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Trade negotiations for a Free Trade Agreement: a guide to general principles and requirements

by Ron Sandrey

The objective of this paper is to outline the process of a trade negotiation and, in particular, a pathway to follow. This paper runs a parallel pathway to a companion paper assessing the China-New Zealand Free Trade Agreement (FTA), and both heavily rely upon the New Zealand Ministry of Foreign Affairs and Trade publications for background data and information. It also references extensively the 2005 paper on regional and bilateral FTAs by Martin Khor, the Director of the Third World Network, and refers to the Chilean examples as, along with New Zealand, this South American country leads the world in 'genuine FTA relationships'. And the term 'genuine FTA relationships' is emphasised as many so-called FTAs are in reality less rigorous preferential trade agreements (PTAs), with a genuine and comprehensive FTA being a PTA 'on steroids' (note in particular the term 'comprehensive').

1. Background to trade negotiations

A fundamental principle is to recognise that these are just what they say: trade negotiations. There are gains that are sought and positions that must be protected, while, similarly, the other side of the table is facing the same situation. As with any street-side discussion on price at a market stall anywhere in Africa, each party should have a clear picture of where their bottom line is. And as with these street negotiations, often the other parties' bottom line is unknown. Here, sometimes, one party is disadvantaged by an asymmetric knowledge problem – where that party has relevant information that the other does not. Associated with this is asymmetrical power – where, similarly, one party, often because of its size, is able to or be perceived to be able to wield that power. Thus, do your homework and know what you are getting into. And, also know your 'walk away' position.

Any negotiation will end with both winners and losers. Consumers benefit from the free trade agreement as they have a wider access to goods at lower prices. Producers in the importing country suffer losses, as there is a price decrease that induces a decrease in output of existing firms (and perhaps some closures), a decrease in employment, and a decrease in profit. And the government loses tariff revenue that would have been collected on imports, and this, in turn, may reduce government spending or transfers or raise government debt. The aggregate national welfare effect is found by summing these gains and losses to consumers, producers and the government. The relative size of these components dictates whether the overall effect is positive or negative. In practice, the producer

effect is likely to be negative notwithstanding the extent to which competition exhorts more efficiency; the consumer effect will be unambiguously positive. The tax collection effect is likely to be negative notwithstanding the (largely) theoretical argument that it can be positive as the increase in imports is such that more tariff revenue can, in fact, be generated.

Why do countries seek trade agreements? Despite numerous and vocal critics, virtually every World Trade Organisation (WTO) member is involved in at least one (and often numerous) FTA or preferential trade agreement (PTA). Sometimes it is for no other reason than being left behind, as a competitor has trade preferences in your markets. Sometimes, as in the case of the smaller open economies such as Chile and New Zealand, it is a desire to complement their unilateral domestic reforms, while at other times it is the desire of a large economy to force a smaller country into granting trade concessions.

There are dangers and pitfalls in trade negotiations to be aware of. One of these is policy space, which should be an ongoing concern for many developing countries as negotiated concessions restrict future government policy options. Sandrey et al. (2008, and updated in Sandrey, 2013) outline how restricted policy space is limiting the options for South Africa to raise agricultural tariffs. Similar situations apply in almost all areas of negotiation such as investment rules and competition policies, with investment policy space being a major concern for those New Zealanders opposed to the China FTA, such as veteran lobbyist Professor Jane Kelsey.[1] Associated with policy space is the particular concern that some developed countries are insisting upon a clause that entitles them to automatically have any future concession negotiated with a third party to be granted to them as well.[2] This can be especially onerous in the case of a small country.

Thrasher and Gallagher (2008) present a good review of how the emerging world trading regime limits the 'policy space' to deploy effective policy for long-run development and the extent to which there is a convergence of such policy space under global and regional trade regimes. Basically, poorer nations now have a more limited policy toolkit to engage in long-run development strategies that were available to the so-called Asian Tigers, and furthermore trade arrangements are influencing and constraining their future policies.

[1] See, for example, http://livenews.co.nz/2012/11/interview-between-jane-kelsey-selwyn-manning-on-concerns-over-trans-pacific-partnership-agreement-tppa-consequences/ where Kelsey voices her opposition to the proposed Trans-Pacific Partnership Agreement (TPPA). Her concerns focus on the dominating and aggressive stance being taken by the US.

[2] This is analogous to the WTO Most Favoured Nation (MFN) clause that requires treating other people equally. Under the WTO agreements, countries cannot normally discriminate between their trading partners. Grant someone a special favour (such as a lower customs duty rate for one of their products) and the same has to be done for all other WTO members. Regional agreements have exemption from this clause provided certain conditions are met.

Another danger is trade creation versus trade diversion. Trade creation is new trade from a FTA partner which would not have existed otherwise, and that, generally, is good. But often much of this may just be trade diversion away from other, non-preference partners, and that may be bad – bad in the sense that it has resulted from an artificial advantage under the FTA in that one is not buying from the world's lowest cost supplier. This is mitigated under a WTO agreement, as all trading members of the WTO are treated equally (the Most Favoured Nation – MFN – principle).

Recent research and discussion point to how trade diversion becomes a particular and potentially costly problem for Africa (Nkuepo, undated). In general, sourcing from a low-cost supplier (China) avoids this problem whereas an agreement such as the TDCA whereby SACU may be sourcing from the higher-cost EU may be hiding trade diversion. A wedge is driven between comparative advantage and what actually happens. Conversely, it must be stated that one country's trade diversion (negative for that country) is the partners' trade creation (good for them). Sandrey (2006a) used a computer model to sequentially apply the TDCA tariff preferences in turn to China, the United States of America (US) and finally India using the calculated post-TDCA trade flows from all the different import sources before creating a 'level playing field' and examining a moderate outcome from the Doha Development Agenda (DDA) of the WTO. The salient point was that with each new bilateral/regional partner at least half of the new trade was merely trade diversion and it was not until the final multilateral simulation that the admittedly modest gains were substantially new trade or trade creation. However, a Doha outcome after these prior agreements made less than 1% difference to South Africa's import profile under these conditions where 65% of the imports were already theoretically entering under preferences. More importantly for the region, the SACU customs revenue pool reduced by an estimated 29.7% from a non-preference base, and, given that Lesotho and Swaziland rely on this revenue for half or more of their total government revenues, this would have serious consequences for them.

Only by a careful analysis of these overall effects can an indication be made as to whether or not an FTA will be unambiguously positive for a country. Often a computer trade model is employed to undertake such an analysis, as in a dynamic and complex world where there may be many trade policy options facing politicians and other decision makers. This is because a model can assist in clarifying the potential trade-offs. These trade models' strength is the ability to handle large and complex data sets and interactions within an economy and to report upon the implications of the changes under examination. Their weakness is that models only react to the assumptions made and the data used, and great care must be exercised in the interpretation of their results. The assumptions made will dictate

the outcome, and an output is only as good as the data. In the final analysis, models are, by definition, an abstraction from reality, and this must be kept in mind. But often they are useful as there is no alternative way to assess all the complex and often conflicting interactions in an economy (Sandrey, 2007b), and, in addition, the analyst must be clear about assumptions used.

The simpler step-by-step analysis can, however, be extremely useful. Khor (2005) provides a blueprint for such a framework, where he lists possible benefits and costs. Under 'benefits' he incudes market access in both merchandise goods and services, possible concessions on Sanitary and Phytosanitary (SPS) and Technical Barriers to Trade (TBT) issues, possible aid mechanisms, and possible investment and investment-related benefits. On the costs side, he lists market access costs of merchandise goods and into the home country, intellectual property costs such as restricted and more costly access to medicines and copyrights, the so-called Singapore issues (to be discussed later), and labour and environmental costs. He stresses how many of these costs really only apply to developing countries, which reinforces the need for often capacity-constrained developing countries to be vigilant. We consider that a useful framework approach is to consider the issues within the context of international competitiveness. This is a valid, indeed a necessary, approach, as a fundamental objective of a trade agreement must be to improve the competitiveness of the business sector. This, in turn, reinforces the need for negotiators to be in meaningful dialogue with the business sector.

There is no question that FTA negotiations are complex. The Trans-Pacific Partnership Agreement, for example, is reported as having negotiators working in 21 working groups that include business mobility, customs, competition, cooperation, e-commerce, environment, financial services, horizontal issues, government procurement, investment, intellectual property, labour, legal issues, market access, rules of origin, sanitary and phyto-sanitary measures, technical barriers to trade, and telecommunication.[3]

2. Multilateral versus regional or bilateral negotiations

Sandrey (2007a) explores the concept of placing South African agricultural trade policies into four 'pillars'. These pillars are unilateral (what you do yourself), bilateral (between you and another party directly), regional (what happens between a group), and multilateral (what happens when all parties are involved). However, within this framework it can become a little difficult to see where the exact boundaries are. For instance, under the 2002 SACU Agreement, South Africa is expected to liaise with the so-called BLNS countries (Botswana, Lesotho, Namibia and Swaziland) on trade policies,

[3] See http://www.aprnet.org/index.php/home/120-volume-19-june-2012/487-exposing-the-myths-of-the-tppa.

and this blurs unilateral policies on one end of the spectrum and bilateral and regional issues towards the other end. Nonetheless, the 'pillars' give a useful framework to evaluate trade policies, although one needs to always consider that trade policies cannot be viewed in isolation from other policy changes taking place both within the sector and outside the sector with respect to 'flanking' policies such as competition policies and infrastructure development, for example.

The WTO, the multinational forum, has a foundation of agreements that covers goods, services and intellectual property, and is based on principles of liberalisation and permitted exceptions. Importantly, there are procedures for settling disputes in this global 'rules based' regime. There are a number of simple, fundamental principles that govern the WTO. Primarily, a country should not discriminate between its trading partners (the most favoured nation (MFN) rule) and nor should it discriminate between its own and foreign products, services or nationals (the national treatment); a fundamental objective of lowering trade barriers is to see that trade is pursued. These barriers include customs duties (tariffs) and measures such as import bans or quotas that restrict quantities selectively. Furthermore, these trade barriers cannot be raised arbitrarily above commitments. The WTO also targets 'unfair' practices, such as export subsidies and dumping products at below cost to gain market share; and in these instances, the issues are complex with rules that try to establish what is fair or unfair and how other governments can respond. This is essentially an attempt to limit the ongoing concerns with non-tariff barriers (NTBs) and non-tariff measures (NTMs). It should always be remembered that in any negotiations the WTO access and other conditions set the benchmark for any 'WTO plus' aspirations; similarly, it often may be useful to closely examine any concessions that a bilateral partner has been granted with a view to the implications of extending these concessions to others. This may in many cases mitigate trade diversion as discussed above, albeit at the expense of tariff revenues and added pressures on the domestic sectors.

Significantly, over three-quarters of WTO members are developing countries and transition economies, and the agreements give them time to adjust to the more unfamiliar and possibly difficult provisions – the so-called 'special and differential treatment'. In particular, the concept of non-reciprocity between developed and developing countries exists whereby developed countries grant trade concessions to developing countries but do not expect the developing countries to make matching offers in return. It is against this leniency for developing and especially least developed countries that the WTO must be judged, as often these countries are required to make few, if any, adjustments to domestic policies. Such leniency is not a compelling feature of FTAs. Finally, members are permitted to protect the environment and public health, animal health and plant health –

but these measures must also be applied equally to both national and foreign businesses ensuring that members do not use environmental protection measures as a guise for protectionist policies. However, against this rigid background the WTO does permit FTA as a departure from its fundamental rule of non-discrimination between countries so long as they cover 'substantially all trade'. In essence, the WTO is based on non-discrimination, reciprocity, binding and enforceable commitments, transparency and safety valves where needed, while exceptions to the MFN principle allow for preferential treatment of developing countries and for regional free trade areas and customs unions to exist.

Again, Martin Khor (2005) presents an excellent discussion of how differences between multilateral and regional/bilateral agreements unfold in reality. He supports the generally agreed view that an FTA is not the best option as multilateral agreements are preferred. His first point is the trade diversion phenomenon discussed above, with the weaker bargaining positions and negotiated resources of developing countries (a weakness accentuated by the proliferation of negotiating demands) listed next. This is followed by the WTO principles of special and differential treatment whereby least developed countries in particular usually mean that those poorer countries are obliged to make few, or even no, meaningful concessions. Conversely, FTAs generally feature reciprocity whereby equal treatment is likely to result in unequal outcomes for developing and least developing countries. This can apply to merchandise goods' access, intellectual property, and services. Next is the concept of 'WTO plus' whereby many issues such as the Singapore issues are introduced 'by the side door' as they have been rejected as WTO issues.

3. The basic components of an FTA

Two countries lead the world in FTA policies and performance, and both are small southern hemisphere agriculture-exporting countries. They are Chile and New Zealand. Chile's FTA policies are outlined by Vergara (2005) who discusses how Chilean FTAs go beyond WTO commitments by not only eliminating tariffs and having comprehensive agreements in services but also by agreeing to commitments that go beyond WTO commitments in areas such as trade facilitation, transparency, intellectual property rights, sanitary and phytosanitary (SPS) and technical barriers to trade (TBT) measures. They are comprehensive in scope; they address all sectors in goods and go beyond WTO commitments in services and other areas previously mentioned. Most eliminate tariffs for substantially all trade since day one, although there are some limited phase-in periods. Transparency is ensured by full notification to the WTO and full public disclosure of all official texts and other related documents. Trade facilitation is being addressed in areas such as TBT and SPS and custom procedures that seek to

make trade more efficient. All but one of Chile's FTAs have a chapter with specific provisions to deal with the administration of the agreement, and generally there are provisions for periodic reviews.

New Zealand's FTA profiles, performance and ambitions are comprehensively documented on the website of the Ministry of Foreign Affairs and Trade (MFAT), and more discussion on these agreements is provided below. If one word describes New Zealand's FTA negotiating position that word is 'comprehensive', and New Zealand has walked away from almost-completed FTA negotiations in the past when comprehensiveness was not achievable.[4]

3.1 Market access for merchandise goods

This is straightforward, as each party seeks preferential access for its merchandise goods over and above the WTO concessions. This is usually in the form of lower tariffs, but where other constraints such as quantitative restrictions apply there may be negotiations on better access conditions in that area – although we note that if quantitative restrictions are in place that indicates that the importing country sees them as sensitive goods. As an aside, there is an interesting point about tariff concessions and the general arguments that many countries use to promote agreements. Taking, say, a 10% tariff, this argument runs (or is implied) that exporters will be 10% better off as their costs of entry are lowered by that amount while consumers will also be 10% better off as the costs of imports are lowered by that amount. The simple fallacy here is that to claim this one party is saying that it is getting substantially all the benefits of the agreement and leaving nothing for the other party. In reality, it is highly unlikely that there will be a 10% adjustment to one party only, as there are many players other than exporters and consumers involved who are going to share in the distribution of the new gains. The distribution will ultimately depend upon the relative market powers of the many players.

Two issues are crucially important for developing countries in the salient aspects of an FTA that feature in merchandise goods negotiations. The first of these is tariff and other border revenues, the second the complex issue of employment. The latter is important in Africa in particular where neither alternative employment nor welfare nets are available to those losing their jobs. It also features strongly in the protectionist policies of developed countries as they seek to curtail labour-intensive goods such as clothing and footwear where developing countries have a low labour cost competitive

[4] With Hong Kong a decade ago when insufficient access to services was not on the table, and with Chile a decade or so before an agreement was signed when full access to the Chilean dairy market was similarly not put on the table.

advantage. A variation is the refusal of developed countries to adjust access conditions for agricultural products in the face of a well-entrenched agricultural lobby.

Examining tariff revenue we find that SACU revenue plays a critical role in financing BLNS government programmes, as on average it contributed 37% to total revenue during 2009.[5] It is the most important contribution to total revenue in both Swaziland and Lesotho, contributing 56.5% and 51.0% respectively. The revenue pool also contributes 40.0% and 25.6% of total revenues to Namibia and Swaziland respectively. Conversely, the contribution of this SACU revenue to South Africa's total revenue was a much lower 3.4% of total revenue and 0.9% to the Gross Domestic Product (GDP) in 2009/10. To put Lesotho's share of the revenue monies in perspective and highlight the transfers from South Africa to the BLNS embodied in this revenue-sharing exercise, Lesotho's total imports during 2009 were some R11.4 billion, of which R10.8 billion was intra-SACU. Their 2009/10 revenue pool money was R4.9 billion – about eight times their 'outside' imports for a 'duty rate' of around 800%!

In assessing some potential revenue implications for Asia, Obradovic (undated) investigates the impact of existing trade agreements on domestic revenue policy and assesses the potential impact of differing levels of economic integration of domestic policy objectives. He argues that these trade agreements afford the opportunity to encourage further reform and transparency within domestic tax and revenue systems, and highlights how, given the growing proliferation of trade agreements, it is important for new agreements to unlock their potential to achieve greater commitments from signatory parties to enact positive and constructive reform.

Reverting to negotiations on goods access, Fundira (2011) examines the issue of sensitive products or those products that countries wish to protect from further competition in the context of regional integration through the so-called Tripartite FTA. He finds that regionally designating sensitive products can perpetuate inefficiencies and undermine the process of regional integration, and this problem is accentuated by the lack of resources and analytical capacity in the region to undertake detailed analysis and develop guidelines and benchmarks. Furthermore, there is no clear understanding as to what the purpose of a sensitive list is (beyond lobbying) with respect to economic versus social versus political concerns and agendas, and even a modest sensitive list reflects poorly on the desire for the liberalisation that the region has an ostensive aspiration to. Therefore, it is essential to be clear about what goods need protection and why. And, of course, it goes without saying that a clear and concise negotiating agenda is necessary with respect to those goods for which market access

[5] See http://www.sacu.int/.

concessions are sought for entry to the negotiating 'adversaries' market. That said, it must also be recognised that should instant gratification not be obtained on either offensive or defensive positions, a phasing-in period may be acceptable in the long term. And recognise when examining your defensive positions that in the longer term competition from imports may well force efficiency gains into you domestic productive sectors, as that accounts for much of the theoretical gains suggested by computer model simulations (based on the model assumption and directives that this will happen of course).

3.2 Trade in services

A crucial issue here is a 'negative list' or a 'positive list' when considering concessions in the service sectors. With an increasing component of GDP deriving from the service sector a far-sighted approach is needed. The positive list outlines those sectors where concessions have been made or at least considered. The problem with a positive list as that the service sector is an evolving one, and over time new services that are not covered by the agreements develop within an economy. For example, it is not that long ago that few people would have considered sectors such as computer-generated movies, ATM machines and mobile phone networks as worthy of negotiation time. Conversely, had the service sector been subject to a negative list, there would have been a list of sectors where no concessions were made and which were 'locked' by the agreement while all other sectors were potentially subject to liberalisation. The three new examples used above could have been treated within the framework of an agreement using the negative-list approach and not necessarily locked out of future liberalisation. There are advantages and disadvantages to either approach, but, crucially, a negative list limits policy space. While this, of course, applies to both parties, it is likely to affect a developing country significantly more in the future.

Those who consider that negotiating goods are an arcane system should be especially wary of entering the negotiation arena for services! Several of the large service sectors that might be considered as part of the WTO process are actually not part of the WTO process. An example is transportation, where even bilateral negotiations concentrate only on many of the niche components in the wider transport sector, such as baggage handling at airports and aircraft maintenance. So, despite contributing a substantial portion to GDP in most countries, often the gains from negotiations may be minimal. For instance, the New Zealand-China FTA emphasises statements such as 'the FTA seeks to facilitate expansion of trade in services between New Zealand and China by establishing provisions for transparency and progressive liberalisation' and a general obligation of national treatment and market access in a restricted listing of sectors. New Zealand binds its existing General Agreement on Trade in

Services (GATS) and also makes some GATS-plus commitments in selected sectors such as other education services, environmental services, computer services, photographic and duplicating services, and construction services. New Zealand also made reciprocal MFN commitments requiring that any better treatment relating to services that New Zealand extends to third countries must also be extended to China in a similar list of services, although preferences granted to New Zealand's existing FTA partners are excluded.

3.3 The so-called Singapore issues[6]

At the 1996 WTO Singapore Ministerial Conference members agreed to set up three new working groups on trade and investment, trade and competition policy, and transparency in government procurement while at the same time instructing the WTO to look at possible ways of simplifying trade procedures, or, as it became known, 'trade facilitation'. These four issues became collectively known as the Singapore issues, and were included on the Doha Development Agenda (DDA). However, following the infamous 'train wreck' of Cancun, a wreck induced in part by the acrimonious debate on the same Singapore issues, WTO members agreed to proceed with negotiations in trade facilitation with the other three being dropped.

These Singapore issues were a priority for the EU in particular, while developing countries had consistently opposed their inclusion in the negotiating agenda, arguing that the subject and scope of these issues were unclear and that they lacked the technical capacity to implement them. Investment, competition policy and government procurement were seen as areas where the developed countries were imposing their standards upon developing countries in a one-way manner (which means, conversely, the developing countries cannot be expected to have any influence at all on developed country markets). Consequently, many developing countries objected to both the manner in which they were advocated and indeed the question of whether they actually had a genuine role in the WTO.

Trade facilitation, however, found common ground; developing members saw it as an opportunity to leverage aid for a chronic internal domestic problem, and developed members saw reduced transaction costs as enabling their exporters to gain advantage in these markets. Meanwhile, do the Singapore issues legitimately belong within regional and bilateral agreements? If so, how may they be treated within these types of agreements? The EU and the US in particular are attempting to re-introduce these Singapore issues 'through the back door' of African bilateral and regional trade agreements.

[6] This section draws heavily from Sandrey (2006b), a source that is admittedly a little dated but little has changed since then.

The success of the old General Agreement on Tariffs and Trade (GATT) – the forerunner of the WTO – had its success limited to bringing industrial tariffs down dramatically over its history since World War II. It had not been very successful in bringing down agricultural tariffs and many subsidies remained in manufacturing sectors such as automobiles, fisheries, and iron and steel. Meanwhile, behind-the-border issues are becoming more important as tariffs and the visible protection are reducing – the so-called non-tariff measures that impede trade; moreover, perhaps one-third of global trade in both goods and services takes place between companies and their subsidiaries in different countries. This occurrence made investment and competition policies increasingly important, as the concept of 'merchandise trade' began to evolve over time. GATS, a limited Agreement on Trade Related Investment Measures (TRIMs), and an Agreement on Government Procurement that cover such issues as transparency and non-discrimination all exist in the current WTO but not all members have signed these agreements. Thus, the crucial question becomes: Are bilateral and regional agreements better vehicles to facilitate these Singapore issues? In general, developing countries saw these issues as a further step towards the globalisation dominance of the north and resented the implied insistence of the developed countries that they should get their way on the Singapore issues before discussing concessions on their agriculture.

3.3.1 Trade facilitation

Traders from both developing and developed countries have long pointed at the vast amount of red tape that still exists in moving goods across borders. Documentation requirements often lack transparency and are often duplicated, a problem compounded by a lack of cooperation between traders and official agencies. Despite advances in information technology, automatic data submission is still not universal. As tariff barriers are reduced, the non-tariff costs assume more importance. These trade clearance (facilitation) costs, or rather, the excessive and unnecessary components of these costs, are a classic non-tariff measure.

Trade facilitation can mean different things to different people, but in the strict sense of the WTO agenda, it is focused upon customs and border operational procedures. In a wider sense the Organisation for Economic and Cooperation Development (OECD) views it as helping the institutions, negotiators and processes that shape trade policy and the rules of international commerce, while in its extreme but still accurate form it can be viewed as the complete infrastructural package that leads to international competitiveness in global trade. The latter is an area in which Africa is notoriously lagging, but this wider picture is outside the scope of this paper although it is acknowledged regionally through such projects as the Integrated Framework. Even at the micro-level

there are suggestions that parties are talking past each other at times. Trade negotiations focus on the role of trade facilitation in reducing what are effectively tariffs in another form, while customs officials, the ones at the 'coal face' on this issue, see it as a capacity-building and ultimately streamlining exercise (Obradovic, undated). Perhaps both are right, but from a different perspective. In any event, the promise of additional resources to assist in implementation was new to the WTO, and this seems to have been one of the keys in getting this particular issue onto the agenda. Unresolved is the role of trade facilitation in the forthcoming EPA negotiations with the EU.

3.3.2 Government procurement

The role of government in its procurement of goods and services typically accounts for 10-15% of GDP for developed countries, and up to as much as 20% of GDP for developing countries. In an attempt to open this significant portion of the international economy to international competition, WTO members signed the plurilateral (only binding on WTO members who choose to sign) Agreement on Government Procurement (GPA) at the Uruguay Round in 1994. Most signatories are developed countries. The intention of the GPA is to ensure that government decisions regarding government purchases of goods and services do not depend upon where the good is produced or the service rendered, nor upon the supplier's foreign affiliations.

Many countries, for a variety of reasons, place restrictions on government procurement of both goods and services. Some will do so to encourage domestic industry, though many developing countries have limited domestic service industries, and turn to foreign providers as a result. Several developed countries would like to see the GPA become a multilateral agreement, allowing them to bid for foreign government purchases. Opposition comes from many developing countries that realise that they will be disadvantaged by established foreign companies, this in turn leading to local problems of employment and balance of payments as well as running counter to possible industrial policy and infant industry, labour, environmental and racial empowerment policies. But in reality they have far less capacity to bid for tenders in the developed countries, so it is a one-way street.

Should the SACU/US FTA proceed, an examination of the Australian/US FTA gives some idea of the US 'negotiating' template on government procurement with a country that is arguably closer to South Africa than some of the other recent partners of the US FTA. Chapter 15 of the Australian/US FTA Agreement requires changes to government procurement process, documentation and reporting at both federal and state levels. In general terms, the goal has been to make government procurement more transparent, and governments are now required to treat Australian and US vendors equally. Agencies

are now required to publish annual notices of their procurement plans, and tender response times must give vendors adequate time to prepare bids; reporting on tenders and contracts has been made more complex. This will be problematical for the region given the asymmetrical development levels of the US on one hand and SACU members on the other.

3.3.3 Investment[7]

In recent years, attracting Foreign Direct Investment (FDI) has assumed a prominent place in economic development strategies as a key to financing development in African countries with expectations that by creating jobs, transferring new technologies and building linkages with the rest of the economy, FDI will directly address the continent's poverty challenge. Basically, investment is a necessary but certainly not sufficient condition for export-led growth, and it is unclear why domestic legislation and regimes need external control to maximise a country's own welfare. The 'Singapore issue' with respect to investment focused on issues such as transparency, non-discrimination, ways of preparing negotiated commitments, development provisions, exceptions for balance-of-payments safeguards, consultation, and dispute settlement. Critics consider that the concepts of 'non-discrimination' and 'national treatment' were developed to facilitate trade in goods and are not applicable to investment – this is because it denies the host country a necessary degree of control over foreign investment in its market.

Investment issues are an essential component of the modern FTA, as partners seek to benefit from an increase in bilateral investment as well as from the exchange and transfer of knowledge, technology, ideas and export opportunities that would flow from it. Intra-industry investment can be particularly beneficial in countries' export sectors, as companies are able to share international market information and strategies, which, in turn, leads to improved competitiveness in the global market place.

Ways in which an FTA could contribute to these aims include:

- greater transparency of regulations or laws that affect foreign investments;
- more liberalised regimes which will facilitate the foreign investment;
- improvements that can make it easier for investors to resolve any disputes that they may have;

[7] Investment in this context means FDI only. At this stage it was not explicitly envisaged that trade agreements would have a role in regimes related to portfolio investments such as current oil revenues and China's (and other countries') trade surpluses that are reinvested in the US and elsewhere.

- promoting bilateral or regional investment by strengthening investor confidence and thereby encouraging current partnerships into new areas of manufacturing and service industries through joint ventures and strategic alliances.

3.3.4 Competition policy

Typically, competition laws provide remedies to deal with a range of anti-competitive practices, including price fixing and other cartel arrangements, abuses of a dominant position or monopolisation, mergers that limit competition, and agreements between suppliers and distributors ('vertical agreements') that foreclose markets to new competitors. The concept of competition 'policy' includes competition laws in addition to other measures aimed at promoting competition in the national economy, such as sectoral regulations and privatisation policies (the WTO website[8]). There is no question that competition provides the basic economic efficiency in a modern trading nation, but the international conflict can roughly be summarised as one between trade officials in exporting countries trying to force open markets set against officials in poorer importing countries trying to ensure economic development in their nations through industrial policy space.

3.3.5 Conclusions from the Singapore issues

There are linkages between Singapore and other related trade issues at the policy level. Examples include the relationship between the competition policy and the WTO Trade-related aspects of Intellectual Property Rights (TRIPs) where South African activists and stakeholders used the Competition Act to reduce the prices of essential medicines and the linkages between competition policies and restrictive practices on government procurement. And, of course, the decisions to invest in a country will be influenced by the legal frameworks in place in areas such as competition policies and government procurement to enable a company to maximise those investments. The extent to which the Singapore issues are being introduced into the African region through bilateral and regional agreements negotiated with the EU and the US becomes an important one. In general, the EU seems to be pursuing them with some vigour and rigour while the US is adopting a more benign approach while nevertheless still pursuing them. There is a danger that their rejection at the collective level and subsequent re-emergence at the bilateral and regional level may result in a 'picking off' without the collective protection of the WTO, although outside South Africa's TDCA with the EU, it is too early to provide a definitive answer for the region.

[8] See http://www.wto.org/english/theWTO_e/minist_e/min99_e/english/about_e/16comp_e.htm.

3.3.6 The 'trade ands' and their treatment in the trade agreements

Meanwhile, there is the interesting question of the role of the other 'trade ands' and why these were not considered for the Singapore issues, and how they are faring in the WTO and regional agreements. These 'trade ands' highlight trade and labour and trade and environment; and an examination of their treatment within the WTO may provide some insights into the appropriate home for the Singapore issues more generally.

Despite attempts by some of the developed economies, **trade and labour** never became part of the DDA negotiating agenda. Grynberg and Qalo (2006) examine the process as it has emerged through regional agreements since its rejection at the 1996 Singapore Ministerial. They found that the US in particular had gradually escalated obligatory labour standards in its bilateral FTAs, and, in the US-Central American FTA (CAFTA), they found provisions for dispute settlement through direct referral to a WTO panel on these issues. It is important to note in this regard that in the context of the Trade Promotion Authority, any bilateral or plurilateral negotiations on trade in which the US is involved, must include an outcome on trade and labour (and environment) and the prescription for this is broadly clear (including access to binding dispute settlement mechanisms and fines and sanctions for transgressions).

While developing countries were vigorously opposed to the introduction of trade and labour as another Singapore issue, ironically, some of these same developing countries have now agreed to standards and disciplines (including trade-related measures) on both labour and environment that are significantly more onerous than would have been the case had the matter progressed through the WTO. Similarly, the US has labour standards embodied in its Generalised System of Preferences (GSP) and African Growth and Opportunities Act (AGOA). The EU sought to pursue a similar agenda bilaterally, though its approach had less emphasis on sanctions and more on cooperative activities, that is, rather more carrot than stick. Thus, the US is clearly advancing its agenda on trade and labour through the 'back door', while the EU is perhaps more neutral. Grynberg and Qalo (2006) conclude on the topic of trade and labour by posing the question whether developing countries may have been better off negotiating collectively rather than just saying 'no' to the WTO, yet finishing up by being unilaterally picked off by the US.

Also established in 1994 was the WTO Committee on Trade and Environment (CTE). Its mandate was to identify the relationships between these two insofar as they were promoting sustainable development and to make appropriate recommendations for changes to WTO provisions that might

help in achieving this aim. Negotiations on some aspects of these trade measures were launched at the Doha 2001 Ministerial, thus avoiding being classified as a Singapore issue and embroiled in the resultant controversy. Again, the WTO is not an environmental agency, and care must be taken to obtain a balance in the CTE work between developed and developing members, as there tend to be elements of an income elastic nature associated with environmental protection (i.e. richer countries can afford protection that is in turn inherently regarded with suspicion as a potential NTB by developing countries). The WTO's philosophy is that trade liberalisation and environmental protection are complementary goals as long as all externalities are recognised. Perhaps the CTE monitoring and advisory role and its quiet but resolute cooperative work close to the mainstream of the WTO set an example for what might have been for some of the rejected Singapore issues such as competition policies.

Meanwhile, an example as to how these Singapore and related issues have been treated in an FTA between a developed and developing country can be found in the New Zealand-China FTA (MFAT).[9] Upon joining the WTO, China pledged to negotiations to accede to the WTO Government Procurement Agreement (GPA) while conducting its government procurement in a transparent manner and extending MFN treatment to all WTO members. As a part of the FTA, China has agreed that upon its accession to the GPA it will begin negotiations on government procurement with New Zealand (although New Zealand is not a GPA member). Trade facilitation concentrates upon agreement for customs cooperation between the two parties and a streamlining of the release of New Zealand goods entering China. Competition policies seem to be excluded at least in the case of services, as the chapter on services excludes services supplied in the exercise of government authority (and government procurement of services). New Zealand will benefit from enhanced national treatment and investment protection provisions that ensure that New Zealand investors remain no worse off than investors of any other countries. It also provides New Zealand investors with access to binding third-party arbitration procedures if the Chinese Government breaches the investment provisions, and makes provision for dialogue between the two countries on investment matters. On the 'trade ands', binding agreements on labour and environment were concluded that will enhance communication and cooperation on these issues and help towards the objectives of raising working standards and improving environmental protection in both countries.

[9] This is investigated in more detail in *The New Zealand-China Free Trade Agreement: implications for South Africa* by Sandrey, 2013 (Trade Law Centre Working Paper).

3.3.7 Other issues that can and should be covered

3.3.7.1 Rules of Origin

A special problem for developing countries is that they often lack the industrial capacity necessary to take advantage of negotiated entry concessions for their produce; this is aggravated by restricting Rules of Origin (ROO) as yet another complex issue that can severely constrain the abilities of developing countries to compete internationally. The rules are complex and controversial. Naumann (2008) provides an overview of the proposed changes to ROO in the EPA negotiations (and updates this examination for the Tripartite FTA in Naumann, 2011). He outlines how ROO are crucial to any preferential trade agreement as they set the rules by which a product may be considered as being of local origin and therefore qualifies for preferential market access. The essential condition is that these preferences are not abused by third countries to take advantage of the preferential tariff regime between the two FTA partners by transhipping their products through the customs territory of an African, Caribbean and Pacific (ACP) state in order to benefit from preferences into the EU by merely changing the label of origin on the way through (for example, the so-called screwdriver industry). Hence, ROO stipulate how much local processing must be undertaken before a product can be considered as being of local origin. ROO complexity is accentuated when onerous restrictions are placed on the qualifying conditions for certain products to be considered as being of local origin. Basically, they are a trade-off between allowing an exporter freedom to choose the lowest cost source of inputs on the one hand and the importing country seeking to (a) ensure that these same exporters source inputs from the partner country and (b) more generally prevent circumvention of the tariff preferences by third parties.

The WTO guidelines consider that contracting parties would be expected to ensure that their ROO are transparent; that they do not have restricting, distorting or disruptive effects on international trade; that they are administered in a consistent, uniform, impartial and reasonable manner; and that they are based on a positive standard (in other words, they should state what does confer origin rather than what does not). There are different approaches to setting ROO, with the three general approaches of 1) change of tariff classification (on any level, though 4-digit level is the most common), 2) the value-added rule whereby a certain percentage must be added in a partner country, and 3) special processing rule whereby the minimum transformation is described. The problem is that ROO can and often do vary for different markets under numerous regional and bilateral agreements, creating extra costs for manufacturers exporting under these different and often complex rules. This problem for the Tripartite FTA area with differing regional ROO requirements is explained by Naumann (2011).

3.3.7.2 Intellectual property rights (IPR)

These are defined by the WTO as the rights given to persons over the creations of their minds, usually given as an exclusive right over the use of his/her creation for a certain period of time. These rights are customarily divided into the two main areas of, firstly, copyright and rights related to copyright, such as the rights of authors of literary and artistic works that are protected for a minimum period of 50 years after the death of the author and, secondly, industrial property that can similarly and usefully be divided into two main areas of (a) basically trademarks and the contentious geographical indications, and (b) what are essentially patents. These exclusive rights are generally subject to a number of limitations and exceptions to find a balance between the legitimate interests of right holders and of users. The issue is that the WTO Trade and Industrial Policy Strategies (TIPS) Agreement provides the basis for negotiations, but many see the various FTAs as weighted towards the interests of countries that are net-exporters of intellectual property-related goods (developed countries) at the expense of those countries that rely heavily on goods protected by IPR (developing countries).

3.3.7.3 Trade remedies

These measures are anti-dumping, countervailing duties and safeguards. Anti-dumping measures can be taken against a country when it exports a product at a price lower than the price it normally charges in its own home market; countervailing duties are disciplines against the use of subsidies in the exporting country; while safeguards are measures to restrict imports of a product temporarily if the domestic industry is injured or threatened with injury caused by a surge in imports (not unfair trade). These are discussed in a regional context by Viljoen (2013) (forthcoming as a Trade Law Centre Working Paper), and are essentially second-level border protection measures that become important tools as tariff protection is lowered. Again, this is a complex and controversial area.

Teh and Prusa (2007) map and examine the provisions on anti-dumping, countervailing duties and safeguards in 74 Regional Trade Agreements (RTAs). Their key policy concern is that the selective nature of trade remedies may lead to more discrimination by distorting trade remedies with fewer actions against RTA partners but at the expense of more actions against non-members – this essentially violates the WTO foundations of equal treatment. In general, trade remedy measures in FTAs are WTO-plus in their agreements, with RTA-specific rules that tighten discipline on the application of these remedies on RTA members. Some anti-dumping provisions increase *de minimis* volume and dumping margin requirements and shorten the duration for applying anti-dumping duties relative to the WTO Anti-dumping Agreement. Many of the provisions on bilateral safeguards led to

tightened discipline or reduced incentives to take safeguard actions, as these measures can be only be imposed during the transition period, have shorter duration periods and require compensation if put in place; retaliation is allowed if there is no agreement on compensation. Global safeguards require that, under certain conditions, RTA partners are exempted from multilateral safeguard actions. This conflicts with multilateral rules and highlights the problem of trade diversion. They were, however, unable to find innovations in countervailing duties rules and practice by past and present RTAs, and suggested that this reflects the inability of RTAs to gain commitments or curbs on subsidies or state aid.

3.3.7.4 Non-tariff Barriers and Non-tariff Measures

The WTO defines Non-tariff Barriers as a term that normally refers to government imposed' or 'government sponsored' measures, other than measures such as quotas, import licensing systems, sanitary regulations, prohibitions, and so forth. The next sentence states that they are the same as 'non-tariff measures'.[10] Viljoen (2011) discusses how successive rounds of multilateral trade negotiations have led to a decrease in the use of tariffs as barriers to trade and how this has been substituted by the increased importance of NTBs that increase business costs and restrict market access. These restrictions include a diverse range of measures such as export taxes, import bans, government monopolies, cumbersome documentation requirements and a lack of physical infrastructure, and they are seen as a growing concern in Africa and a major obstacle to regional integration. Viljoen finds that the most prevalent NTBs hindering regional trade in the Tripartite Territory (COMESA, the EAC and SADC) include customs procedures and administrative requirements, technical standards, government participation in trade, and the lack of physical infrastructure. This is of particular importance to agricultural trade within the region. Cumbersome documentation requirements, stringent standards and inefficient road and rail networks cause time delays and increase the cost of intraregional trade. This has a direct and indirect impact on the quality and price of agricultural products available in the regional market. She considers that in order to enhance regional development and promote intraregional trade the Tripartite member states need to intensify efforts to address NTBs on a regional basis.

The problem with many of these NTBs is that, firstly, they are often 'grey areas' and, secondly, in many NTBs concessions cannot be granted in areas such as SPS measures in an FTA whereby lower standards are permitted for health and safety measures, for example. Often the best that can be achieved is an accelerated process to discuss these measures in order to work together in seeking a

[10] See http://www.wto.org/english/tratop_e/dda_e/status_e/jargon_e.htm.

mutual solution where this is possible. Many FTAs seem to include clauses along these lines, with the New Zealand-China FTA, for example, specifically looking at greater cooperation in discussing SPS measures and some specific technical barriers to trade (TBT) such as the Electrical and Electronic Equipment Mutual Recognition Agreement (EEEMRA) to encourage recognition of the partners' health and safety standards. However, as always, there are clauses protecting what is seen are preserving domestic sovereign rights and standards.

4. Other issues to be considered

4.1 Movement of natural persons

The WTO reports that 'movement of natural persons' (that is, foreigners entering a country to engage in services business) is a good indication of just how difficult it is to write rules for services trade and to negotiate its liberalisation. It is one of four methods (or 'modes' in WTO speak) of supplying commercial services internationally as contained in GATS. This is important as many services need the knowledge, expertise and technical skills of individuals if they are to be supplied successfully. Therefore the ability to move key personnel into foreign markets is essential for many suppliers with international operations, and this is set against the visa, residence and work permit restrictions of most countries which can impede or delay the movement of these professionals. The interest is in the movement of natural persons, on the one hand, from developing countries seeking entry commitments for less skilled employees such as construction workers travelling abroad to work and, on the other hand, developing countries seeking opportunities for their well-qualified professionals capable of providing services abroad.

Khumalo (2007) examines the challenges surrounding the liberalisation of movement of natural persons in Southern Africa. In particular, the paper assesses progress in facilitating intraregional trade through the liberalisation of cross-border movement of natural persons as service providers within SADC, and concludes that a paradigm shift, whereby skilled labour migration is seen as a development resource rather than as a threat, can be harnessed for the benefit of all countries is sorely needed in the SADC region. Therefore we can conclude that a component of an FTA should be to explore mutually agreeable accelerated arrangements to facilitate temporary entry and temporary employment of natural persons, such as streamlined procedures, while at the same time recognising the need to ensure border security and protection of domestic labour workers.

4.2 Dispute settlement

This reflects, as set out in the New Zealand-China FTA, a desire to encourage the parties at all times to endeavour to reach a mutually satisfactory resolution of disputes arising under FTA through cooperation and consultations; and to provide an effective, efficient and transparent process for consultations and settlement of disputes between the parties concerning their rights and obligations under this Agreement.

Although somewhat dated, Szepesi (2004) examines the provisions for dispute settlements in ten FTAs concluded by the EU with developing countries. The conclusion was that these provisions should have two objectives. Firstly, they should deter the parties from violating the agreement, while, secondly, should adispute arise over a possible violation, the provisions should prevent the parties concerned from having immediate recourse to protectionist countermeasures. A good dispute settlement mechanism allows for consultation and arbitration, and ensures that sanctions are used only as a measure of last resort. Rather disconcertingly, a comparison of various trade agreements signed by the EU showed that, to that date, they had not included any standard dispute settlement procedure. The agreements signed with seven Mediterranean (MED) countries, South Africa, Mexico and Chile differ widely from each other in both the scope and the content of their respective dispute settlement provisions. In terms of procedures, the TDCA clearly differs from the MED agreements as it sets out a clear time frame for the resolution of disputes, while in a comparison with the more detailed agreements with Mexico and Chile, the TDCA does not include any measure that the complaining party can take if the other party does not implement the arbitrators' decision in a satisfactory manner.

4.3 Sequencing

This term usually has a specific meaning in a unilateral liberalisation context, and refers to the ordering of reforms. The debate in the unilateral context is about what sectors of the economy should be liberalised first, and to a large degree sequencing is related to the speed and certainty of adjustment. If the speed of adjustment is fast, this to some extent takes precedence over sequencing as reforms are run in parallel or, at least, are closely associated with one another.

In a bilateral negotiation, sequencing takes on a slightly different meaning in that the question is whether the order of negotiating different aspects of the FTA matters. This is in part a matter of being very clear as to what the final end point is, and in part being firm in the principle that comprehensiveness is paramount (if that is indeed what you are seeking). Are there crucial sticking

points that must be agreed upon before the next phases of the negotiations begin? Here the important point is to make certain that the one partner knows that the other's position is to see the negotiation as a single undertaking: all the points are finalised or there is no agreement. To assist in making these calls an examination of previous trade agreement your partner has made is necessary. What has your partner agreed to in the past and what are they offering to others? This of course means that your absolute minimum position is one of 'WTO plus'. There is little point in negotiating an agreement that does not go beyond MFN commitments made in the WTO (or offered in the WTO as part of perhaps a Doha negation). And does the sequencing of implementation matter? Again, the speed of implementation is likely to be more important, but a longer term phase-in process may be necessary in obtaining comprehensiveness. But at all times it must be remembered that this is a negotiation, which involves both give and take.

References

Fundira, T. 2011. *An assessment of agricultural sensitive products within the Cape to Cairo Tripartite Region*. tralac Working Paper No. S11WP08/2011, April. Stellenbosch: tralac.

Grynberg, R. and Qalo, V. 2006. Labour Standards in US and EU preferential trading arrangements. *Journal of World Trade*, 40 (4), August.

Khumalo, N. 2007. *Trade in services: from controlling to managing the movement of persons in SADC*. South African Institute of International Affairs (SAIIA), Trade Policy Report no. 16.

Ministry of Foreign Affairs and Trade (MFAT). Undated. *New Zealand – China Free Trade Agreement: national interest analysis*. [Online]. Available: http://www.chinafta.govt.nz/1-The-agreement/3-Publications/National-interest-analysis.pdf

Naumann, E. 2008. *A general overview of proposed changes to the Rules of Origin in ACP-EU Economic Partnership Agreements.* tralac Trade Brief No. 3. Stellenbosch: tralac. [Online]. Available: www.tralac.org

Naumann, E. 2011. *Tripartite FTA: state of play on Preferential Rules of Origin.* tralac Trade Brief No. S11TB05/2011, March. Stellenbosch: tralac. [Online]. Available: www.tralac.org

Nkuepo, H. J. Undated. Research and Analysis: Preferential Trade Agreements, Trade Creation and Trade Diversion. [Online]. Available: http://www.wto.org/english/res_e/publications_e/wtr11_forum_e/wtr11_12july11_bis_e.htm

Obradovic, L. Undated. The role of bilateral and regional trade agreements in the modernisation of taxation and revenue policy in developing economies**.** *World Customs Journal*, 6, (2).

Sandrey, R. 2006a. *Trade Creation and Trade Diversion resulting from SACU trading agreements.* tralac Working Paper No. 11. Stellenbosch: US Printers.

Sandrey, R. 2006b. *WTO and the Singapore Issues*. tralac Working Paper No. 18. Stellenbosch: US Printers.

Sandrey, R. 2007a. *The four pillars of South African agricultural trade policy*. tralac Trade Brief No. TB08/2007. Stellenbosch: tralac.

Sandrey, R. 2007b. *The use and limitations of computer models in assessing trade policy.* tralac Trade Brief No. 3. Stellenbosch: tralac. [Online]. Available: www.tralac.co.za

Sandrey, R., Karaan, M. and Vink, N. 2008. Is there policy space to protect South African agriculture? *South African Journal of Economics*, 76(1): 89-103, March.

Szepesi, S. 2004. *Comparing EU free trade agreements: dispute settlement*. InBrief 6G. Maastricht: ECDPM. [Online]. Available: http://www.ecdpm.org/Web_ECDPM/Web/Content/Navigation.nsf/index2?readform&http://www.ecdpm.org/Web_ECDPM/Web/Content/Content.nsf/0/0B93C780A2099F1AC1256F08002C700E?OpenDocument

Teh, R. and Prusa, T.J. 2007. *Trade Remedy Provisions in Regional Trade Agreements*. WTO Research and Analysis Working Papers, September. [Online]. Available: http://www.wto.org/english/res_e/reser_e/ersd200703_e.htm

Thrasher, R.D, and Gallagher, K.P. 2008. *21st Century Trade Agreements: Implications for Long-Run*. Development Policy, The Pardee Papers /no 2 / September. [Online]. Available: http://www.bu.edu/pardee/files/documents/PP-002-Trade.pdf

Vergara, K.G. 2005. *Possible impacts of RTAs/FTAs development on APEC developing member economies***.** Economy Report: Chile, APEC Workshop, Hanoi, Vietnam, 28-30 June.

Viljoen, W. 2011. *Non-tariff barriers affecting trade in the COMESA-EAC-SADC Tripartite Free Trade Agreement.* tralac Working Paper No. N11WP07/2011, March. Stellenbosch: tralac.

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