵² The then EU Trade Commissioner, Peter Mandelson, retorted that developing countries cannot expect a Doha deal if they were to arrive empty-handed.⁵³ So far as China, India, Brazil and South Africa were concerned, however, developed nations such as the US should offer more market access in industrial tariffs or elsewhere in order to gain further developing country concessions.⁵⁴ There was no movement either, and indeed no further movement since, on the Latin

payments to farmers, and the EU’s demand that tariff cuts – including cuts by developing countries – in industrial goods match agricultural tariff cuts favouring the developing countries.

⁴⁹ Odessey, *op. cit.*

⁵⁰ Ismail (2009): 579–80.

⁵¹ Another major country with concerns in this regard is Japan: “Chairs Highlight Outstanding Issues in Doha Round”, *Bridges*, 14 (2), May 2010.

⁵² Invoking the principle of non-reciprocity.

⁵³ See also “Doha Round at Crossroads”, “Work Continues on May Agriculture Draft” and “New NAMA Text Sparks Old Reactions”, *Bridges*, Year 12, No. 8, May 2008, at 1, 3 and 5, respectively.

⁵⁴ “Chairs Highlight Outstanding Issues in Doha Round”, *op. cit.*

American and the African, Caribbean and Pacific (APC) Group's concerns about preference erosion in tropical products.⁵⁵

What is noteworthy about the 2008 collapse was the fact that few had anticipated that SSM – in other words, permissive protection for the poorer nations – would become a principal issue. China, now included in the G7 group of leading countries was blamed, together with India.⁵⁶

With multilateral talks continuing to linger over such distributive justice and other concerns, how then do RTAs intersect or interact with, or affect, these concerns? One widely supposed connection already mentioned is that the proliferation of today's new FTAs is inversely related to progress in multilateral trade talks. Countries like the US and Singapore have pursued "competitive liberalisation" in order to spur or provide a fall-back plan to global trade talks – the two being not the same thing.⁵⁷ Others seek FTAs as an alternative because of other kinds of dissatisfaction. China, for example, is seeking to undo non-recognition of its market economy status through its bilateral FTAs. Hostility to the growth of RTAs therefore is at least partly related to the diminution in the importance of, or distraction from, the Doha Development Agenda and, more broadly, the WTO. Similarly, current attempts to form, in the longer term, a Free Trade Area of the Asia-Pacific creates an alternative, "Plan B" to the Doha Round.⁵⁸

Others argue that RTA partner selection could by-pass the poorest countries for these may have little to offer. Yet others point out that the problem is compounded when a

⁵⁵ Greater market access following a successful conclusion in farm talks would erode preferential trading arrangements that are currently in place. See "Work Continues on May Agriculture Draft", *op. cit.*; "Chairs Highlight Outstanding Issues in Doha Round", *op. cit.*

⁵⁶ "WTO Mini-Ministerial Ends in Collapse", *op. cit.*; see further Lim and Wang (2010); "The Trade Round that Refuses to Die", *Bridges*, Year 12, No. 4, August 2008, 1; Ismail (2009); Wolfe (2009); Blustein (2009).

⁵⁷ See Robert Zoellick, "Our Credo: Free Trade and Competition", *Wall Street Journal*, 10 July 2003; C. Fred Bergsten, "A Competitive Approach to Free Trade", *Financial Times*, 4 December 2002.

⁵⁸ Fred Bergsten, "Plan B for World Trade: Go Regional", *Financial Times*, 16 August 2006; contra Sungjoon Cho, "'Plan B' is Always Inferior to 'Plan A'", *Financial Times*, 22 August 2006. See Lim et al. (2012).

“domino effect” might mean that more countries will enter, or have entered, into RTAs simply because they have no choice.

For these reasons, there is concern that RTAs threaten developing countries’ efforts to achieve distributive justice goals in the WTO, by throwing the baby out with the bathwater. It may be closer to the truth that the baby of distributive justice is precisely what countries that wish to accelerate tariff liberalisation wish to throw out. Where the Doha Round has been stalled by the insistence of the large, rising developing nations (China, India, Brazil and South Africa) arguing that developing countries should be accommodated further, this marks a curious paradox. The more staunchly these developing countries maintain their position, the greater the incentive the developed nations have to pursue an alternative “track” of RTA liberalisation instead.

Efforts to “multilateralise” RTAs in order to curb their economic and discriminatory ill-effects do not address the distributive justice issue.⁵⁹ The aim should not be to make RTAs more multilateral, in terms simply of extending their membership, but to be more “like” the multilateral system in reflecting the concerns of the poorer nations.

[a]6. A CONCEPTUAL PROBLEM

But if RTAs were to seek to incorporate S&D treatment even more fully in their design, various conceptual difficulties which have arisen in Geneva will not simply disappear. These conceptual difficulties will make it more difficult instead to imagine the ways in which S&D treatment might feature in RTA design.

⁵⁹ See the excellent collection in Baldwin and Low (2009).

Pursuant to the mandate embodied in Paragraph 44 of the Doha Ministerial Declaration, the African and LDC group have put forward a whole host of written proposals to which there has been inadequate detailed response. In the context of the Doha negotiations, the call for a tighter definition of what constitutes a “developing country” has come to the fore. Thus far the WTO has practised “self-selection” – i.e. countries call themselves what they wish.⁶⁰ It is understandable that developed nations are uncomfortable with this for Brazil, India and China are not quite the same as other developing nations. A definition however would automatically lead to differentiation between developing country nations, and would come uncomfortably close to talk of graduating some of these self-styled developing nations. Therein lies the problem. Even without that difficulty, which nations should qualify?⁶¹

Take the example of the ASEAN-Korea FTA which contains an express S&D clause.⁶² In common with other ASEAN treaties, S&D may mean longer time-frames for liberalisation for the lesser developed ASEAN countries, lower thresholds to be met within the same period and even a tariff cut gradient which is less steep.⁶³ But the ASEAN-Korea FTA is noteworthy because, there, ASEAN is differentiated as between the more developed “ASEAN Six” nations, Cambodia, the Lao PDR, Myanmar (Burma), and Vietnam. The ASEAN-Korea deal singles out Vietnam for treatment different from both the ASEAN Six and the other three CLMV nations. The ASEAN-Australia-New Zealand FTA does the same thing. In both these cases, pressures against Vietnam to be treated differently from the (even) “less developed” nations of Cambodia, Lao PDR and Myanmar show a concerted move

⁶⁰ See also Hoekman and Kostecki (2001): 389.

⁶¹ I am grateful to Mr. Shishir Priyadarshi for impressing these points upon me.

⁶² See Article 1.3 of the Framework Agreement on Comprehensive Economic Cooperation among the Government of the Republic of Korea and the Member Countries of the Association of Southeast Asian Nations. It refers to “provision of special and differential treatment to the ASEAN Member Countries and additional flexibility to the new ASEAN Member Countries as agreed in the Joint Declaration on Comprehensive Cooperation Partnership between Korea and ASEAN and the core elements attached thereto”.

⁶³ For example, Vietnam’s gradient of tariff cuts under the China-ASEAN FTA’s “normal track” for tariff liberalisation; see Chin (2010): 223.

towards the “graduation” of Vietnam.⁶⁴ The ASEAN-India FTA goes the other way in effectively extending S&D treatment to the Philippines, a nation typically considered within ASEAN as one of the “more developed” ASEAN Six; such things being – at the end of the day – relative.

In contrast, ASEAN’s own internal FTA (the ASEAN Free Trade Area) and the China-ASEAN FTA have adopted only one differentiating criterion – i.e. between the ASEAN Six and the CLMV nations (Cambodia, the Lao PDR, Myanmar and Vietnam). Differentiation, graduation and problems with identifying FTA members for S&D treatment are therefore now a feature of FTA negotiations where, arguably, ASEAN treaty practice provides one of the closest, actual examples of a genuine intent to build S&D treatment into a regional trade agreement programme at the present time.

At the multilateral level, debate has centred on the potential use of multiple criteria (e.g. income, degree of vulnerability, land-locked nations, etc.) as opposed to a single criterion for differentiation due to the bluntness of a single criterion approach – for example, a per capita income approach. The benefit of such an approach is that there will, hopefully, be an even spread of wins and losses across developing countries. Another bold possibility is to define S&D treatment by circumstances and events - e.g. by, or partly by, the occurrence of natural disasters such as droughts, floods, etc. - thereby by-passing the need for identification of countries a priori based on contested criteria.⁶⁵

Thus, to compound the difficulty of translating S&D treatment as a multilateral concept into a workable doctrine at the level of regional trade agreements, there has been no agreement multilaterally on the framing principles and objectives of S&D treatment.

During the Uruguay Round, diverse S&D provisions came into being but there was an absence of guidance on broader framing principles and objectives. During the Cold War

⁶⁴ “ASEAN Plus One” is a phrase typically used to denote ASEAN’s treaties with countries such as China, Korea and Japan.

⁶⁵ Again, I am grateful to Mr. Priyadarshi.

GATT, developing countries did much to advance their position but no structured debate took place either about the integrating principles and unifying objectives of S&D treatment. Instead, S&D treatment as a concept has developed organically. There was a spectrum of legal devices and even a lack of consistently “hard” legal obligations. Following the Uruguay Round, S&D provisions therefore varied in depth and seriousness – compare, for example, GATT Part IV to Article 27.4 and Annex VII of the Agreement on Subsidies and Countervailing Measures.⁶⁶ Edwini Kessie has divided these provisions into five classes – those which are intended to increase trade opportunities for poor countries (e.g. the good-faith obligation in GATT Article XXXVII), those intended to safeguard their interests (e.g. Article 9.1 of the Safeguards Agreement), provisions allowing lesser obligations (e.g. under the Agreement on Agriculture), provisions allowing longer time-frames for developing countries to meet their obligations (with limited exceptions, almost all the Uruguay Round Agreements), and provisions on technical assistance (e.g. Article 9 of the Sanitary and Phytosanitary Standards Agreement).⁶⁷ This unevenness, lack of hard and precise binding obligations and, at times, the inoperative nature of the provisions is what Paragraph 44 of the Doha Ministerial Declaration is meant to remedy through mandating fresh negotiations.

At bottom, there is a fundamental difference in viewpoint about whether developing countries should enjoy the relaxation of trade obligations as a prelude to integration, or whether integration is a prerequisite for development. By the 1970s onwards and certainly by the Uruguay Round, developing countries had moved towards parity of obligations and the Single Undertaking approach in the Uruguay Round both signified this change and weakened developing countries’ past efforts to pursue S&D treatment.⁶⁸ It is here that FTAs,

⁶⁶ The operation of the former provision is well-described by Lee (2008), while the latter is described in Alex Easson, *Tax Incentives For Foreign Direct Investment* (Hague: Kluwer, 2004): 201, 204–06. *See also* the proposal by the African Group, WTO Doc. TN/CTD/W/3/Rev. 2.

⁶⁷ See the five-fold classification in Kessie (2007): 23–4.

⁶⁸ Hoekman and Kostecki (2001): 389; Kessie (2007): 21.

particularly where they are regional in scope, might have a better chance of securing agreement over basic principles.

In principle, provided agreement is possible, no international economic issue lies outside the reach of RTAs. There lies the paradox in the claim that RTAs threaten the gains made by developing countries during the Cold War GATT.

[a]CONCLUSION: ARE FTAs INCOMPATIBLE WITH GLOBAL JUSTICE CONCERNS?

Fundamentally, FTAs modify the GATT-WTO's formal notion of equality and permit discriminatory treatment as a result. According to the GATT, equality means treating the GATT member countries alike. FTAs depart from that flat rule. Unlike GSP and unilateral developed country preferences to poor countries, however, FTAs do not embrace a substantive conception of equality. In other words, FTAs are not usually premised upon the view that developing and developed countries are not similarly situated, that equality of treatment is insufficient or that formal equality of treatment will necessarily lead to equality of outcomes.⁶⁹ Instead, FTAs are based on the fact that they are a lawful form of discrimination against other third countries.⁷⁰

This is where the debate trenches closely on contemporary scholarship and debate on global distributive justice. Unlike FTAs, GSP programmes at least purport to take a cosmopolitan view of global justice. Opportunities should not depend on where one is born.⁷¹ Global equality is precisely that and disrespects the differences in equality of opportunity

⁶⁹ For further discussion, see Lim (2011).

⁷⁰ See further, for an exploration of this issue in a practical context, Lim (2008b).

⁷¹ See the essays in Carmody (2011).

created by state boundaries.⁷² Developing country preferences may be justified on the basis that they intend to produce an equality of outcomes (substantive equality); thus the differential treatment embodied in them is not “discriminatory” and is justified by the global distributive aims sought to be achieved.

As such, FTAs adopt a different conception of the world when compared with developing country preferences. Unlike the GATT-WTO, FTAs allow discrimination and selective concessions; but that is not the only difference. FTAs are also premised upon a view of equality that is based purely on formal sovereign equality as opposed to a substantive conception of equality which prizes equality of outcomes. As such, today’s FTAs risk ignoring attempts since the days of the GATT to persuade developed countries to recognise the demands of cosmopolitan justice (e.g. through GSP programmes, the principle of non-reciprocity, etc.). One solution is to have S&D treatment built into common FTA design but we have seen that some of the conceptual challenges encountered in the WTO may yet be relevant to this matter and may cause similar difficulties in the FTA design and negotiation context. FTAs, depending on their actual design, may include the best or worst elements of the multilateral regime from the viewpoint of cosmopolitan justice.

Through Part IV of the GATT and the Enabling Clause, cosmopolitan principles have long been formally, though not always effectively, built into the architecture of GATT and WTO law. Today’s FTAs are newer creatures with no special memory of that aspect of the Cold War GATT’s institutional history. In fact, FTAs are often motivated by a slow-down in global trade talks which, today, is partly caused by the current intense debate about global distributive justice. How FTA parties seek to regulate their trading relationship will therefore always depend on the perspectives and intentions of those parties themselves. This makes FTAs, especially those involving both developed and developing countries, particularly

⁷² *Ibid.*

important for the issue at hand. Theoretical studies suggest that larger, more powerful countries – including many developed country powers – enjoy greater bargaining strength in the context of actual trade negotiations. If so, larger, more developed and powerful nations are more likely to prevail over developing country perspectives in FTA negotiations where the poorer nations may lack the strength in numbers they enjoy in Geneva. This is partly what makes FTAs, EPAs and the like controversial from a developmental viewpoint.

Yet there are already signs that RTAs will need to take developing country views into account, in the same way that the multilateral system has had to do. The question is whether these RTAs do enough, or threaten the poverty agenda instead. For many, the hope is that the conclusion of the Doha Round, wherein the needs of developing countries might be taken into proper account, is the only way of resisting the diminution of developing country claims to greater global distributive justice through the proliferation of RTAs. Despite the considerable difficulties surveyed in this chapter, we should not believe that is the only possible view.

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