

## **CISDL WORKING PAPER**

### **Sustainable Development in Regional Trade and Investment Agreements: Policy Innovations in Asia?**

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Centre for International Sustainable Development Law (CISDL)  
Legal Working Paper

In cooperation with Heinrich Böll Foundation

28 June 2007



HEINRICH BÖLL FOUNDATION



# Sustainable Development in Regional Trade and Investment Agreements: Policy Innovations in Asia?<sup>1</sup>

## 1. Summary Introduction

This draft working paper analyses sustainable development in regional trade and investment agreements, focusing on the potential for policy innovation in Asia.

Recently, several ‘pure trade’ Regional Trade Agreements (RTAs) as well as RTAs with investment provisions have been negotiated in Asia. These developments present an opportunity for policy change to have an important impact. The same holds true, though to a lesser extent, for the recent negotiation of ‘pure investment’ agreements, or bilateral investment treaties (BITs). Such treaties have recently come under increased public scrutiny and critique, though if they incorporated innovations, they could also provide a space for increased participation in policy making, and for the integration of sustainable development provisions.<sup>2</sup> It is important to consider how these new treaties relate to sustainable development, what kinds of innovative mechanisms they could offer as examples for China, Pakistan and India, and how the treaty provisions actually affect (if at all) economic, social and environmental practices.

In the region, India is only just embarking on bilateral negotiations. As such India has agreed to negotiations with the European Union (EU) and the Gulf Co-operation Council and is currently exploring the possibility of negotiations with Canada and Russia. This provides an ideal opportunity to identify regional innovations, and to engage civil society in bringing proactive proposals forward. Pakistan recently changed its policy direction as well, and is currently in negotiations with several Central and South East Asian states (such as Malaysia, Thailand, Russia, Tajikistan, Singapore and Indonesia). It has also concluded an FTA with the US and with China, and is about to finalise another with Canada. The Pakistan-China FTA on trade in goods, and trade and investment, has been ratified and will enter into force in July 2007. A new China-Pakistan FTA on trade in services is currently under negotiation. Even Afghanistan has entered in to two Trade and Investment Framework Agreements with the U.S. and Pakistan to explore bilateral trade relations and has entered into a preferential trade agreement with India.

China has also become extremely active in the negotiation of trade and economic treaties. Examples include the China-ASEAN FTA and China-Thailand agricultural FTA, the China-Hong Kong Closer Economic Partnership Arrangement, China-Macao Closer Economic Partnership Arrangement, the Australia-China FTA discussions and New Zealand-China

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<sup>1</sup> This working paper shares thoughts with several of the collaborators’ previous publications. The authors wish to thank Mr. Chao Sun, Prof. Henry Gao, Prof. Bian Yongmin, Prof. Jiangyu Wang and the heads of the Asia Offices of the Boell Foundation team for their invaluable comments on earlier versions of this paper. The draft was extensively discussed during the Boell Asia Regional Meeting in April 2007 and the authors wish to thank all participants for their helpful comments and questions.

<sup>2</sup> See for example Howard Mann, Konrad von Moltke, Aaron Cosbey, Luke Eric Peterson, *IISD Model International Agreement on Investment for Sustainable Development* (Winnipeg: IISD, 2005).

FTA discussions, as well as China-India and China-Chile and China-SACU (Southern African Customs Union)<sup>3</sup> preliminary trade and investment discussions. What are the sustainability related innovations in China's trade policy and agreements, and how can these compare with regional and bilateral trade and investment treaties across Asia? For instance, can any interesting innovations be drawn from other FTAs in the region?

Not all trade and investment treaties are created equal, especially with regards civil society participation and sustainable development. Ministers in the ASEAN have identified sustainable development as an area of cooperation, though they have not converted this commitment into a tangible agreement. Some trade and investment treaties are more innovative than others, and all include provisions that could significantly impact on both democracy, and sustainability. This paper discusses these questions, focusing on the trade relations of China, India, Pakistan and South East Asia, in particular Thailand and Cambodia. Examples from other parts of Asia and regions of the world are also pertinent, and are considered where helpful to the analysis.

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<sup>3</sup> The Southern African Customs Union came into existence on 11 December 1969 with the signature of the Customs Union Agreement between South Africa, Botswana, Lesotho, Namibia and Swaziland. It entered into force on the 1st of March 1970, thereby replacing the Customs Union Agreement of 1910.

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### **3. Glossary of Acronyms**

AFP – Asian Forest Partnership

AFTA – Asian Free Trade Agreement

AJCEP -- Japan-ASEAN Comprehensive Economic Partnership

ANZCER – Australia-New Zealand Closer Economic Relations

ANZCERTA -- Australia New Zealand Closer Economic Relations Trade Agreement

APEC – Asia-Pacific Economic Cooperation

ASEAN+3 -- ASEAN plus China, Japan and South Korea

ASEAN 6 -- Brunei, Indonesia, Malaysia, the Philippines, Singapore and Thailand

ASEAN FTA - Association of South East Asian Nations Free Trade Agreement

AUSFTA -- Australia-United States Free Trade Agreement

BECC -- Border Environmental Cooperation Commission

BIMSTEC – Bay of Bengal Initiative for Multi-Sectoral Technical and Economic Cooperation

BITs – Bilateral Investment Treaties

CAFTA -- China – ASEAN Free Trade Agreement

CEPA -- Closer Economic Partnership Arrangements

COMESA – Common Market for Eastern and Southern Africa

EAFTA – East Asian Free Trade Agreement

EAS – East Asia Summit

ECAFE -- United Nations Economic Commission for Asia and the Far East

EFTA – European Free Trade Agreement

EIA – Environmental Impact Assessment

ESCAP -- Social Commission for Asia and the Pacific

FTA – Free Trade Agreement

FTAA -- Free Trade Area of the Americas

GATS – General Agreement on Trade in Services

GCC – Gulf Cooperation Council

ICSID – International Center for the Settlement of Disputes

ILO – International Labour Organization

ISCECA -- India-Singapore Comprehensive Economic Cooperation Agreement

ITTO – International Tropical Timber Organization

JMEPA -- Japan- Malaysia Economic Partnership Agreement

JPEPA -- Japan-Philippines Economic Partnership Agreement

JSEPA – Japan-Singapore Economic Partnership Agreement

MERCOSUR – Southern Common Market

NACEC -- North American Commission for Environmental Cooperation

NAALC -- North American Agreement on Labor Cooperation

NAFTA – North American Free Trade Agreement

OECD – Organization for Economic Cooperation and Development

RTA – Regional Trade Agreement

SACU – Southern African Customs Union

SAFTA – South Asia Free Trade Agreement

SAR – Special Administrative Region

TBT – Technical Barrier to Trade

TECA -- Trade and Economic Cooperation Agreement

TPSEP -- Trans-Pacific Strategic Economic Partnership (Brunei Darussalam, Chile, New Zealand and Singapore)

TRIMs – Agreement on Trade Related Investment Measures

UNCTAD – United Nations Conference on Trade and Development

USSFTA – United States Singapore Free Trade Agreement

WTO – World Trade Organization

## 4. International Economic Law: Pertinent Terms

*Substance from the Dictionary of Trade Terms*<sup>4</sup>

1. *Most-favored-nation treatment (MFN)*: This is the rule, typically enshrined in a trade agreement, that a country gives each of the trading partners with which it is concluded relevant agreements the best treatment it gives to any of them in a given product. 'Most-favoured-nation-status' is not an obligation in itself to extend any favourable treatment to another party, nor is it an obligation to negotiate for better treatment. Concomitant with national treatment, MFN makes up the principle of non-discrimination. Most-favoured-nation treatment is evident in GATT Article I, GATS Article II and TRIPS Article 4.
2. *National Treatment*: The term enunciating the principle of giving others the same treatment as one's nationals. GATT Article 3 requires that imports be treated no less favourably than the same or similar domestically-produced goods once they have passed customs (equality of competitive opportunity). GATS Article 17 and TRIPS Article 3 also deal with national treatment for services and intellectual property protection. Although it is a simple proposition, national treatment has been the cause of many disputes. In some instances, a strict interpretation of the rule may disadvantage foreign suppliers. In other scenarios, or it is difficult to distinguish between measures aimed at imported and domestic productions and quantitative restrictions aimed at foreign products alone.
3. *Distortion*: A measure, policy or practice that shifts the market price of a product above or below what it would be if the product were traded in a competitive setting. Measures causing distortion include subsidies, import restrictions and restrictive business practices.
4. *Technical Barriers to Trade (TBT)*: impediments to trade resulting from the existence of standards and conformity assessment systems. The WTO Agreement on Technical Barriers to Trade contains provisions for the harmonization, reduction and elimination of such obstructions.
5. *Commercial Presence*: Any type of business or professional establishment (judicial persons, offices, branches or subsidiaries) within a territory of a member of GATS for the purpose of providing a service.
6. *Competition law*: Laws and regulations, also known as anti-trust laws, designed to foster a competitive environment in an economy, partly through the more efficient allocation of resources. The competition laws of most countries deal with four main groups of behaviour by firms: (1) horizontal arrangements (mainly arrangements

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<sup>4</sup> The substance of the terms in the glossary is largely taken from W. Goode, *Dictionary of Trade Policy Terms*, 4<sup>th</sup> ed. (Cambridge: Cambridge University Press, 2004).

between firms to maintain and control prices; (2) vertical arrangements (i.e. exclusive dealing, resale price maintenance, geographical limitations on activities and tied dealing); (3) misuse of market power by monopolies and large firms and (4) control of mergers and acquisitions to ensure they do not impair the overall competitiveness of the market place.

7. *Article XX*: A GATT article listing allowed general exceptions to trade rules.
8. *Countervailing Duties*: Action taken by the importing country, usually in the form of increased duties to offset subsidies given to producers or exporters in the exporting country. GATT Article VI and the WTO *Agreement on Subsidies and Countervailing Measures* provide the regulatory provisions. Countervailing duties can be applied under certain restrictive conditions and subject to material injury being caused to a domestic industry.
9. *Customs Union*: An area consisting of two or more individual economies or customs territories which remove all tariffs and on occasion, broader trade impediments between them. Members apply a common external tariff (e.g. the European Union).
10. *Dispute Settlement Body (DSB)*: The WTO General Council, when it convenes meets to settle trade disputes among members. The DSB has the sole authority to establish panels, adopt panel and appellate reports, maintain surveillance of implementation of rulings and recommendations, and authorize retaliation when its recommendations are ignored.
11. *Dumping*: Occurs when goods are exported at a price less than their normal value, generally meaning they are exported for less than they are sold in the domestic market or third-country markets, or at less than production cost. Dumping and countervailing measures are regulated by GATT Article VI, which does not preclude dumping per se. Rather, the text notes that GATT parties recognize that dumping is to be sanctioned if it causes or threatens material injury to an established industry or impedes the growth of a domestic industry in the territory of another member. If enquiries in the importing country indicate that dumping is taking place and causing material injury to an industry, governments may take anti-dumping measures. *Eco-dumping* connotes the dumping of products resulting from unsustainable production methods (i.e. substandard environmental conditions).
12. *Free Trade Area (FTA)*: Trade within the group (a custom territory) wherein all internal tariff and most non-tariff measures have been eradicated. Participating countries typically retain existing tariffs on external goods. FTAs are termed 'reciprocal' if all partners remove barriers and eliminate tariffs in their transactions.
13. *Intellectual Property Rights (IPR)*: Ownership of ideas, including literary and artistic works (protected by copyright), inventions (protected by patents), signs for distinguishing goods of an enterprise (protected by trademarks) and other elements of industrial property. IPRs are regulated by the WTO *Agreement on Trade-Related Aspects of Intellectual Property Rights*, WIPO, traditional knowledge and the *United Nations Educational, Scientific and Cultural Organization*. The safeguarding of IPRs is the purview of national

legislation and international agreements covering patents, trademarks and copyrighting.

14. *Non-Trade Barriers*: Generally contravening WTO rules, non-tariff barriers encompass quotas, import licensing systems, sanitary regulations, prohibitions and quantitative restrictions etc.
15. *Rules of Origin (ROOs)*: Laws, regulations and administrative procedures that determine the country of origin for goods, services and investment. A decision by a customs authority on origin can determine whether a shipment falls within a quota limitation, qualifies for a tariff preference or is affected by an anti-dumping duty. These rules can vary from country to country, but the WTO *Agreement on Rules of Origin* has established a work programme aimed at the long-term harmonization of ROOs.
16. *Special and Different Treatment (S&D)*: Provisions for developing countries contained in several WTO agreements with the underlying concept that they should have preferential market access to developed countries and that developing countries in trade negotiations need not reciprocate fully the concessions they receive. Under S&D developing countries also enjoy longer timeframes for phasing in new rules and lower levels of obligations for adherence to rules.
17. *Safeguard Measures*: Action taken to protect a specific industry from an unexpected build-up of imports — generally governed by Article XIX of GATT (Emergency Action on Imports of Particular Products – the ‘escape clause’). Safeguard action is also condoned under Article XII (Restrictions to Safeguard the Balance of Payments) and Article XVII (Governmental Assistance to Economic Development).
18. *Subsidy*: Financial or in-kind assistance by governments to producers or exporters of commodities, manufactures and services. Broadly, the WTO *Agreement on Subsidies and Countervailing Measures* defines subsidies as financial contributions by a government or public body, direct transfer of funds or potential transfer of funds (i.e. grants, loans, equity infusions) government revenue foregone or not collected, government provision of goods and services other than general infrastructure, payments to a funding mechanism or private body to perform these functions, income or price support. There are two general types of subsidies: export and domestic. An export subsidy is a benefit conferred on a firm by the government that is contingent on exports, while a domestic subsidy is a benefit not directly linked to exports. *Actionable subsidies* are an illegal category of subsidies that cause injury to a domestic industry of another member, negate other commitments made under the GATT or cause serious prejudice to the interests of another member. If such adverse effects are rendered, the country maintaining the subsidy must withdraw it and remove the negative effects.

# **Sustainable Development in Regional Trade and Investment Agreements: Policy Innovations in Asia?**

## **A. Introduction**

Asia has a long history of integration into the multilateral trading system. It is thus not surprising that it was one of the slowest regions to jump onto the recent Free Trade Agreement (FTA) bandwagon, largely initiated by trading nations doubtful about multilateral success. As late as 1998, the only FTAs in the region were the Association of South East Asian Nations (ASEAN) FTA, the largely forgotten Bangkok Agreement between seven mostly developing Asian countries, and the Australia-New Zealand Closer Economic Relations (ANZCER). By the end of 2006, however, every country in East Asia except Mongolia was involved in at least one FTA.

Looking beyond the bilateral to the regional level, there are various proposals for FTAs currently in negotiation. China has concluded an agreement on trade in goods and on dispute settlement and more recently on trade in services (which will enter into force in July 2007) with ASEAN, and has proposed to establish a full FTA with ASEAN (the “ASEAN-China FTA” or ACFTA) by 2010 with all old ASEAN members and by 2015 with the four ‘new’ ASEAN members Laos, Cambodia, Myanmar and Vietnam. China has also adopted FTAs with its two Special Administrative Regions Hong Kong and Macao which aim in addition to increased trade at closer integration and cooperation between the economies in question..

In 2003, ASEAN and India agreed to a framework agreement, which subsequently led to the initiation of FTA negotiations. The negotiations were supposed to be finalised by 2005 but have at the time of writing still not been concluded. One of the obstacles seems to be India’s proposed negative product list (a list of products excluded from free trade, particularly agricultural products). The list published in the summer of 2006 originally contained over 1000 products but has now been revised and renegotiated to significantly less than those originally envisioned by India. Due to these difficulties India is now insisting that blocks of

countries like the EU come to a common position before entering into detailed negotiations with India. After lengthy pre-discussions since 2005, India and the EU have entered into bilateral FTA negotiations in June 2007.<sup>5</sup>

A Japan-ASEAN Comprehensive Economic Partnership (or AJCEP) was proposed in 2002; although the terms were vague, commentators indicate that AJCEP will essentially amount to a FTA. Also in 2002, President Bush proposed the Enterprise for ASEAN Initiative, which offered the prospect of bilateral FTAs with individual ASEAN countries.<sup>6</sup> In 2004, ASEAN announced plans for formal negotiations for FTAs with Korea, Australia and New Zealand after earlier consultations and deliberations. There are also exploratory talks with the EU.

On the bilateral front, there is even greater activity. Many of Asian countries are in various stages of negotiations of bilateral FTAs, with several already concluded.

Thailand has concluded agreements with Australia (2003)<sup>7</sup> and New Zealand (2004)<sup>8</sup> and is pursuing the USA and Japan. The possibility of an FTA with Pakistan is being studied by a joint study group. The final report is expected for the middle of 2007 and formal negotiations will likely begin thereafter.

Singapore is most active in its bilateral trade negotiations. It has concluded FTAs with New Zealand (2000),<sup>9</sup> Japan (2002), the European Free Trade Area (2002),<sup>10</sup> Australia (2003), USA (2003),<sup>11</sup> Jordan (2004), and in 2005 the Pacific Four (that is, itself, Brunei, New Zealand and Chile).<sup>12</sup> It is also in talks with Bahrain, Canada, Egypt, India, South Korea, Kuwait, Mexico, Panama, Peru, Qatar and Sri Lanka. Malaysia is looking to sign FTAs with the USA, Japan and South Korea.

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<sup>5</sup> See DG Trade, online: EC < [http://ec.europa.eu/trade/issues/bilateral/countries/india/index\\_en.htm](http://ec.europa.eu/trade/issues/bilateral/countries/india/index_en.htm)>.

<sup>6</sup> See State Department <<http://www.state.gov/p/eap/rls/14700.htm>>.

<sup>7</sup> The FTA came into force in 2005.

<sup>8</sup> The FTA came into force on 1 July 2005.

<sup>9</sup> This FTA came into force in 2001.

<sup>10</sup> This FTA came into force in 2003.

<sup>11</sup> This FTA came into force in 2004.

<sup>12</sup> This FTA came into force during 2006.

Japan has concluded FTAs with Singapore (2002), Mexico (2004) and the Philippines (2004) and is in negotiation with South Korea, Malaysia and Thailand and ASEAN collectively. Some commentators are even proposed an East Asian Free Trade Area (EAFTA).<sup>13</sup>

There has thus been a dramatic change in the economic landscape in Asia in only the last decade. This paper will examine the consequences that this new trend towards free trade agreements might have for sustainable development policy in Asia, and the potential for sustainability innovations to be made within or alongside these trade agreements.

## **B. Stocktaking – Regional Trade and Investment Agreements in Asia**

### **1. WTO Consistency**

Bilateral or Regional Trade Agreements are in fact regulated under WTO rules. According to the WTO rules, member countries may only negotiate agreements bilaterally, outside the WTO system, under three main conditions:

- the agreement must not raise trade barriers with non-parties to it;
- the free trade area must be established within a reasonable period, generally accepted to be ten years; and
- the agreement must cover “substantially all sectors”.

This last requirement leads to much debate, as to whether it relates to a quantitative measurement of the number of tariff lines covered, or a qualitative measurement of the most important products and services.

In practice, though, the consistency requirement may be less significant than it appears, as most bilateral and regional trade agreements signed are consistent in themselves with concessions granted and obligations imposed under the WTO Agreements. The short

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<sup>13</sup> Pengiran Mashor Pengiran Ahmad, “East Asia Economic Community: Prospects and Implications” ASEAN Secretariat, online: ASEAN <<http://www.aseansec.org/15655.htm>>.

memorable formula is usually a “WTO plus” requirement, meaning that agreements reaffirm WTO commitments and then go beyond them. This is logical from an economic perspective, since it would make little sense to settle on commitments below or only slightly above WTO commitment levels.

## 2. Motivations for the Proliferation of FTAs

The slowdown of trade negotiations at the multilateral level in the World Trade Organisation (WTO) is sometimes recognised as the main factor driving the rise in the number of FTAs generally worldwide, and particularly in the Asian region.<sup>14</sup> While the failure to obtain any consensus in the Doha Development Round’s negotiations has certainly contributed to the attractiveness of FTAs as a policy instrument, there are other factors at play.<sup>15</sup> Governments initiate FTA negotiations for a variety of reasons – in response to other FTAs,<sup>16</sup> because they are seeking to establish a “regional” trading bloc,<sup>17</sup> or because they are “practising trade negotiations in preparation for another trade negotiation.”<sup>18</sup>

In fact, the traditional justifications for trade agreements, focussing on the economic benefits that will accrue to each party, do not seem to bear out in analysis of FTAs in the Asian region. Table 1 below shows that historically many Asian FTA partners did not have significant levels of trade with one another, meaning that either economic benefits to be gained from an FTA will be minimal or massive economic changes and transformation would have to occur to justify an FTA on pure economic terms.

**Table 1 Trade and Investment Among Recently Established or Proposed FTA Partners, 2003**

| Country/ Group | Partner | Share of trade with partner as a proportion of country’s total trade, 2003, % |
|----------------|---------|---|
| ASEAN-6        | China   | 7.4   |

<sup>14</sup> Desker (2004: 10)

<sup>15</sup> JETRO (2003a)

<sup>16</sup> Baldwin (1997)

<sup>17</sup> The AFTA is an example of this.

<sup>18</sup> For instance, the Singapore- New Zealand FTA was the first FTA for Singapore and was widely recognised as a means to hone the skills of the trade negotiators. Interestingly, the New Zealand negotiation delegation was pleased that there was no dramatic increase of trade between Singapore and New Zealand a year after the FTA was concluded! This is hardly the response one ought to have if the purpose of the FTA had been primarily economic. See Hoadley (2002).

|           |              |      |
|-----------|--------------|------|
|           | India        | 1.5  |
|           | Japan        | 14.4 |
|           | Korea        | 4.2  |
|           | USA          | 15.0 |
|           | CER          | 2.8  |
|           | EU           | 12.4 |
| China     | ASEAN        | 8.5  |
|           | Thailand     | 1.5  |
|           | Australia    | 1.6  |
|           | India        | 0.9  |
|           | Hong Kong    | 10.3 |
|           | Macau        | 0.2  |
|           | New Zealand  | 0.2  |
|           | Chile        | 0.4  |
|           | SACU         | 0.5  |
| India     | ASEAN        | 8.7  |
|           | China        | 5.0  |
|           | Korea        | 2.5  |
|           | Singapore    | 3.0  |
|           | Sri Lanka    | 1.1  |
|           | Thailand     | 1.0  |
|           | BIMSTEC      | 4.5  |
|           | SACU         | 1.7  |
|           | COMESA       | 1.2  |
|           | MERCOSUR     | 0.9  |
|           | Mauritius    | 0.1  |
|           | Japan        | 3.1  |
|           | Malaysia     | 2.1  |
|           | South Africa | 1.7  |
|           | GCC          | 7.2  |
|           | Chile        | 0.2  |
|           | Egypt        | 0.3  |
| Singapore | Australia    | 2.5  |
|           | Canada       | 0.4  |
|           | Egypt        | 0.1  |
|           | EFTA*        | 1.1  |
|           | EU           | 12.9 |
|           | India        | 1.7  |
|           | Japan        | 9.2  |
|           | Jordan       | 0.01 |
|           | Korea        | 4.0  |
|           | Mexico       | 0.4  |
|           | New Zealand  | 0.3  |
|           | Sri Lanka    | 0.2  |
|           | USA          | 14.2 |
|           | Qatar        | 0.5  |
|           | Peru         | 0.01 |
|           | Panama       | 0.4  |
|           | Kuwait       | 0.8  |
|           | Bahrain      | 0.03 |

|  |        |      |
|--|--------|------|
|  | Brunei | 0.2  |
|  | Chile  | 0.03 |

Source: (Sen 2006: 563)

NB: \*EFTA shares excludes Liechtenstein

Furthermore, trade (and investment) patterns in the region do not seem to have changed significantly even after the conclusion of FTAs. For instance, trade between Singapore and Chile is not expected to increase greatly despite both countries having FTAs bilaterally and sub-regionally (under the Trans-Pacific Strategic Economic Partnership). If these FTA partners do not have significant economic relations with one another prior to the negotiation of FTAs, and do not have greatly increased economic flows after the conclusion of FTAs, then the effectiveness of the agreements in promoting trade or investment should be questioned. This phenomenon can also be observed in other regions of the world. For example, trade between Canada and Chile has not increased significantly following the FTA signed between them in 1996, but the agreement served to send an important political signal of friendly relations and mutual support. FTAs between the US and Middle Eastern countries have quite explicitly been concluded at least also for geopolitical reasons.<sup>19</sup>

One way of assessing effectiveness more directly would be to examine how traders make use of the FTAs and its tariff preferences. The problem with such an approach is that there is considerable difficulty in obtaining utilisation figures, especially since most governments do not publish the statistics of the value of trade conducted under the FTA preferences.<sup>20</sup> Where figures do exist, for instance within the ASEAN Free Trade Area, utilisation rates appear low. Less than 10% of the intra-ASEAN trade is conducted under ASEAN Free Trade Area preferences.<sup>21</sup> Traders do not have a strong incentive to use the ASEAN Free Trade Area preferences since most of the ASEAN members already have low tariff levels.

Within APEC, the business community has responded with less enthusiasm for the FTAs than expected by the governments who have enthusiastically embarked on these negotiations. Brian Lynch, of the APEC Business Advisory Council, has commented that “business does not respond to the same set of imperatives that drive the work of political

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<sup>19</sup> See USTR statement on U.S. Jordan FTA.

<sup>20</sup> For some studies on the utilisation of trade preferences (on EU-related trade agreements), see Manchin (2006) and Brenton and Manchin (2003).

<sup>21</sup> Figures obtained from fieldwork in Singapore in October 2006.

leaders and their policy advisors. Agendas, incentives, behavioural patterns; they all differ between the two settings.” That is to say, the existence of free trade agreements is not the only factor that influences business decisions and export practices; the existing and potential demand for a particular product and the likelihood of obtaining a preferred price in the FTA partner market, for instance, are naturally also important considerations.

This all suggests, as Desker notes,<sup>22</sup> that economic reasons may not be the sole ones leading Asian governments to embark on FTA programmes, and that politics may also be at work. Although China at first glance seems to be an exception to this with many of its economic agreements specifically aimed at encouraging trade and investment, there are undeniably political considerations also influencing the Chinese government in its pursuit of agreements in the region. The ASEAN-China FTA, discussed below, may be one example of this. China and the ASEAN countries compete with each other in many third markets due to their similar comparative advantages, and the economic benefits to be gained from the agreement appear minimal with few complementarities in the economies. Commentators thus view the agreement as primarily a political one, and only secondarily as an economic one.<sup>23</sup>

These implicit political factors, in China’s case, could be connected to its desire to be seen as undertaking a “peaceful rise” to regional and world power, in bilateral cooperation with its neighbours and in many cases support other nations through trade. Another more economic reason can be seen in the so-called “domino effect” identified in FTA negotiations, which starts from the recognition that FTAs necessarily disadvantage non-members. If a country’s regional neighbours are all forming bilateral and plurilateral alliances, the domino effect then pressures the country into joining the negotiations so as not to be left out of regional developments. Some Asian countries, on the other hand, are seen as quite selective in their FTA negotiation – Singapore, for instance, recognising that levels of economic development vary hugely between the nations of Asia, prefers to focus on bilateral arrangements rather than encouraging region-wide arrangements.<sup>24</sup>

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<sup>22</sup> Desker (2004)

<sup>23</sup> IISD 21.

<sup>24</sup> IISD 23.

### 3. China's Trade and Investment Agreements

As the regional heavyweight, China warrants particular attention in any study of Asian economic arrangements. China has been active in FTA negotiation and has placed some emphasis on provisions covering investment,<sup>25</sup> whether as part of a broader trade agreement or as a standalone investment agreement. Such investment-specific agreements have proliferated around the world in recent years, to establish rules for the liberalisation, promotion and protection of foreign investment.

International trade and investment agreements can be roughly divided into two groups. The first group adopt the negative list approach (i.e. certain products, services and/or investments are excluded from general free trade between the countries) used, for example, in the NAFTA. These agreements provide for full liberalisation subject to a list of country exceptions. The second group is characterised by an incremental approach (i.e. the agreements specify which areas of trade, for example specific goods or services, will be traded freely) according to which restrictions on the establishment and operation of investments are reduced progressively with the commitment to achieve full liberalisation within a set timeframe. The Framework Agreement on the ASEAN Investment Area is a good example of this approach.

China's emerging network of agreements is marked by the fact that they are unlike the models recently employed by the US and EU, that they are diverse in form and coverage, that the relative brevity of the agreements leave many aspects as the subject of continued negotiations, and that several omit elaborate dispute resolution procedures.<sup>26</sup>

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<sup>25</sup> For a study of the impacts of China's outward investment flows, see Pamlin and Baijin 2007 in particular p. 43 pp.

<sup>26</sup> Agata Antkiewicz & John Whalley, "China's New Regional Trade Agreements" (December 2004), available at: [www.nber.org/papers/w10992](http://www.nber.org/papers/w10992).

a) *The WTO Agreements*

China has been a member of the World Trade Organisation since 2002.<sup>27</sup> While there is no investment-specific WTO Agreement (investment being one of the Singapore Issues on which negotiations stalled at the Cancún Ministerial Conference in 2003, with no progress likely at present), both the *Agreement on Trade Related Investment Measures* (TRIMs) and the *General Agreement on Trade in Services* (GATS) are relevant to foreign investment.

TRIMs prohibits measures relating to trade in goods that are inconsistent with the national treatment obligation of the GATT. It limits Members' rights to impose performance requirements (such as for local content or export performance) on investors. These requirements, for example specifying that products manufactured in a facility developed with foreign investment were to contain a certain minimum of content sourced locally, were characteristic of China's early investment laws.

GATS is important because many investments depend on the ability to establish a presence in the market. Mode 3 applies to the supply of trade in services through "commercial presence".<sup>28</sup> GATS, which adopts a positive list approach, provides for market access and national treatment for scheduled service industries. It does not however restrict local content requirements in relation to services (for example, many countries have notified their imposition of employee nationality requirements). From a policy perspective, it is notable that "Zhu Rongji and other leaders have explicitly portrayed China's accession to the WTO as desirable partly because it will hasten market-oriented reforms in China. The WTO case is hardly unique. It is one turn in the cycle of reform-era China's quest to become sufficiently acceptable in its positions on international legal, political, and economic issues that the outside world (and particularly the West) views it as a fit recipient of massive trade, aid and capital flows."<sup>29</sup> This reasoning can also apply to China's bilateral trade agreement programme – as mentioned above, the political implications of China being seen to be

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<sup>27</sup> [www.wto.org](http://www.wto.org)

<sup>28</sup> Marie-France Houde and Katia Yannaca Small "Relationships between International Investment Agreements" (2004), OECD Working Papers on International Investment (2004/1 OECD Publishing), 6.

<sup>29</sup> Jacques Delisle, "China's Approach to International Law: A Historical Perspective" (2000) 94 *Am. Soc'y Int'l L. Proc.* 267, 274.

cooperative in regional economic affairs may be just as important as any trade and economic benefits that might be expected from the agreements.

As Houde and Small point out, there is some overlap between GATS provisions and those to be found in most BITs.<sup>30</sup>

*b) Bilateral Investment Treaties*

In 2004, the number of BITs concluded worldwide stood at 2,392, of which about 70% are reckoned to have come into force.<sup>31</sup> China has signed over 70 BITs and has ratified a high proportion of them.<sup>32</sup> In the past, the majority of BITs were concluded between developed and developing countries, but China joins the Republic of Korea, Egypt and Malaysia in having signed more than 40 with other developing countries.<sup>33</sup>

While the precise content of BITs varies (eg the definition of investment, the definition of standards of treatment of investors, the exceptions provided for, and dispute settlement procedures), the core rights that they guarantee are generally quite standard. They typically provide for most favoured nation treatment (meaning that concessions awarded to one nation are awarded to all others), national treatment (meaning that foreign investors are treated equally to domestic investors), fair and equitable treatment, full protection and security of investments, compensation for any direct or indirect expropriation by the target country's government, and repatriation of investments and returns among other things. But there are substantial distinctions between the US and European model BITs on matters such as market access and dispute resolution, for example.<sup>34</sup>

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<sup>30</sup> Marie-France Houde and Katia Yannaca Small "Relationships between International Investment Agreements" (2004), OECD Working Papers on International Investment (2004/1 OECD Publishing), 6.

<sup>31</sup> UNCTAD, *World Investment Report: Transnational Corporations and the Internationalization of R&D*, (New York, United Nations, 2005), 24.

<sup>32</sup> See <http://www.worldbank.org/icsid/treaties/china.htm>. See <http://www.worldbank.org/icsid/treaties/china.htm>. One source suggests that China has signed over 100 BITs: Luke Peterson, *Investment Treaty News*, (Online IISD: February 17, 2006).

<sup>33</sup> UNCTAD, *World Investment Report: Transnational Corporations and the Internationalization of R&D*, (New York, United Nations, 2005), 303. In 2004, the largest number of new BITs were concluded between developing countries.

<sup>34</sup> Marie-France Houde and Katia Yannaca Small "Relationships between International Investment Agreements" (2004), OECD Working Papers on International Investment (2004/1 OECD Publishing), 4.

Chinese BITs are often marked by the fact that they do not permit investors to go to arbitration to resolve disputes with the host country's government (for instance, over the legality of a government act nationalising some of the investor's property). Such investor-State arbitration is only permitted to establish the exact amount of compensation payable by the government for any breach of the BIT. However, the Sino-German BIT of 2005, which replaced the 1983 treaty between these two countries, suggests that this characteristic may be being abandoned.<sup>35</sup> The new BIT "offers much wider scope for aggrieved investors to pursue international arbitration in case of disputes with their host state" and provides for ICSID or *ad hoc* investor-state arbitration over "any dispute concerning investments between a Contracting Party and an investor of the other Contracting Party".<sup>36</sup> This is a broad provision which may cover claims unrelated to the BIT – for example, claims relating to rights granted under a private contract between the investor and the host government. Notably, the BIT also has an unusually broad exceptions clause, preserving the host government's right to take measures that discriminate against foreign investments "for reasons of public security and order, public health or morality". It is also interesting that the new Sino-German BIT does not follow the recent Canadian and US models which expressly allow host governments to take "measures in pursuit of legitimate public welfare".<sup>37</sup>

*c) China – Hong Kong & Macao Closer Economic Partnership Arrangements*

The two Closer Economic Partnership Arrangements (CEPA) agreed between China and Hong Kong on the one hand and Macao on the other are practically identical.<sup>38</sup> The Hong Kong CEPA was signed on 29 June 2003 and the Macao CEPA on 17 October 2003. Both have been notified to the WTO for review by the Committee on Regional Trade Agreements.<sup>39</sup>

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<sup>35</sup> Luke Peterson, *Investment Treaty News*, (Online IISD: February 17, 2006).

<sup>36</sup> Luke Peterson, *Investment Treaty News*, (Online IISD: February 17, 2006).

<sup>37</sup> Luke Peterson, *Investment Treaty News*, (Online IISD: February 17, 2006).

<sup>38</sup> The full text of the Hong Kong CEPA can be found at:

[http://www.bilaterals.org/article.php?id\\_article=2494](http://www.bilaterals.org/article.php?id_article=2494). The full text of the Macao CEPA can be found at:

[http://www.bilaterals.org/article.php?id\\_article=2544](http://www.bilaterals.org/article.php?id_article=2544). The agreements only differ in the names of the relevant agencies and regulations, and the lists of goods in Annexes 1 and 2; see Agata Antkiewicz & John Whalley, "China's New Regional Trade Agreements" (December 2004), available at: [www.nber.org/papers/w10992](http://www.nber.org/papers/w10992).

<sup>39</sup> Agata Antkiewicz & John Whalley, "China's New Regional Trade Agreements" (December 2004), available at: [www.nber.org/papers/w10992](http://www.nber.org/papers/w10992).

The terms of these agreements have been discussed in detail elsewhere,<sup>40</sup> so it will suffice here to point out the key characteristics relating to investment. The Preamble and Article 1 make clear that the purpose of the Agreement is to strengthen trade and investment cooperation, and promote the joint economic prosperity and development of the Mainland (China) and the Special Administrative Region (Hong Kong/Macao), and to facilitate the further development of economic links between the two sides and other countries and regions. Article 11 focuses on Market Access, Article 16 on the need for “transparency, standard conformity and enhanced information exchange” (a notion which is restated in Annex 6) and Article 17 sets out seven areas as the focus of cooperation. Trade and investment promotion is the first of these.

Article 19 establishes a Joint Steering Committee responsible for resolving disputes and interpreting the agreement’s provision. Annex 4 provides for a range of specific measures to liberalise 18 service sectors including banking, management consulting, advertising and legal services. Annex 5 defines the “service suppliers” able to avail themselves of the more open climate, by, for example, requiring them to have been established in the Special Administrative Region for no less than three years. By Annex 6, the two sides “agree to cooperate in trade and investment facilitation in seven areas, namely, trade and investment promotion; customs clearance facilitation; commodity inspection and quarantine, food safety, quality and standardization; electronic business; transparency in laws and regulations; cooperation of small and medium enterprises, and cooperation in Chinese traditional medicine and medical products sector.”<sup>41</sup> The Hong Kong CEPA was expanded in scope to, for example, 8 new service sectors, by the Record of Consultation on Further Liberalization of August 2004.<sup>42</sup>

The CEPAs have been characterized as “a series of one-sided concessions by Beijing” on the ground that Hong Kong and Macao, as two of the most liberal economies in the world, did

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<sup>40</sup> Agata Antkiewicz & John Whalley, “China’s New Regional Trade Agreements” (December 2004), available at: [www.nber.org/papers/w10992](http://www.nber.org/papers/w10992).

<sup>41</sup> Agata Antkiewicz & John Whalley, “China’s New Regional Trade Agreements” (December 2004), available at: [www.nber.org/papers/w10992](http://www.nber.org/papers/w10992).

<sup>42</sup> Agata Antkiewicz & John Whalley, “China’s New Regional Trade Agreements” (December 2004), available at: [www.nber.org/papers/w10992](http://www.nber.org/papers/w10992).

not have any significant trade barriers to reduce.<sup>43</sup> Promoting integration, including attracting professionals from the Special Administrative Regions to bring their skills to China, has been suggested as one motivation behind China's agreement.<sup>44</sup> Such provisions on labour mobility are in fact relatively rare in Asian FTAs, and tend to focus on skilled workers where they do exist. One example is APEC's Business Travel Card Scheme, which is aimed at easing the entry of skilled professionals into participating countries.

Similarly, under the US-Singapore FTA, Singapore secured entry to the US of several thousand skilled professionals. The Japan-Singapore Economic Partnership Agreement includes a separate chapter addressing labour movement, but simply allows each party to make commitments in the area rather than specifying any minimum levels of access. The ASEAN Plan of Action on Immigration Matters works on practical issues such as visa issuance procedures, collection of migration information, and facilitation of remittances. Japan has made some concessions in trade agreements with the labour-exporting countries Thailand and the Philippines, in permitting semi-skilled and skilled workers.<sup>45</sup>

*d) China – Thailand Free Trade Agreement*

The China-Thailand FTA, China's first trade agreement with an ASEAN neighbour, came into force in 2003 and eliminates tariffs on 188 types of fruits and vegetables.<sup>46</sup> It does not contain any provisions on investment, but has been credited as a first-step towards the closer integration that will result from the China-ASEAN FTA.

*e) China – ASEAN Free Trade Agreement (CAFTA)*

A Framework Agreement on Comprehensive Economic Cooperation between ASEAN and the People's Republic of China (PRC) was signed in November 2002, two years after it was

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<sup>43</sup> Agata Antkiewicz & John Whalley, "China's New Regional Trade Agreements" (December 2004), available at: [www.nber.org/papers/w10992](http://www.nber.org/papers/w10992).

<sup>44</sup> Agata Antkiewicz & John Whalley, "China's New Regional Trade Agreements" (December 2004), available at: [www.nber.org/papers/w10992](http://www.nber.org/papers/w10992).

<sup>45</sup> See generally Siow Yue Chia, "Labor Mobility and East Asian Integration" (2006) 1 *Asian Economic Policy Review* 349.

<sup>46</sup> See [http://www.bilaterals.org/rubrique.php?id\\_rubrique=26](http://www.bilaterals.org/rubrique.php?id_rubrique=26)

proposed by Chinese Premier Zhu Rongji at the 4<sup>th</sup> ASEAN Informal Summit.<sup>47</sup> It entered into force on 1 July 2003. Among its objectives are trade and investment cooperation, and the creation of a more liberal and transparent investment regime (Article 1) which would remove or lessen restrictions on foreign investment in both directions (from China to ASEAN and *vice versa*), and make any approval procedures clear and public. The Preamble states that, among other things, the agreement was made “[d]esiring to minimise barriers and deepen economic linkages between the Parties...[and] increase intra-regional trade and investment...and enhance the attractiveness of the Parties to capital and talent.”

Article 2(c) sets as an objective “the establishment of an open and competitive investment regime that facilitates and promotes investment within the ASEAN-China FTA”. Article 2(f) provides for the “establishment of effective trade and investment facilitation measures, including, but not limited to, simplification of customs procedures and development of mutual recognition arrangements”. Article 5, “Investment”, calls for the promotion of investments and the creation of “a liberal, facilitative, transparent and competitive investment regime”, and under Article 7 investment is named as one of the 5 priority sectors for economic cooperation. Article 8 sets the timeframes for negotiations on investment to be concluded “expeditiously as possible for implementation in accordance with the timeframes to be mutually agreed: (a) taking into account the sensitive sectors of the Parties; and (b) with special and differential treatment and flexibility for the newer ASEAN Member States.”

The Agreement is essentially a framework for more detailed agreements to be negotiated within ten years of signature. 2010 is the target date for the establishment of a free trade area between China and the ASEAN 6 (Brunei, Indonesia, Malaysia, the Philippines, Singapore and Thailand). In anticipation of that date, reciprocal tariff cutting began in 2004 under the Early Harvest Program.<sup>48</sup> A larger free trade area with the newer ASEAN members (Vietnam, Lao People’s Democratic Republic, Myanmar and Cambodia) is set to be established by 2015. As regards investment, the parties have agreed to cooperate through the ASEAN-China Trade Negotiation Committee and to liberalize their investment regimes,

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<sup>47</sup> China Daily, “Pact’s Progress”, China Daily, 9 January 2006. The full text is available at: <http://www.aseansec.org/13197.htm>

<sup>48</sup> Agata Antkiewicz & John Whalley, “China’s New Regional Trade Agreements” (December 2004), available at: [www.nber.org/papers/w10992](http://www.nber.org/papers/w10992).

strengthen cooperation and improve transparency of rules and regulations.<sup>49</sup> The parties plan to progressively eliminate discrimination in new and existing service restrictions (save as permitted under the GATS).<sup>50</sup>

The China-ASEAN FTA will “form a huge market, with 1.85 billion consumers and a combined gross domestic product of almost US\$2.5 trillion.”<sup>51</sup> Ministry of Commerce Statistics indicate that “from 2002 to 2004 the average annual growth rate of bilateral trade between China and ASEAN stood at 38.9 per cent. In 2004, China’s exports to ASEAN increased by 32% to \$8.1bn and China’s imports from ASEAN increased by 43% at \$13.8bn. In 2004, volume reached US\$105.9 billion, exceeding the target one year ahead of schedule. The trade volume is expected to reach more than US\$120 billion in 2005, and the target for 2010 is US\$200 billion.”<sup>52</sup> CAFTA has been called a potential “counterforce to the US and Europe” and also a building block towards a pan-Asian FTA.<sup>53</sup> It is also a spur for deeper regional integration. Thailand, for example, plans to open four new consulates in China, and to enhance transport links, in anticipation of the CAFTA.<sup>54</sup>

Three sub-agreements followed the China-ASEAN Framework Agreement:

*The Agreement on Trade in Goods* This agreement was signed on November 29, 2004 and entered into force in July 2005.<sup>55</sup> Article 7 of this agreement provides that “subject to the provisions of this Agreement and any future agreements as may be agreed pursuant to reviews of this Agreement by the Parties under Article 17 of this Agreement, the Parties hereby agree and reaffirm their commitments to abide by the provisions of the WTO disciplines on, among others, ... sanitary and phytosanitary [i.e. health and plant-health] measures”. Article 12 and Article 13 contain General Exceptions and Security Exceptions.

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<sup>49</sup> Agata Antkiewicz & John Whalley, “China’s New Regional Trade Agreements” (December 2004), available at: [www.nber.org/papers/w10992](http://www.nber.org/papers/w10992).

<sup>50</sup> Agata Antkiewicz & John Whalley, “China’s New Regional Trade Agreements” (December 2004), available at: [www.nber.org/papers/w10992](http://www.nber.org/papers/w10992).

<sup>51</sup> China Daily, “Pact’s Progress”, China Daily, 9 January 2006

<sup>52</sup> Zhang Jin, China Daily, 8 April 2004, cited in Agata Antkiewicz & John Whalley, “China’s New Regional Trade Agreements” (December 2004), available at: [www.nber.org/papers/w10992](http://www.nber.org/papers/w10992).

<sup>53</sup> Agata Antkiewicz & John Whalley, “China’s New Regional Trade Agreements” (December 2004), available at: [www.nber.org/papers/w10992](http://www.nber.org/papers/w10992).

<sup>54</sup> MCOT News, Thailand, “FTA prompts boost in logistics cooperation with China” (28 April 2005).

<sup>55</sup> [http://www.bilaterals.org/article.php3?id\\_article=2489](http://www.bilaterals.org/article.php3?id_article=2489).

### *The Agreement on Dispute Settlement Mechanism*

This agreement was signed on the November 29, 2004 and has yet to enter into force. It established a formal dispute settlement procedure and mechanism in accordance with the Article 11 of the Framework Agreement. It does not include any issues related with sustainable development.

### *The Trade in Services Agreement*

This agreement was signed on the January 14, 2007 and will come into force on July 1, 2007. Articles 12 and 13 of the agreement contain general exceptions and security exceptions respectively. In the annexes to the agreement, the Schedule of Specific Commitments of China and some ASEAN countries liberalise trade in environmental services.

### *f) China – Australia Free Trade Agreement*

A framework agreement for a potential FTA was signed in October 2003,<sup>56</sup> and a feasibility study has been undertaken. China is currently Australia's second largest trading partner. In 2003, Australia had a \$13.5bn trade surplus with China based on exports of iron ore, copper and petroleum.<sup>57</sup>

The Preamble to the Agreement emphasises “the Parties' commitments to developing trade and investment”. Paragraph 1 provides that “[b]y means of all-round economic and trade cooperation, the Parties will cooperate to achieve balanced and comprehensive trade and investment facilitation and liberalisation.” Paragraph 2 identifies key sectors with “outstanding potential” for cooperation and the parties agree to “facilitate mutual business travel and the activities of business associations.” Paragraph 3 recognises the benefits of “regular bilateral meetings”, and paragraph 4 states that the parties will promote “high-level two-way visits and dialogue between the government, business and academic communities of the Parties for the purpose of developing and enhancing the trade and investment

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<sup>56</sup> The full text is available at: [http://www.dfat.gov.au/geo/china/framework/economic\\_framework.html](http://www.dfat.gov.au/geo/china/framework/economic_framework.html)

<sup>57</sup> Agata Antkiewicz & John Whalley, “China's New Regional Trade Agreements” (December 2004), available at: [www.nber.org/papers/w10992](http://www.nber.org/papers/w10992).

partnership and strengthening cooperation on issues of mutual interest.” By paragraph 6, the parties recognise that “all national government measures which impact on bilateral trade and investment should be carried out in a reasonable, objective and transparent manner. The Parties will afford adequate opportunity for consultations to exchange information on issues raised by the other country with respect to such matters.” Paragraph 7 contains an agreement that “the Parties will afford adequate opportunity for consultations to exchange information and views on issues related to the possible implications of agreements between either country and a third country or countries that provide for preferential treatment of trade or investment.”

Paragraph 8 is politically significant. It states that, “[r]ecognizing China's tremendous achievements in establishing a market economy, Australia will not apply Sections 15 and 16 of the *Protocol of Accession of the People's Republic of China to the WTO* and Paragraph 242 of the *WTO Report of the Working Party on the Accession of China* during the course of the study. Recognizing that Australia and China should negotiate on an equal basis, a joint decision by the two Parties to negotiate an FTA will take account of the results of the feasibility study and only follow Australia's formal recognition of China's full market economy status.”

Annex 1 identifies target areas for cooperation including energy and mining, textiles, clothing and footwear, agriculture and quarantine inspection, development of China's Central and Western regions, investment and services. As initiatives to promote investment, it is agreed that there will be information exchanges, improved transparency and predictability of the relevant laws, and protection of investors and investments. Australian and Chinese government agencies are also committed to building linkages to promote cooperation and consultation.

*g) China – New Zealand Free Trade Agreement*

A Trade and Economic Cooperation Agreement (TECA) was made between China and New Zealand in May 2004 aimed at “comprehensive trade and investment facilitation and

liberalization through all-round economic and trade cooperation”.<sup>58</sup> As regards investment, the parties “aim to increase investment by exchanging information, enhancing transparency and predictability, protecting investments and investors and building institutional linkages to promote investment visits, B2B initiatives, conferences and other innovations”.<sup>59</sup>

China is currently New Zealand’s fourth largest trading partner,<sup>60</sup> and New Zealand is on course to become the first Western country to finalize a free trade agreement with the PRC.<sup>61</sup> New Zealand’s one-China policy, early recognition of China in the 1970s and early agreement on China’s accession to the WTO have given it a degree of priority. Also, under the Trade and Economic Cooperation Agreement, New Zealand, unlike Australia, immediately recognizes China as a market economy and agrees not to implement anti-dumping measures against China under the relevant sections of the WTO accession protocol.<sup>62</sup>

*b) China – Chile Free Trade Agreement*

This Agreement was signed on November 18, 2005 and came into force on October 1, 2006. According to our research, this was the first Chinese FTA (after the WTO accession) in which the goal of sustainable development is expressly recognised. In the preamble of the agreement, it states that ‘recognizing that this Agreement should be implemented with a view toward raising the standard of living, creating new job opportunities, and promoting sustainable development in a manner consistent with environmental protection and conservation; and committed to promoting the public welfare within each of their countries’. Chapter 7 deals with the issue of Sanitary and Phytosanitary Measures. In the Article 99 of Chapter XII, Article XX of GATT 1994 and its interpretative notes are incorporated into and made part of this Agreement as General Exceptions. The Chapter XIII mainly deals with the economic cooperation, research, science and technology, education, labour, social

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<sup>58</sup> Agata Antkiewicz & John Whalley, “China’s New Regional Trade Agreements” (December 2004), available at: [www.nber.org/papers/w10992](http://www.nber.org/papers/w10992)

<sup>59</sup> Agata Antkiewicz & John Whalley, “China’s New Regional Trade Agreements” (December 2004), available at: [www.nber.org/papers/w10992](http://www.nber.org/papers/w10992)

<sup>60</sup> Agata Antkiewicz & John Whalley, “China’s New Regional Trade Agreements” (December 2004), available at: [www.nber.org/papers/w10992](http://www.nber.org/papers/w10992)

<sup>61</sup> Marie McNicholas, “NZ-China FTA in two years” (6 April 2006) National Business Review, 6 April 2006

<sup>62</sup> Agata Antkiewicz & John Whalley, “China’s New Regional Trade Agreements” (December 2004), available at: [www.nber.org/papers/w10992](http://www.nber.org/papers/w10992)

security and environmental cooperation, SMEs, cultural cooperation, intellectual property rights, promoting investment, mining and industrial cooperation and mechanisms for cooperation. Article 108 of the agreement provides that ‘the Parties shall enhance their communication and cooperation on labour, social security and environment through both the Memorandum of Understanding on Labour and Social Security Cooperation, and the Environmental Cooperation Agreement between the Parties’. In the Article 113 of the agreement, the bio-mining (mining using biotechnology procedures) is a part of Mining and Industrial cooperation between two countries.

*i) Other Trade Agreements under discussion*

In addition to the agreements discussed above, China is carrying on FTA discussions with Pakistan, the Southern Africa Customs Union, Singapore, the Gulf Cooperation Council and Iceland. It is also working towards opening discussions with Brazil, India, Japan, Norway, South Korea and Switzerland.<sup>63</sup>

#### **4. International Organisations and their influence on Asian FTAs**

One factor which adds to the complexity of studying the impact of FTAs in Asia is the fact that there are multiple actors, including non-state ones, encouraging and pursuing FTAs. Rather than any domestic government, it was an international organisation, the United Nations Economic Commission for Asia and the Far East (ECAFE), the predecessor of the United Nations Economic and Social Commission for Asia and the Pacific (ESCAP), that was one of the earliest actors involved in drawing the Asian states together to form trade agreements. The ECAFE was the secretariat for the Bangkok Agreement, a preferential trade agreement between Bangladesh, India, Laos, South Korea, Sri Lanka and (since 2001) China.<sup>64</sup> The Bangkok Agreement has now been renamed as the Asia-Pacific Trade Agreement, in force since September 2006.

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<sup>63</sup> [http://www.bilaterals.org/rubrique.php?id\\_rubrique=118](http://www.bilaterals.org/rubrique.php?id_rubrique=118); Agata Antkiewicz & John Whalley, “China’s New Regional Trade Agreements” (December 2004), available at: [www.nber.org/papers/w10992](http://www.nber.org/papers/w10992).

<sup>64</sup> The Bangkok Agreement was signed in 1975 and ratified by these five states. The Philippines and Thailand signed the Bangkok Agreement but did not ratify the agreement.

More recently, another international organisation, the ASEAN, entered the foray of trade agreements. ASEAN is currently involved in FTA negotiations with Australia and New Zealand, China, Japan, South Korea and India. It is also in discussions for a possible FTA negotiation with the European Union.

The involvement of these international organisations mean that many of the countries in the region, particularly the ASEAN members, can be involved in two separate FTA negotiations with the same partner. For instance, Singapore has already concluded a bilateral FTA with South Korea but is negotiating another FTA with South Korea under the auspices of ASEAN (the ASEAN-South Korea FTA). Singapore is also involved in the ASEAN-China FTA negotiations, but has recently agreed to negotiate a separate bilateral FTA with China.

Singapore's case is not unique; Thailand's trading relationship with India is another example. Thailand is negotiating FTAs with India both in its own right and through ASEAN. To complicate matters further, both Thailand and India belong to the Bay of Bengal Initiative for Multi-Sectoral Technical and Economic Cooperation, another regional grouping which has agreed to negotiate (by 2017) a FTA among its seven members.

These overlapping agreements can mean that trade between the same two partners, say Singapore and South Korea, is governed in two or more ways – in this case, through the Singapore-South Korea FTA, ASEAN-South Korea FTA, and the rules determined at the multilateral level in the World Trade Organisation. Economists have called such situations the “spaghetti bowl syndrome”.<sup>65</sup> In some cases obligations can be satisfied by finding a course of conduct that meets all applicable standards even if a more favourable course of conduct would be permitted under one particular agreement. In other cases the commitments are wider in some agreements than in others, with the result that a course of conduct is permitted under one agreement while not being explicitly prohibited in another. In practice, given the requirement discussed above that bilateral and other trade agreements be WTO-consistent, the most liberal commitments are the ones that will apply and compliance with several agreements is made possible.

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<sup>65</sup> Bhagwati (1994)

One way of harmonising the various FTAs would be to subsume many of the FTAs into a region-wide one. In 2001, a group of academics (the “Vision Group”) commissioned by the governments of ASEAN, China, Japan and South Korea considered the formation of an East Asian Free Trade Area (EAFTA) as part of the process of the formation of an East Asian Community.<sup>66</sup> In 2002, the same governments established another group, this time comprising of government officials, to prioritise the recommendations of the Vision Group.<sup>67</sup> The EAFTA was stated as a long-term goal. This EAFTA was to be comprised of ASEAN, China, Japan and South Korea (or the members of the “ASEAN Plus Three”). Japan, in particular, appears to be keen on creating an economically powerful East Asian Community. However, since the first East Asia Summit (EAS) in 2005 (which included Australia, New Zealand and India), there has been debate over the exact composition of “East Asia” and thus the composition of any EAFTA, and progress on it is currently slow.

The Asia-Pacific Economic Co-operation (APEC) is another possible candidate for harmonising the various FTAs. In recent years, some of its member countries have proposed creating an APEC-wide FTA.<sup>68</sup> APEC itself is not strictly speaking an FTA; it is a forum for inter-governmental discussions on economic matters. However, since the Asian Financial Crisis in 1997, APEC has lost most of its dynamism in trade liberalisation.<sup>69</sup>

The complication resulting from the proliferation of these FTAs in the region has been recognised by many governments and businesses in the region. Two main databases have been established by the ADB and APEC to monitor these FTAs. The Asia Regional Integration Centre under the auspices of the ADB has an extensive database which consolidates research, news and other indicators of the FTAs in Asia. The APEC database provides links to the text of the various FTAs involving APEC members. Another database, [bilaterals.org](http://www.bilaterals.org), is an open-source database which allows users to add updates of the negotiations of the various FTAs in the region.

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<sup>66</sup> East Asia Vision Group (2001)

<sup>67</sup> East Asia Study Group (2002)

<sup>68</sup> <http://www.abc.net.au/news/newsitems/200611/s1782553.htm>

[http://www.bilaterals.org/article.php3?id\\_article=978](http://www.bilaterals.org/article.php3?id_article=978)

[http://www.bilaterals.org/article.php3?id\\_article=7264](http://www.bilaterals.org/article.php3?id_article=7264)

[http://www.apecsec.org.sg/apec/apec\\_groups/other\\_apec\\_groups/FTA\\_RT.html](http://www.apecsec.org.sg/apec/apec_groups/other_apec_groups/FTA_RT.html)

<sup>69</sup> Ravenhill (2000)

**Table 2 Databases monitoring the FTAs in the region**

| <b>Organisation</b>                    | <b>Website</b>  | <b>Remarks</b>                                 |
|--|---|--|
| ADB (Asia Regional Integration Centre) | <a href="http://aric.adb.org/ftatrends.php">http://aric.adb.org/ftatrends.php</a>                                       | Tracks FTAs and other trade agreements in Asia |
| APEC                                   | <a href="http://www.apec.org/webapps/fta_rta_information.html">http://www.apec.org/webapps/fta_rta_information.html</a> | Tracks FTAs of APEC members                    |
| Bilaterals.org                         | <a href="http://www.bilaterals.org">www.bilaterals.org</a>  | Tracks negotiations of FTAs internationally    |

### **C. Sustainable Development in Regional Trade Agreements**

What effect does the proliferation of bilateral and regional trade agreements have on sustainable development in the Asian region? Can these agreements, traditionally designed to increase trade flows, at the same time assist with countries' development and pursue social and environmental goals?

As mentioned earlier, there are varying assessments of the actual economic impact of many FTAs in the Asian region. If it is true that such agreements are entered into not for purely economic but also for political and other reasons, and that trade is not in fact expanded very significantly following the conclusion of the agreements, the agreements' effect on sustainable development arguably cannot be very negative and is more a shade of grey than black and white. Furthermore, this might also provide an explanation why several of the FTAs do not contain many provisions beyond basic ones covering trade in goods and reduction of tariffs. In other word because the economic impact is expected to be small, the FTA negotiations can only with some difficulty or indeed argumentative efforts leverage agreement in adjunct areas by providing economically more beneficial terms.

One of the areas where this statement requires a qualification is the area of agriculture. Agriculture has a special relevance for most societies due to its close connection with food security and especially because most society actually share a living memory of food shortages or even famine. Because agriculture is the basis for most food products, it also is closely related to culture and traditions of a society. The agricultural sector, particularly traditional farming, can face significant adverse impact in case of any kind of liberalisation, even if trading patterns do not significantly change. Even small agricultural imports can have severe trickle down effects at the local level. The mere opening of the market can send market signals which will adversely affect for example subsidy or credit decisions by banks or seed merchants.<sup>70</sup>

However, some of FTAs do contain broader provisions, addressing matters such as harmonisation of intellectual property laws and dispute settlement regimes for investments. These provisions can have mixed effects on regional development. Requiring least-developed countries to make broad liberalisation commitments before they have the institutional and market structures to cope with foreign competition, for instance, could be economically damaging; or a country's ability to tackle life-threatening diseases such as AIDS or malaria could be affected if intellectual property laws on pharmaceutical products are strictly enforced when citizens do not have the means to pay the higher drug prices that would follow.<sup>71</sup>

## **1. Provisions for Sustainable Development**

Cordonier Segger *et al.* (1999) have conducted a survey of the sustainable development provisions in various FTAs in Latin America and Cosbey, Tay, Lim and Wells (2005) conducted a more recent study which also included several involving Asian countries. Their review examined agreements for six main issues: investment rules, intellectual property rights, capital controls, trade in services, dispute settlement mechanisms, and institutions of

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<sup>70</sup> For a in-depth discussion of agricultural trade, see Sachs and Santarius, *Slow Trade – Sound Farming* (Berlin: Boell Foundation & Misereor, 2007).

<sup>71</sup> See generally Gehring and Cordonier Segger, *Sustainable Development in World Trade Law* (The Hague: Kluwer Law International, 2005).

development cooperation. In some cases, discussed below, the agreements reviewed contain requirements going beyond those in the WTO Agreements (by which the parties are already bound).

The Japan-Singapore Economic Partnership Agreement, Korea-Chile and ASEAN agreements contain stronger provisions to protect foreign investments than is required under the WTO's TRIMS agreement, as they adopt an investor-state arbitration mechanism. The Korea-Chile FTA includes extensive provisions on government procurement, imposing obligations of national treatment and non-discrimination. The US-Singapore FTA, Singapore-Australia FTA and Korea-Chile FTA adopt the negative list approach for services, with the result that commitments are far more comprehensive than, for instance, under the GATS positive list approach.

The US-Singapore FTA, like most other post-NAFTA agreements involving the US, effectively grants in Article 16.8 a five-year protection to patented pharmaceuticals from competition with generic drugs.

ASEAN's dispute settlement mechanism is relatively comprehensive, containing several levels of escalation with the option to take disputes elsewhere (for example, to ICSID). The Agreement on Dispute Settlement Mechanism,<sup>72</sup> attached to the ASEAN-China FTA, is similarly comprehensive allowing for escalation of disputes and providing for compensation or suspension of benefits to enforce decisions.

The study by Cosby *et al* commented on the effectiveness of institution- and capacity-building through FTAs in addressing development issues. It has been seen that regional and international agreements, often in the field of environmental protection but also in others, are more effective in practice if they are backed up by an administrative and institutional apparatus to maintain their relevance, track parties' compliance and provide a forum for further developments. The study notes ASEAN's development program, the Initiative for ASEAN Integration, which focuses on building infrastructure and providing training for developing country members of ASEAN (Cambodia, Myanmar, Laos and Vietnam). The

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<sup>72</sup> [http://gjs.mofcom.gov.cn/table/ACFTA\\_DSM.doc](http://gjs.mofcom.gov.cn/table/ACFTA_DSM.doc).

ASEAN-China FTA and the ASEAN-Japan CEP include similar development objectives, while some bilaterals (Korea-Chile and Australia-Thailand, for instance) have established committees on standards or SPS measures to monitor implementation in these areas, build capacity where possible and exchange best practices.

At the level of preambular language, the US-Singapore FTA, the Korea-Chile FTA, the Panama Taiwan FTA and the EFTA-Singapore FTA all recognise that economic growth must occur within the bounds of sustainable development. More recently some of China's FTAs also recognize in their preamble that the agreements should be implemented with a view towards promoting sustainable development. Various ASEAN treaties contain similar language, while the preamble to the Japan-Vietnam BIT acknowledges that the economic objectives of the agreement "can be achieved without relaxing health, safety, and environmental measures of general application". The South Asia FTA, on the other hand, mentions only economic objectives in its preamble. While preambular statements are not technically legally binding in the same way that operational provisions can be, they can certainly play a role in interpretation of a treaty, particularly in the identification of the treaty's object and purpose.<sup>73</sup> The Appellate Body of the World Trade Organisation, the highest world trade dispute body, ruled in its famous *Shrimp-Turtle* decision that "[a]s this preambular language reflects the intentions of negotiators of the *WTO Agreement*, we believe it must add colour, texture and shading to our interpretation of the agreements annexed to the *WTO Agreement*, in this case, the GATT 1994."<sup>74</sup> In other words, while it might seem unimportant that the goal of sustainable development is included in the preamble of an agreement, the inclusion can make a significant difference to the agreement's operation in practice. Recognition of sustainable development in a preamble can thus place greater importance on balancing ostensibly competing objectives, such as economic and environmental viewpoints, under the trade agreement.

a) *Labour Standards*

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<sup>73</sup> See Gehring & Cordonier Segger, Introduction, *Sustainable Development in World Trade Law*, p.10 pp.

<sup>74</sup> *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (6 November 1998), WTO Doc.WT/DS58/AB/R, Appellate Body Report.para. 153.

Concerns have been raised over the lack of provisions on labour standards in Asian FTAs generally. The notable exceptions are the FTAs involving the United States: the US-Singapore FTA and the Australia-United States FTA. The Trans-Pacific Strategic Economic Partnership, between Brunei Darussalam, Chile, New Zealand and Singapore, has a side agreement on labour standards.

The United States insist on the ratification of some of the International Labour Organisation's (ILO) labour standards as a condition for negotiating bilateral FTAs.<sup>75</sup> Despite the Australian government's initial reluctance to include the labour clauses in the Australia-United States FTA, it eventually agreed to their inclusion.<sup>76</sup> The wording of the labour aspects of both US-Singapore FTA and Australia-United States FTA are largely similar except that the US-Singapore FTA includes a greater elaboration on a labour cooperation mechanism. In each case, the provisions are in the body of the agreement (making them fully enforceable, compared with the provisions of the preamble or in an Annex). They provide that each party:

- a) must ensure that ILO labour principles and internationally recognised worker rights are protected by domestic law;
- b) shall not fail to enforce its own labour laws in a manner affecting trade;
- c) retains discretion in allocating enforcement resources;
- d) agrees not to waive or derogate from domestic labour law to encourage trade;
- e) may not undertake labour law enforcement in each other's territory; and
- f) is entitled to private remedies and procedural guarantees.

Sanctions for breaches of these requirements are authorised only for a sustained failure to enforce one's own labour laws in a manner affecting trade. There is a maximum penalty of \$15 million annually, backed up by the ability to suspend benefits under the agreements to the same value if the penalty is not paid.

In most other FTAs in the region the provisions for labour standards, if any are included, tend to be contained in a memorandum of understanding or an appendix attached to the main FTA. The efficacy of such provisions is thus legally limited by the enforceability of

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<sup>75</sup> Bolle (2003: 1-2)

<sup>76</sup> Wallace (2003); Nyland and O'Rourke (2005)

these instruments, and practically limited by the existence of an action plan to bring the commitments into effect.

Under Article 108 of the China-Chile FTA, both parties agree to “enhance their communication and cooperation on labour, social security and environment through both the Memorandum of Understanding on Labour and Social Security Cooperation, and the Environment Cooperation Agreement.” This is also the case in the Malaysia-Japan EPA, where under Article 139 of Chapter 12, both Malaysia and Japan agreed to “promote cooperation under this agreement for their mutual benefits in order to liberalise and facilitate trade and investment between the Countries and to promote the well-being of the peoples of the Countries.” The objectives of the Chapter explicitly mention, amongst others, the desire to “improve the well-being of the peoples of both Countries.” However, the commitment is weak since there is no further explanation of what standards these commitments might require in practice. Both countries pledge no more than to promote cooperation.

The earlier reference to “Mode 4” under a Services liberalisation schedule is also relevant with regards to workers. Generally “Mode 4” means that the workers can, in order to provide a specific service, move to another country but with regards to their labour relations the law of the sending state remains applicable. As such countries are hesitant to make “Mode 4” concessions.

#### *b) Environmental Policy*

The US-Singapore FTA specifically provides that measures to protect the environment and living exhaustible resources are permitted.

Environmental impact assessments have generally only been carried out in Asia at the request of developed countries; few Asian agreements include specific provisions requiring EIAs to be carried out, although in Singapore’s case this is because it believes its own environmental regime is sufficiently robust to deal with any adverse impacts of an FTA.

As with labour, most Asian FTAs do not include environmental provisions in their main text – except, again, for those agreements involving the United States, as well as the Australia New Zealand Closer Economic Relations Trade Agreement and Trans-Pacific Strategic Economic Partnership to some degree. The Trans-Pacific Strategic Economic Partnership includes a side agreement on environmental cooperation, which takes as its relatively broad objectives the encouragement of sound environmental policies and practices, the promotion through environmental cooperation of the commitments made by the parties, and the facilitation of cooperation and dialogue in order to strengthen the broader relationship among the parties. The key commitments made under the side agreement include recognition that it is inappropriate to use environmental laws for trade protectionist purposes, and respect for the sovereign right of each party to set, administer and enforce its own environmental laws according to its priorities.

In terms of regional organisations, ASEAN's record of cooperation in environmental matters has been patchy.<sup>77</sup> The ASEAN Regional Centre on Biodiversity Conservation has been operating since 1999, and the Specialised Meteorological Centre commenced operations in 1993. ASEAN also currently maintains five working groups for MEAs, covering nature conservation and biodiversity, sustainable cities, the marine and coastal environment, and water resources management. Meetings of these groups, however, are not regular, and environmental governance is not a legally-binding feature of ASEAN agreements.

In 1993, a mention of the environment was made in the APEC Leaders' Declaration. "Our environment is improved as we protect the quality of air, water and green spaces and manage our energy resources and renewable resources to ensure sustainable growth and provide a more secure future for our people." However, these aspirations have generally been unfulfilled given that APEC's declarations or resolutions are not binding. APEC itself does not have a permanent working group on environment.

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<sup>77</sup> Elliot (2003)

## 2. China and Sustainable Development in FTAs

Under the ASEAN-China FTA, both sides agreed to cooperate in certain sectors, with one sector being the environment. China also agrees to cooperate on environmental matters in trade treaties with various other countries, including New Zealand, Australia, Chile and Pakistan. According to some commentators though, China's track record in environmental cooperation with some of its ASEAN neighbours, particularly those along the Mekong River, does not inspire confidence in the quality of cooperation.<sup>78</sup> China has traditionally been reluctant to engage with the Mekong River Commission, an intergovernmental agency formed for the cooperation of developing, utilising, managing and conserving water and related resources of the Mekong Basin in a sustainable manner. The construction of dams to supply hydro-electricity to China along the upper streams of the Mekong River has arguably severely affected the livelihood of the people downstream.<sup>79</sup>

Significant is the language contained in the Mainland – Hong Kong & Mainland - Macao Closer Economic Partnership Arrangements contain somewhat weaker language on sustainable development. Both sides agreed in the principles section “to accord with the needs of both sides to adjust and upgrade their industries and enterprises and to promote steady and sustained development”.<sup>80</sup> An analysis of the text of this agreement reveals that an element of “sustained economic growth”, which only aims at economic development resounds. The connection with the upgrading of industries however can also lead to the conclusion that a real reference to “sustainable development” as defined in international agreements and declarations was intended.

The table below summarises the characteristics of certain FTAs between China and other mostly Asian parties. Generally speaking China as been reluctant to include environmental provisions in her FTAs. While some commentators see the main reason for this reluctance in China's less developed environmental regulation a recent official statement seems to indicate

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<sup>78</sup> *Economy* (2005: 422)

<sup>79</sup> See Mui Pong Goh, “A Survey of Sustainable Development Provisions in FTAs in Asia”, on file with authors.

<sup>80</sup> Art. 2.3 Mainland – Hong Kong CEPA and Art. 2.3 Mainland – Macao CEPA.

a desire to safeguard regulatory space. China intervened as a third party in the recent *Brazil-Re-treaded Tyres* dispute in the WTO brought by the European Communities.

It pleaded with the panel to find for Brazil:

“China hopes that the Panel will give considerations to the fact that the defending party in this case is a developing country. In fact, developing countries are facing more difficulties than developed countries in balancing their economic development and environment protection. In addition, in dealing with environmental problems, developing countries usually are less sufficient in terms of funding and less efficient in terms of technology. Therefore, the multilateral trade system should give more support and tolerance to developing countries' endeavour to improve the environment.”<sup>81</sup>

This statement shows that China does on the one hand not want to shoulder further commitments in the area of the environment but on the other hand does want to safeguard the regulatory space for environmental regulation without having to comply with further trade obligations. The statement shows that China is far from not sharing certain environmental concerns. Indeed it wishes trade law to be interpreted in a way that allows space for environmental regulation. If this is indeed the official policy, some of the policy innovations in developing country – developing country FTAs from other regions of the world will be increasingly relevant in the near future.

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<sup>81</sup> WTO, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WTO document WT/DS332/R, Panel Report of 12 June 2007, para. 5.37.

| <b>FTA between China and</b>                | <b>Australia</b> | <b>ASEAN</b> | <b>Bangkok Agreement parties</b> | <b>Chile</b> | <b>Hong Kong</b> | <b>Macao</b> | <b>New Zealand</b> | <b>Pakistan</b> |
|---|------------------|--------------|----------------------------------|--------------|------------------|--------------|--------------------|-----------------|
| Accession Clause                            |                  |              | *                                |              |                  |              |                    |                 |
| Dispute Settlement Mechanism                |                  | *            | *                                | *            |                  |              |                    | *               |
| E-Commerce                                  | *                |              |                                  |              | *                | *            | *                  |                 |
| Environment Clause                          |                  |              |                                  |              |                  |              |                    |                 |
| Labour Clause                               |                  |              |                                  |              |                  |              |                    |                 |
| Movement of Natural Persons                 |                  |              |                                  |              |                  |              |                    |                 |
| Periodic Review (Whole Agreement)           |                  |              | *                                |              |                  |              |                    |                 |
| Rules of Origins (regime-wide only)         |                  | *            |                                  |              |                  |              |                    | *               |
| Rules of Origin (Product-Specific Included) |                  |              |                                  | *            | *                | *            |                    |                 |
| Sanitary and Phytosanitary Measures         |                  |              |                                  | *            |                  |              |                    | *               |
| Services Trade                              | *                | *            |                                  |              | *                | *            | *                  |                 |
| TBTs, Safeguards, Regulatory Conformity     | *                |              |                                  | *            | *                | *            | *                  | *               |
| “Behind the Border” market access/ Rights   |                  | *            | *                                | *            | *                | *            |                    | *               |
| Competition Policy                          |                  |              |                                  |              |                  |              |                    |                 |
| Financial Sector (Liberalisation)           |                  |              |                                  |              |                  |              |                    |                 |
| Government Procurement                      |                  |              |                                  |              |                  |              |                    |                 |
| Intellectual Property (rights Emphasis)     |                  |              |                                  |              |                  |              |                    |                 |
| Investment (Rights Emphasis)                |                  | *            |                                  |              |                  |              |                    | *               |
| Privatisation                               |                  |              |                                  |              |                  |              |                    |                 |
| Telecommunications (Market Access Emphasis) |                  |              |                                  |              |                  |              |                    |                 |
| Economic Cooperation                        | *                | *            |                                  | *            | *                | *            | *                  |                 |
| Agriculture/ Primary Industry               | *                | *            |                                  | *            |                  | *            | *                  |                 |

|  |   |   |   |   |   |   |   |  |
|--|---|---|---|---|---|---|---|--|
| Co-operation                                 |   |   |   |   |   |   |   |  |
| Broadcasting Co-operation                    |   |   |   |   |   |   |   |  |
| Education/ HRD Cooperation                   | * | * |   | * | * | * | * |  |
| Energy Industry Cooperation                  | * | * |   |   |   |   |   |  |
| Entertainment Industry Cooperation           |   |   |   |   |   |   |   |  |
| Environment Cooperation                      | * | * |   | * |   |   | * |  |
| Financial Sector (cooperation)               |   | * |   |   | * | * |   |  |
| Information Technology Cooperation           | * | * |   | * | * | * | * |  |
| Intellectual Property (cooperation emphasis) | * | * |   | * | * | * | * |  |
| Investment (Cooperation Emphasis)            | * | * |   | * | * | * | * |  |
| Science and technology Cooperation           | * | * |   | * | * | * | * |  |
| SME Cooperation                              |   | * |   | * | * | * |   |  |
| Telecommunications (cooperation emphasis)    |   | * |   |   |   |   |   |  |
| Tourism Industry Cooperation                 | * | * |   |   | * | * | * |  |
| Customs Cooperation                          | * | * | * | * | * | * | * |  |
| Transportation/ Road Development             |   | * |   |   |   |   |   |  |

Source: Chao Sun, Dec 2006 adapted from Dent (2006:287).

### 3. Pakistan and Sustainable Development in FTAs

Pakistan is relatively active in pursuing FTAs in the region. It has concluded one with Sri Lanka, participates in an Early Harvest Programme with Malaysia, is a member of the South Asia Free Trade Agreement (a framework for reducing tariffs over time), and is engaged in talks with Indonesia, Thailand, Malaysia, China and Singapore, as well as other countries

outside Asia. More recently, it has signed an FTA covering goods trade and investment with China, due to come into force on 1 July 2007.

In the preamble of the Pakistan-China agreement, it is recognised that “this Agreement should be implemented with a view toward raising the standard of living, creating new job opportunities, and promoting sustainable development in a manner consistent with environmental protection and conservation.” Chapter VI of the agreement specially deals with the Sanitary and Phyto-sanitary Measures (SPS) issue.

Some of Pakistan’s agreements contain dispute settlement mechanisms, provisions allowing sanitary and phytosanitary exceptions, and differentiated responsibilities for least developed parties. In general, though, they are weak on development and environment issues, omitting to address expropriation in investment provisions, standards of treatment and limits on the use of performance requirements.

Similarly, the agreements make no mention of institutions of development cooperation whether inside or outside of the agreement. A failure to create specific institutions does not necessarily mean that no cooperation will be inspired or will occur between authorities in the day-to-day operation of trade and other agreements. The Latin American trade agreement experience shows that, even without formal institutions, government cooperation networks can form between officials.<sup>82</sup>

Other trade agreements, though, have found it useful to take initiatives to create such institutions addressing sustainable development concerns. For example, NAFTA created a bank to finance environmental infrastructure projects in the US-Mexico border region<sup>83</sup>. It also formed a Border Environmental Cooperation Commission to identify priority areas<sup>84</sup>. Similarly, European Union's European Investment Bank has structural funds that transfer funds from rich to poor countries for promoting regional development. ASEAN's Initiative for ASEAN Integration is aimed at helping new less developed/developing members to

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<sup>82</sup> M.C. Cordonier Segger & M. Lechner Reynal, eds., *Beyond the Barricades: An Americas Trade and Sustainability Agenda* (Aldershot: Ashgate Press, 2005)

<sup>83</sup> Ibid 1, pg 8

<sup>84</sup> Ibid, see footnote 4

improve transportation, energy and communications infrastructure and train civil servants to facilitate trade.

#### 4. India and Sustainable Development in FTAs

India has not yet concluded enough FTAs to provide a comprehensive picture of its future activity. It is interesting to note that the joint action plan contains perspective environmental and social cooperation and information exchange (without specifying their inclusion in the trade negotiations). As such India and the EU agreed:

- Strengthen the dialogue on global environmental issues with a view to building mutual understanding in particular on the UN Framework Convention on Climate Change (UNFCCC) and the Kyoto Protocol, the Montreal Protocol on Substances that Deplete the Ozone Layer, the UN Convention to Combat Desertification and the Convention on Biological Diversity;
- Hold meetings of the Joint Working Group (JWG) on Environment on a yearly basis and develop high level visits;
- Organise an India-EU environment forum [...] with stakeholders involving business, academia and civil society to exchange views and information;
- Hold an experts' meeting to exchange views on voluntary eco labelling schemes;
- Identify key environmental issues and approaches to sustainable development where exchange of experiences and cooperation could be mutually beneficial.<sup>85</sup>

In 2006 the EU-India high level trade group agreed that: "The EU and India support a social form of economic development and are keen to encourage a model of growth with equity, which is socially inclusive and broadbased. Both are conscious of the need for growth to respect the environment and be sustainable for future generations."<sup>86</sup> The more specific sections about the broad trade negotiations do contain a mandate to negotiate for example competition and investment rules (both having been deleted from the global negotiations in

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<sup>85</sup> Council of the European Union, "The India-EU Strategic Partnership - Joint Action Plan", EU Doc. 11984/05 (Presse 223) of 7 September 2005, online: <http://trade.ec.europa.eu/doclib/html/124785.htm>.

<sup>86</sup> Report of the EU-India High Level Trade Group to The EU-India Summit, 13 October 2006, online: DG Trade <[http://trade.ec.europa.eu/doclib/docs/2006/september/tradoc\\_130306.pdf](http://trade.ec.europa.eu/doclib/docs/2006/september/tradoc_130306.pdf)>.

the WTO) but do not mention any inclusion of innovative instruments for sustainable development.

## 5. Singapore and Sustainable Development in FTAs

### *a) India-Singapore Comprehensive Economic Cooperation Agreement (ISCECA)*

The preamble of the India-Singapore Comprehensive Economic Cooperation Agreement, came into force on 1 August 2005, explicitly mentions that one of the aims of the agreement was to “enhance economic and social benefits, improve living standards and ensure high and steady growth in real incomes in [the parties’] respective territories through the expansion of trade and investment flows.” However, issues such as environmental protection and labour standards are not addressed in the main body of the agreement.

### *b) US-Singapore FTA (USSFTA)*

This is arguably the most comprehensive of all the FTAs in Asia-Pacific. In the preamble of the agreement, both sides agree that “economic development, social development and environmental protection are interdependent and mutually reinforcing components of sustainable development, and that an open and non-discriminatory multilateral trading system can play a major role in achieving sustainable development.” The agreement has specific chapters on labour (Chapter 17) and environment (Chapter 18), and environmental provisions in other chapters, including the investment chapter. Both the US and Singapore conducted environmental reviews of the expected impact of the US-Singapore FTA before its signature.

Under Article 17.2 (of the Labour Chapter), the parties agreed that it is “inappropriate to encourage trade or investment by weakening or reducing the protections afforded in domestic labour laws.” There is a similar provision in Article 18.2 on environmental standards. The parties also agreed to establish a Labour Cooperation Mechanism for further cooperation on core labour standards.

A Memorandum of Intent on Cooperation in Environmental Matters was signed between the United States and Singapore on 14 June 2003 to provide a framework for future bilateral cooperation.<sup>87</sup> Further potential areas of cooperation such as energy efficiency, natural resource management and endangered species conservation have been proposed.<sup>88</sup>

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<sup>87</sup> [www.us-asean.org/Singapore/MOI\\_Environmental.doc](http://www.us-asean.org/Singapore/MOI_Environmental.doc).

<sup>88</sup> “Singapore, US Sign Memorandum on Cooperation in Environmental Matters.” ChannelNewsAsia, 13 June 2003. Accessed through LexisNexis.

## **6. Others countries and Sustainable Development in FTAs**

The Bay of Bengal Initiative for Multi-Sectoral Technical and Economic Cooperation (BIMSTEC) was formed in June 1997 to foster cooperation among Bangladesh, India, Sri Lanka and Thailand. Myanmar joined in December 1997, and Bhutan and Nepal were admitted in 2004.

In the joint statement of the ninth Ministerial Meeting held in 2006 in New Delhi, India, the members called for greater cooperation “to ensure the sustainable use of marine resources through effective conservation and management of the resources in the Bay of Bengal in accordance with international law.” Thailand offered to host a workshop on Fisheries Cooperation in late 2006 to discuss the direction of future cooperation and the proposed joint survey under the Ecosystem-based Fisheries Management in the Bay of Bengal project.

Other agreements in the region, including the JSEPA, India-Thailand FTA, Thailand-Australia FTA, and the Asia-Pacific Trade Agreement (Bangkok Agreement), make essentially no commitments in the area of sustainable development, focussing entirely on economic issues such as facilitation of trade and investment.

### **D. Potential for Sustainable Development in Regional Trade Agreements**

#### **1. Sustainable Development Innovations in Trade Law**

At the bilateral and regional level, countries have sought to develop other innovative approaches to sustainable development as an objective of a trade agreement.<sup>89</sup> The North American Agreement for Environmental Cooperation (NAAEC) and North American Agreement on Labour Cooperation (NAALC)<sup>90</sup> are two side agreements adopted by Canada, the United States and Mexico together with the North American Free Trade Agreement (NAFTA). As part of its mandate to examine the ongoing environmental effects of NAFTA,

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<sup>89</sup> See for this entire section, M. Gehring, J. Hepburn & M.C. Cordonier Segger, *World Trade Law in Practice* (London: Globe Law and Business Publishing, 2007) p. 131 pp.

<sup>90</sup> [www.naalc.org](http://www.naalc.org).

the Commission on Environmental Cooperation<sup>91</sup> established by NAAEC adopted an analytic framework in 2000.<sup>92</sup>

The framework sets out six main areas to focus its review of NAFTA, including:

- consideration of the connections between NAFTA's liberalised trade rules and an increased use of environmentally friendly products; and
- consideration of the potential for upward convergence of environmental practice and regulation in the public and private sectors.

One innovative element of NAAEC is the process allowing for civil society groups to complain to the commission of a member country's non-compliance with environmental laws and regulations. Although such complaints cannot lead to any binding determination, they have been both a source of embarrassment and an important way of maintaining public support for NAAEC and NAFTA. NAALC, for its part, takes as its focus labour standards in the three NAFTA countries, aiming to promote compliance with and enforcement of national labour laws and to foster continual improvement of working conditions and living standards.

A highly practical example of the integration of economic, social and environmental concerns (as envisaged by sustainable development) is found in the increasing use of impact assessment tools in the international arena. These tools come in various forms, ranging in scope from environmental impact assessments and human rights impact assessments to the broadest tool, sustainability impact assessments. Impact assessments operate as a formalised consideration of the wider effects of particular policies (usually trade policies or development projects), and aim to ensure that trade and development decisions result from processes that promote sustainability and public participation. Although it remains unusual for any national development decision or regional or bilateral trade agreement to require some form of impact assessment, the European Union, the United States and Canada have all adopted the tool to some degree, to be used either before or after the decision or agreement has been concluded.

The 1992 Rio Declaration recognised the potential of impact assessment in Principle 17: "Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority." At the international level, certain environmental treaties contain obligations to perform environmental impact

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<sup>91</sup> [www.ccc.org](http://www.ccc.org).

<sup>92</sup> CEC, *Analytic Framework for Assessing the Environmental Effects of the North American Free Trade Agreement* (Montreal: CEC 1999), at [www.ccc.org/files/pdf/ECONOMY/Frmwrk-e\\_EN.pdf](http://www.ccc.org/files/pdf/ECONOMY/Frmwrk-e_EN.pdf) (August 2005).

assessments in situations where one country's activity may flow across a border or when areas of common concern, such as the high seas<sup>93</sup> or the Antarctic,<sup>94</sup> are involved. The application of such instruments to trade agreements is relatively new, but developing rapidly, and in some instances the assessments include a regulatory dimension.

In Canada, the Framework for Conducting Environmental Assessments of Trade Negotiations<sup>95</sup> has been used since 2001 to conduct environmental assessments of new bilateral and regional trade negotiations, and since 2005 this has also been applied to investment agreements. The assessments seek to assist Canadian negotiators in integrating environmental considerations into the negotiating process (as envisaged by the Doha Development Agenda), and to address public concerns. The framework includes provisions for actively seeking public input into assessments from non-governmental organisations, businesses, indigenous peoples and the general public. Similarly, the Office of the US Trade Representative has conducted environmental reviews of all bilateral and regional trade agreements signed by the United States since 1999, in which regulatory impacts, public advice and potential impacts in the territory of the proposed new trading partner are taken seriously and addressed.<sup>96</sup> Developing countries have, in some cases, also found such assessments useful for economic policy making. For instance, as discussed by the International Institute for Sustainable Development, Senegal recently found that stocks of certain species of fish with high market values were being seriously depleted through the use of trade impact assessment.<sup>97</sup>

Sustainability impact assessments are more complex, innovative studies which take economic, environmental and social impacts into account to provide a complete picture of the expected effects of a trade policy or project. They include target-related indicators, which attempt to measure sustainability against a set of defined goals, and process-related indicators, which are based on the principle that the process itself by which policies and decisions are adopted plays a substantial role in achieving sustainable development goals. Indicators of sustainability used in the assessments fall into three categories:

- economic indicators, including average real income, fixed capital formation and employment rates;
- social indicators, including poverty rates, health and education levels and equity; and

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<sup>93</sup> *UN Convention on the Law of the Sea*, December 10 1982, UN Doc A/CONF.62/122, 21 ILM 1245 (entered into force November 16 1994), preamble, Arts 192 and 194.

<sup>94</sup> *Antarctic Environmental Protocol*, 30 ILM 1461 (1991), Art 23(1).

<sup>95</sup> Available at [www.dfait-maeci.gc.ca/tna-nac/Environment-en.asp](http://www.dfait-maeci.gc.ca/tna-nac/Environment-en.asp).

<sup>96</sup> Available [online](http://www.ustr.gov/Trade_Sectors/Environment/Environmental_Reviews/Section_Index.html) at [www.ustr.gov/Trade\\_Sectors/Environment/Environmental\\_Reviews/Section\\_Index.html](http://www.ustr.gov/Trade_Sectors/Environment/Environmental_Reviews/Section_Index.html).

<sup>97</sup> IISD, *Environment and Trade – A Handbook*, p 112.

- environmental indicators, including air and water quality indicators, biological diversity and natural resources.<sup>98</sup>

Sustainability impact assessments are mostly in use within the European Union, which developed a framework for analysis in 1999 and has since applied it to the WTO Doha Round negotiations and EU bilateral and regional trade agreements with Chile, Mercosur, the African-Caribbean-Pacific nations and the Gulf Cooperation Council nations. EU sustainability impact assessments place much emphasis on consultation both within EU member states and in the third country trade partners. The assessments themselves are conducted by independent experts commissioned by the European Union, which then receives a response paper from the European Commission. All results are made public.

## 2. Sustainable Development Innovations in Asia

The process involved in concluding large-scale regional trade agreements such as SAFTA or the ASEAN FTA provides the perfect opportunity for a broader examination of the goals of the process and an identification of shared regional problems that can be addressed in some way by these regional agreements. As noted above, bilateral and regional trade agreements are not always purely about the monetary benefits that will accrue to each side. Conversely, they can not be purely about environmental protection or social development; the aim is to strike some kind of balance in which a different kind of economic growth can be achieved. The RTA process offers a chance to create an Asian regional legal and policy framework to promote sustainability.

More specifically, economic agreements can include a variety of provisions aimed at increasing sustainability:

- prohibitions on unsustainable subsidies, particularly in Asian developed economies;
- side agreements, or incorporated provisions, on ecological cooperation – that is, cooperation across ecologies, rather than across political borders;
- prior to conclusion, commitments to conduct environmental impact assessments on the predicted effects of the agreements;
- certification and eco-labelling processes, to give incentives for the production of less environmentally harmful products;
- substantive labour standards to ensure that these are not lowered in the interests of economic gain;

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<sup>98</sup> EUROPA, *Sustainability Impact Assessment*, [http://ec.europa.eu/comm/trade/issues/global/sia/index\\_en.htm](http://ec.europa.eu/comm/trade/issues/global/sia/index_en.htm).

- regional foreign investment codes to govern decision-making on infrastructure and other projects, particularly in developed-developing Asian agreements;
- workable dispute resolution mechanisms that take sustainable development as a guiding principle in their operation;
- transparency and consultation requirements, both prior to conclusion and during the term of the agreement, including allowing for Asian civil society participation in agreements;
- implementations of the precautionary principle in trade and infrastructure projects;
- processes to encourage technology and knowledge transfer so that appropriate regulatory decisions can be made;
- explicit recognition of the role that sub-national governments and authorities can play in implementing and monitoring all of the above.

It can be seen from the above discussions that, in general, trade and investment agreements in Asia do not yet adequately focus on the goal of sustainable development. However, there are some positive developments to be noted. APEC has issued guidelines entitled “Best Practice For RTAs/FTAs In APEC”,<sup>99</sup> which call on agreements to reflect “the inter-dependent and mutually supportive linkages between the three pillars of sustainable development – economic development, social development and environmental protection – of which trade is an integral component.”

There is also growing recognition in China of the need to recognise sustainable development as a goal of policy-making. The scientific concept of development was advanced at the Third Plenary Session of the 16th Central Committee of the Communist Party of China in October 2003.<sup>100</sup> The Session called for an end to the excessive and unhealthy pursuit of economic growth in China and promoted comprehensive, coordinated and sustainable development.<sup>101</sup> It stressed coordinated development between urban and rural areas, among different regions,

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<sup>99</sup> Available online: APEC

<[http://www.apec.org/apec/apec\\_groups/other\\_apec\\_groups/FTA\\_RTAs.MedialibDownload.v1.html?url=/etc/medialib/apec\\_media\\_library/downloads/ministerial/annual/2004.Par.0004.File.v1.1](http://www.apec.org/apec/apec_groups/other_apec_groups/FTA_RTAs.MedialibDownload.v1.html?url=/etc/medialib/apec_media_library/downloads/ministerial/annual/2004.Par.0004.File.v1.1)>.

<sup>100</sup> Xinhua News Agency October 15, 2003.

<sup>101</sup> ‘Zhongguo gongchandang dishiliujie zhongyang weiyuanhui disanci quanti huiyi gongbao’ (Communiqué of the Third Plenary Session of the 16th CPC Central Committee of the Chinese communist Party), Xinhua News Agency, October 14, 2003.

between economic and social dimensions, between man and nature, and between domestic development and opening-up to the outside world.<sup>102</sup>

Given that new trade agreement negotiations are ongoing in many Asian countries, particularly China and India, it is essential to provide some mechanisms and tools for the inclusion of sustainability provisions in future agreements. Asia can look for inspiration outside its borders; for instance, to the negotiations on the Free Trade Area of the Americas (FTAA). Although FTAA negotiations are currently stalled, the processes that have been established and undertaken thus far represent an encouraging advance in reconciling economic, social and environmental interests in a regional trade agreement.<sup>103</sup>

Four integration strategies can be identified in the FTAA negotiations:

- the use of interpretive provisions;
- ‘integrated’ substantive provisions;
- ‘value-added’ parallel instruments; and
- procedural innovations.

The first strategy, the use of interpretive provisions, plays out in three main forms – preambular language, explicit interpretation provisions, and exceptions. Preambles, while not binding, essentially set the tone of an agreement and can be used in construing its provisions in cases of uncertainty. Explicit interpretation provisions might specify, for instance, that particular environmental or social agreements are to prevail over the economic agreement in case of any conflict, provided that the least trade-restrictive or inconsistent measure is taken in order to satisfy the environmental or social agreement. Provisions allowing for exceptions can clarify and expand on exceptions already existing in multilateral agreements such as GATT and GATS, to better ensure that environmental and social priorities are met.

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<sup>102</sup> ‘Build Up and Implement Scientific Concept of Development,’ People’s Daily, November 5, 2003; ‘Fully recognize the guiding importance of the Scientific Concept of Development,’ People’s Daily, October 3, 2005; ‘Firmly Establishing a Scientific Concept of Development,’ Qishi, 2003, no 22 (November 16).

<sup>103</sup> This part draws heavily upon Marie-Claire Cordonier Segger, “Integration of Social, Environmental and Economic Considerations in Regional Trade Law”, in *Sustainable Development in World Trade Law*, p. 403 pp and Marie-Claire’s earlier work.

The second strategy focuses on means of including substantive provisions in the agreement text to address sustainable development issues. One such method is the requirement for Sustainability Impact Assessments to be carried out. These tools aim to canvass the implications of a trade agreement along the various dimensions of sustainability, and can be conducted not only before the agreement's commencement but also during its life, to monitor its effects. Provisions explaining the connections between the trade agreement and other international agreements where potential for overlap exists (such as the *Kyoto Protocol*, the *Convention on Biological Diversity*, or the *Cartagena Protocol on Biosafety*) can also be included to encourage reconciliation of competing norms.

The third strategy relies on the idea that, in some cases, social or environmental instruments agreed in parallel to the main trade agreement text can be an effective means of addressing these issues in direct and binding ways while satisfying economic concerns by setting them outside the primary text. Lastly, the procedures both used in the negotiation of trade agreements and established in the agreement itself can contribute to ensuring sustainability. Wide public consultations can take place, allowing civil society to access draft texts and to participate in negotiations, in order to obtain a complete picture of the broader effects of the agreement before it is implemented. Sustainability Impact Assessments can also be useful in that regard. Institutions for capacity building can be designed into the agreement, affecting the procedures used to administer it. Other proposals and ideas include the establishment of civil society committees within the trade agreement framework for ongoing consultation and dispute settlement assistance during the life of the agreement.

As for labour standards, Asian RTAs could learn from NAFTA, where the side agreement on labour (the North American Agreement on Labor Cooperation) aims to guarantee certain core standards such as the freedom to organise, the right to collective bargaining, the freedom from forced labour, the prevention of discrimination, and minimum working ages. Other useful paths to consider are: to include clear provisions in trade agreements prohibiting the lowering of labour (or environmental) standards, together with effective monitoring regimes; the harmonisation of manufacturing standards so that each country is satisfied with the other's production methods and thus the regard had to labour and environmental concerns; harmonisation or mutual recognition of environmental and labour laws; compliance by companies operating outside their home country's territory with home

country environmental and labour laws; and auditing, certification and labelling schemes to provide public incentives to adopt high standards.

Consideration must also be given to the diversity of the Asian region. Commitments made in regional economic agreements cannot be expected to be identical when the countries involved range in levels of development from Japan (with the world's second-highest GDP) to East Timor (175<sup>th</sup>). Agreements with differentiated responsibilities in terms of liberalisation commitments and timeframes from compliance are essential if progress is to be made in practice.

Investment provisions can have wide-ranging effects on host countries, and if the provisions are not carefully designed these effects can include environmental degradation and pressure to ignore domestic social, labour and environmental regulations. Targeted foreign investment can, on the other hand, be a significant catalyst for development and a positive force in environmental protection if sufficient regard is had to the principles of sustainability. According to the US National Wildlife Federation, "increased investment built on a solid commitment to sustainable development can potentially lead to transfers of cleaner environmental technologies and improved capital expenditures in environmental protection infrastructure."<sup>104</sup> The negotiation of trade and investment agreements in Asia is an ideal opportunity to develop and include investment criteria, to ensure that capital flows between the parties achieve beneficial outcomes.

It has been seen that regional and international agreements, often in the field of environmental protection but also in others, are more effective in practice if they are backed up by an administrative and institutional apparatus to maintain their relevance, track parties' compliance and provide a forum for further developments. The Asian Development Bank plays some of this role, and groupings such as ASEAN serve related purposes. As an example from outside the region, the North American Commission for Environmental Cooperation performs activities such as environmental audits and analyses of the environmental effects of trade, as well as monitoring the NAFTA parties' compliance with the NAAEC. As suggested above, institution- and capacity-building is fundamental to the success and goals of Asian trade agreements, and is an important part of encouraging sustainable development in the region.

Transparency in, and liberalisation of, government procurement is another area of trade policy that can have sustainable development impacts. Despite trends towards public-private partnerships and increasing private provision of essentially public infrastructure, governmental spending choices still have large consequences on development, particularly in

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<sup>104</sup> M.C. Cordonier Segger *et al.*, *Trade Rules and Sustainability in the Americas*, p38.

developing countries such as the many in Asia. The degree to which domestic civil society can participate in and view the progression of government procurement decisions partially mandates those decisions' efficiency and effectiveness in achieving sustainable outcomes. Widespread consideration and discussion of a governmental proposal to, for instance, build a new road or bridge, or (more controversially) a new dam or mine, along with freely competing tenders from the region to undertake the works, clearly assists in attaining a result that pleases all stakeholders and all interests, human and otherwise.

Transparency is important more generally too, of course, and Asian trade policy-makers and legislators can encourage this through several methods. Free access to information (via the Internet, or via readily accessible inquiry points if Internet access is not widely available in the country) helps to create a culture of openness, and this should extend not only to NGOs and civil society but also to national governments and regional organisations such as ASEAN and the Asian Development Bank. Within domestic legal systems, freedom of information legislation can be effective if it is well-understood and if infrastructure allows it to be widely used. Civil society participation in governmental decision-making (beyond procurement decisions) can be encouraged through the use of national trade advisory committees with members from various sectors, including government, business, environmental and labour groups.

Alongside developments in law and trade policy, the promotion of scientific inquiry is also fundamental to building knowledge about the Asian environment that feeds into trade and sustainable development debates. A highly valuable input to this scientific analysis is the traditional knowledge of communities in Asia, which, according to some, “transcends the knowledge gained by extended rigorous scientific effort.”<sup>105</sup> This knowledge must be incorporated into mainstream processes to develop scientific capacity in the region, and particularly in South-East Asia. The large numbers of trained scientists in Asian countries such as China, Japan, South Korea and Singapore can play a vital role here in assisting other less-developed areas in Asia.

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<sup>105</sup> M.C. Cordonier Segger *et al.*, *Trade Rules and Sustainability in the Americas* 48.

## **E. Conclusions**

With the relative explosion of bilateral and regional activity in the negotiation of free trade and investment agreements in Asia, the time is ripe to consider how sustainable development has been approached in these agreements and could be further integrated as the trend continues. Although the evidence suggests (somewhat paradoxically) that Asian FTAs are often not concluded for trade and economic reasons alone, their existence can still have an important effect on regional integration, trade and development policy – even through non-trade provisions and commitments such as the creation of monitoring institutions. The presence of well-established non-State actors in the region provides a number of potentially useful forae to facilitate and encourage beneficial trends.

An analysis of existing Asian trade and investment agreements shows a “mixed bag” in terms of sustainability awareness, tending however towards a lack of consideration for matters such as environmental and labour standards or differentiated obligations. The discussion in Section C, then, proposes an agenda for sustainable development in Asian regional economic agreements. It aims to demonstrate the potential that sustainability concepts and provisions hold to create tangible developmental benefits in a number of dimensions for the region. The concepts and provisions discussed can be implemented in a variety of highly practical ways in the wave of agreements that has arisen in Asia in the last decade and that looks set to continue. Around the world, sustainable development is increasingly recognised as something more than an aspirational phrase pasted into the unenforceable preamble of a treaty. It is assisting judicial authorities with the interpretation of agreements and the resolution of resource conflicts; it is providing governments with a yardstick against which to measure the desirability of new policies and projects; and its underlying ideas offer opportunities for realistic, workable changes in process and practice that promise real benefits for both the human and natural resources of Asia.

In summary, FTAs have the potential to be just bad or not so bad, indeed sometimes even good, for sustainable development – the real effect depends on several factors of which the inclusion of innovative provisions is one. Asian FTA negotiations have become increasingly prevailing and this activity could in the long term mean that the emerging civil society in many countries needs to enable to become an active stakeholder.

There are some indications that regional trade negotiations could become the likely next step and especially in an East-Asian Free Trade Zone proper consideration for sustainable development has to be included. There is a need for a “toolkit” which explains the dynamic and the potential for change in current and future negotiations, and which could be used by

relevant, sometimes “underprivileged” government departments and civil society alike. In procedural terms impact assessments and public consultation could help intra-government and non-governmental actors to prioritise and lead in the long term to harnessing the current negotiations for sustainable development.

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