THE WTO IN THE TWENTY-FIRST CENTURY

Dispute Settlement, Negotiations, and Regionalism in Asia

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Free trade agreements in Asia and some common legal problems

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I. The Asian scene

The number of free trade agreements (FTAs) notified to the *General Agreement on Tariffs and Trade*/World Trade Organization (GATT/WTO) had grown to 285 as of February 2004. By 2005, the number of free trade agreements (FTAs) notified to the *General Agreement on Tariffs and Trade*/World Trade Organization (GATT/WTO) exceeded 300. East and Southeast Asia have been the most active in the last half decade or so, with individual countries like Singapore and Thailand being the most active in Southeast Asia and Japan being the most active in East Asia. On the East Asian front, China has also concluded its two Closer Economic Partnership Agreements with Hong Kong and Macao in June and October 2003, respectively, as well as the goods agreement with the Association of Southeast Asian Nations (ASEAN) in November 2004. Japan, in addition to its FTAs with Singapore, the Philippines, and Mexico, has further ongoing negotiations with Korea, Malaysia, Thailand and also ASEAN. Korea has, in turn, concluded its FTA with Chile in 2003, and is now negotiating with the European Free Trade Association (EFTA) while Taiwan had earlier concluded an FTA with Panama. ASEAN as a whole has also been pursuing FTAs,[1] particularly in East and South Asia and with the Closer Economic Relations (CER) nations of Australia and New Zealand; all this is in addition to the ASEAN Free Trade Area (AFTA) itself. Such activity in Southeast Asia is not, however, confined to intra-regional or intra-sub-regional trade. Singapore, for example, concluded the United States–Singapore FTA in May 2003 and has concluded or is negotiating FTAs with nations stretching from Latin America to the Middle-East,[2] while Thailand concluded a Framework

[1] See the ASEAN Secretariat website at <http://www.aseansec.org>.

[2] See the Singapore Government FTA website at <http://www.app.fta.gov.sg/asp/index.asp>.

Agreement on Economic Cooperation with Bahrain as early as December 2002,[3] as well as with Peru in September 2003. Likewise, in East Asia, mention has already been made of the Taiwan–Panama FTA concluded in August 2003, the Japan–Mexico FTA concluded in September 2004, the Korea–Chile FTA concluded in February 2003 as well as, for example, the negotiations between Korea and the EFTA which began in January 2005.

Outside East Asia and Southeast Asia, the South Asia Free Trade Area is currently being negotiated amongst the South Asian Association for Regional Co-operation Member States (India, Pakistan, Bangladesh, Sri Lanka, Nepal, Bhutan, and Maldives) following the conclusion of a framework agreement in January 2004. Other agreements currently being negotiated such as the proposed Bay of Bengal Initiative for Multi-Sectoral Technical and Economic Cooperation (BIMSTEC) Free Trade Area involve several South Asian and Southeast Asian Nations – Bangladesh, Bhutan, India, Myanmar, Nepal, Sri Lanka, and Thailand – negotiating between various 'sub-regions'. India, following its FTAs with Nepal in December 1991 and Sri Lanka in December 1999, has been especially active of late and concluded the Comprehensive Economic Cooperation Agreement with Singapore in November 2004, as well as framework agreements with both ASEAN and Thailand in October 2003 and the Southern Common Market (MERCOSUR) in June 2003. Pakistan, in turn, is currently engaged in active negotiations with Singapore, as well as with Nepal, Malaysia, Indonesia and China.[4] Pakistan is also negotiating a framework agreement with Sri Lanka. Lastly, Australia and New Zealand have also been active on the FTA front.[5]

II. The legal advisor's role

Legal creativity as much as policy imagination will both be required, and Asian legal advisors will have to look far and wide to craft what are some

[3] In addition to the ASEAN Free Trade Area (AFTA), Thailand has signed bilateral FTAs with China and Australia, and is negotiating with India, Japan, Bahrain, Peru, New Zealand, the United States of America and the BIMSTEC countries (Bangladesh, India, Myanmar, Sri Lanka, Thailand, Nepal, and Bhutan); Nataya Seetubtim, 'Thailand FTAs', June 2004, website of the ASEAN Secretariat at <http://www.aseansec.org>. The Thailand–Australia FTA entered into force on 1 January 2005; see the website of the Australian Department of Foreign Affairs and Trade at <http://www.dfat.gov.au>.

[4] See 'FTAs with Four Asian Countries', 12 February 2005, at <http://www.bilaterals.org>.

[5] Within the Asian region, Australia has concluded FTAs with Singapore (February 2003) and Thailand (July 2004) while New Zealand has concluded FTAs with Singapore (January 2000) and Thailand (November 2004). In addition to the ASEAN–CER Framework Agreement that was concluded in September 2002, New Zealand is now negotiating with China, both countries having issued a joint report in November 2004.

very diverse FTAs. These could range from FTAs resembling the comprehensive approach of the North American Free Trade Agreement (NAFTA) (with deep services, investment and intellectual property coverage, as in the case of Singapore's FTAs with the United States and Australia) to those which face the challenge of accommodating diverse economies and balancing resulting questions of individual economic interests and issues of sensitive imports. At the same time, virtually all of these countries are WTO Members as well, and complications are likely to arise in designing some of these FTAs in order to fit the requirements imposed by the rudimentary, but nevertheless real, multilateral disciplines currently in existence under the WTO. Moreover, many Asian countries are still on a steep learning curve when it comes to techniques of trade dispute settlement, and this too could raise questions of policy choice and treaty design.

The lesson ultimately may be that there are no uniquely 'Asian' FTA challenges on the legal front. In any case, this chapter proposes to adopt a slightly different tack from the usual treatment given to such questions. Our aim here is to seek to avoid both a general treatment of the policy issues, and a specific focus on such legal problems as might be raised by particular FTAs. Instead, we will focus on three categories of general legal issues that are likely to be faced by many Asian countries at the present time:

(i) Doctrinal issues arising under WTO multilateral disciplines;
(ii) 'Free standing' doctrinal problems in some typical FTA provisions, including the scope of most-favoured nation (MFN) clauses applicable to negotiations between unitary and federal entities; and
(iii) General international law problems relating to overlapping and interlocking dispute settlement mechanisms, as well as more specific dispute settlement problems in the investment and trade areas.

III. The framework of our discussion

As for doctrinal issues that arise under WTO multilateral disciplines, I shall further divide my treatment of the issue into two parts, involving (a) problems arising under the general 'gateway principles' imposed by WTO agreements,[6] and (b) those that have to do with more specific issues

[6] Readers should turn to Gabrielle Marceau's chapter in this book. Won-mog Choi has also recently produced a fascinating study of the GATT 1947 records on the evolution of GATT Article XXIV and its application to FTAs comprising non-GATT members (unpublished manuscript, on file with the author).

concerning the relationship between the multilateral rules and certain questions that are likely to be raised by some relatively common FTA provisions. The analytical distinction here is neither neat nor watertight, and one way of thinking about the difference between (a) and (b) above is perhaps to say that there is a difference between approaching the issue of WTO multilateral disciplines from a multilateralist's viewpoint on the one hand, and from the viewpoint of an FTA legal advisor on the other (the latter perspective may also be described, loosely speaking as a 'bilateralist viewpoint').

Secondly, with respect to free-standing technical problems arising under typical FTA clauses, I would like to focus on one problem in particular, based on the example of a 'NAFTA' template of services and investment coverage. Due to the broad and diverse range of Asian countries and FTA partners that are involved, I shall also use this opportunity to mention a technical FTA design problem raised by the different kinds of domestic constitutional arrangements within countries entering into FTAs today. Unlike the GATT and the *General Agreement on Trade in Services* (GATS), which deal with the problem of federal states in a rather tepid fashion, countries seeking substantial gains from FTAs may wish to have deeper commitments from such sub-federal entities. However, the constitutionally enshrined distribution of powers within a federal system may present serious, sometimes even unique, obstacles both in international negotiations and in the process of drafting the FTAs themselves.

Finally, while acknowledging the contemporary debate surrounding resort to public international law rules and principles in the specialized trade law area, I should also say something about the problem of overlapping international dispute settlement regimes.

The aim of this chapter is therefore to focus on selected legal-doctrinal issues. But two caveats are in order. First, as mentioned previously, even if the problems analyzed here are problems faced or likely to be faced by the Asian FTAs, they are not specifically 'Asian'. Secondly, space does not permit an in-depth, systematic study of the FTAs that have been concluded. To my knowledge, no serious study of comparative FTA law has yet been published. The aim here is simply to sketch out the significance of some of the more general or illustrative problems that are likely to be faced today and in the future, in the belief that these problems have some salience or resonance, especially for practitioners who are responsible for developing legal strategies and drafting such FTAs. These are just some general, personal observations by a former FTA legal advisor for the

purposes of encouraging further discussion with like-minded colleagues and others who may be interested in such matters.

IV. Doctrinal problems related to multilateral disciplines

As a threshold issue, any preferential trade agreement (PTA) – FTA or customs union – by Member countries of the WTO will have to observe the requirements imposed by GATT Article XXIV and GATS Article V.

1. The GATT

GATT Articles XXIV:4 to XXIV:10 (as clarified in the *Understanding on the Interpretation of Article XXIV of the GATT 1994*) govern the formation and operation of customs unions and free trade areas covering trade in goods. Under Article XXIV:4:

> The contracting parties *recognize the desirability of increasing freedom of trade* by the development, through voluntary agreements, of closer integration between the economies of the countries parties to such agreements. They also recognize that the purpose of a customs union or of a free-trade area should be to *facilitate trade between the constituent territories* [hereafter, 'the internal trade requirement'] and *not to raise barriers to the trade of other contracting parties with such territories* [hereafter, 'the external trade requirement']. (Emphasis added)

These internal and external trade requirements which Article XXIV:4 imposes set out the formal legal aims of customs unions and free trade areas. It is in the light of these aims then that Article XXIV:5 states:

> Accordingly, the provisions of this Agreement shall not prevent, as between the territories of contracting parties, the formation of a customs union or of a free-trade area or the adoption of an interim agreement necessary for the formation of a customs union or of a free-trade area.

Article XXIV:5 provides the legal basis for forming such customs unions and free trade areas, or to adopt interim agreements to that effect. Such agreements would otherwise be inconsistent with the GATT 1994, namely, with the MFN requirement under GATT Article 1.

GATT Article XXIV:8(b) then goes on to define the internal trade requirement; namely, the '*substantially all trade*' requirement that has been the source of so much doctrinal uncertainty. Article XXIV:8(b) states:

> A free-trade area shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of

> commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) [hereafter, the 'parenthetical list'] are eliminated on substantially all the trade between the constituent territories in products originating in such territories.

In addition to this internal trade requirement concerning the coverage of substantially all trade between the parties to the preferential trading agreement, an external requirement exists. This is to be found in GATT Article XXIV:5(b), which imposes the 'shall not be higher or more restrictive' standard:

> [W]ith respect to a free-trade area, or an interim agreement leading to the formation of a free-trade area, the duties and other regulations of commerce maintained in each of the constituent territories and applicable at the formation of such free-trade area or the adoption of such interim agreement to the trade of contracting parties not included in such area or not parties to such agreement shall not be higher or more restrictive than the corresponding duties and other regulations of commerce existing in the same constituent territories prior to the formation of the free-trade area, or interim agreement as the case may be.

In this regard, the WTO *Understanding on Interpretation of Article XXIV* states, in paragraph 2, that

> [t]he evaluation under paragraph 5(a) of Article XXIV of the general incidence of the duties and other regulations of commerce applicable before and after the formation of a customs union shall in respect of duties and charges be based upon an *overall assessment of weighted average tariff rates and of customs duties collected.* (Emphasis added)

Finally, with respect to these general formal constraints under the GATT, Article XXIV:7 also imposes a 'prompt notification' requirement. These notifications are submitted to the Committee on Regional Trade Agreements (CRTA).

None of these requirements has yet proven particularly difficult in practice and may even be viewed by trade lawyers as essentially 'political' questions that, in reality, involve Geneva representatives and delegations working on the CRTA process. Indeed, prior to the Appellate Body report in *Turkey – Textiles*, the view of Turkey and the European Communities, as well as of some other WTO Members, appeared to be that Article XXIV of the GATT 1994 was simply non-justiciable. Be that as it may, if the present trend towards more and more FTAs continues, the interpretation of these provisions can be expected to be driven by the mutual interest of

WTO Members in being party to one or more such agreements, in particular with respect to those agreement in which compliance with these internal and external trade questions may be questionable. Nonetheless, sharp doctrinal questions could still arise as in the *Turkey – Textiles* case. As such, it is somewhat problematic to simply assume that differences on these questions will likely be resolved through diplomatic efforts (as opposed to WTO litigation), because the reciprocal 'allowances' and flexibility between the Members in negotiations could be based on a mutually acceptable practice gradually evolving over time. While that approach may work in the context of surveillance or enforcement under the CRTA procedure (the so-called 'Track I' enforcement procedure) – excepting FTAs made under the Enabling Clause[7] – there would be less room for reciprocity and political accommodation under the 'Track II' enforcement procedure, namely that of submitting a dispute based on the interpretation of the above requirements to formal dispute settlement (for example, with respect to MFN violations). The disciplines imposed by the reverse consensus rule for the approval of panel and Appellate Body reports essentially allows any one Member State to trigger an Appellate Body ruling that could upset the whole doctrinal applecart in relation to the interpretation of the requirements under Article XXIV of the GATT 1994 or Article V of the GATS.

Against this possibility, there is only the soft, pragmatic 'assurance' that, if hard cases were indeed to arise in practice sufficiently widely amongst the Asian and other FTAs, the same set of incentives and disincentives that exist under Track I should, in principle, apply when a WTO Member decides whether to file, or not, a formal WTO claim to initiate formal dispute settlement proceedings. In other words, even if a disagreement arises, the aggrieved WTO Member would still have enough incentives to settle the issue amicably, rather than initiating a WTO dispute and taking the risk of having WTO adjudicatory bodies decide the disagreement – a matter that will typically also be of significant national importance for the complaining WTO Member, because that Member can also be expected to be a Member of one or more FTAs. However, this complacent way of looking at things most likely underestimates the potential difficulties in store for us. Those who, in principle, would have the most to gain and the least to lose in the event that the dispute settlement system

[7] For a recent argument that the CRTA should be reformed, see, for instance, Michael Ewing-Chow, 'South-East Asia and Free Trade Agreements: WTO Plus or Bust?' (2004) 8 *Singapore Year Book of International Law*, 193–206, 204.

would decide these issues would be the countries that have been left out of the spread of benefits under the various FTAs. This is said merely by way of a cautionary note. It is precisely because of the nebulous nature of these seemingly easy-to-satisfy formal requirements that GATT imposes that it becomes important that FTAs should be highly inclusive. FTAs should have broad memberships so as to avoid those who have not shared in the benefits of FTAs finding themselves in a position whereby they would be tempted to push for formal legal interpretations of Article XXIV of the GATT 1994.

It is also a roundabout way of saying that the external trade and 'substantially all trade' requirements may yet need to be reviewed in tandem with our growing experience in the coming years.

Nevertheless, these requirements serve the purpose of ensuring that at least a basic aim and justification for FTAs is met; namely, that FTAs should promote trade liberalization, despite the risk of trade diversion and a hike in transaction costs caused by complex FTA rules of origin. In other words, FTAs are best justified where an FTA is 'WTO-plus'. And that is not all there is to it. Asia's FTAs should also keep up with 'best FTA practices' globally and cannot be viewed in isolation only from the viewpoint of the GATT multilateral disciplines imposed by the provisions referred to above. FTA legal advisors generally should keep an eye on FTA legal designs and the different approaches that other countries have taken.

2. The GATS

In the case of the GATS, we find problems similar to those identified above in the context of the GATT 1994. Article V of the GATS governs the conclusion of PTAs in the area of trade in services. It states:

> 1. This Agreement shall not prevent any of its Members from being a party to or entering into an agreement liberalizing trade in services between or among the parties to such an agreement, provided that such an agreement:
>
> (a) has substantial sectoral coverage[1], and
>
> (b) provides for the absence or elimination of substantially all discrimination, in the sense of Article XVII, between or among the parties, in the sectors covered under subparagraph (a) . . .

Footnote 1 to Article V:1(a) in turn states that: 'This condition is understood in terms of number of sectors, volume of trade affected and modes of supply. In order to meet this condition, agreements should not provide

for the *a priori* exclusion of any mode of supply'. What does the reference to an *a priori* exclusion of any mode of supply mean?

Take, for example, the Singapore–Australia Free Trade Agreement, which states in Article 2 of Chapter 8 (Investment):

> This Chapter shall apply to investments made, *in the process of being made, or sought to be made*, by an investor of a Party in the territory of the other Party.

This FTA provision extends MFN treatment and national treatment to the so-called 'pre-establishment phase', that is, in respect of investments that foreign investors are seeking to establish in Singapore or Australia. What if Singapore and Australia had sought to carve out pre-establishment? Would they have run up against the requirement of coverage of all four modes of supply due to an 'overlap' between mode-3 services and investment disciplines? Does an answer depend upon a clause such as Article 1112.1 of the NAFTA?[8] While these questions may appear abstract at first glance, they nonetheless demonstrate the need to exercise substantial care in both fulfilling the requirement imposed by Article V of the GATS and pursuing Singapore's and Australia's 'WTO-plus' FTA policies.

V. Relationship between multilateral disciplines and FTA commitments

Resolving the threshold issues above is not the end of the analysis. There are specific matters that FTA parties may wish to address, which are subject to multilateral disciplines whose precise requirements are, however, unclear. This reflects, to some extent, the fact that the current proliferation of FTAs was wholly unanticipated when the original GATT was drafted.

1. A GATT illustration: the 'safeguards exemption' issue

Would the FTA parties wish to permit the exemption of FTA partners from safeguard measures taken by other FTA partners? A general answer is practically impossible, because it depends on the specific individual policies and circumstances of each FTA. In this context, it may be noted

[8] Article 1112.1 of the NAFTA (Relationship to Other Chapters) provides:
> In the event of any inconsistency between a provision of this Chapter and a provision of another Chapter, the provision of the other Chapter shall prevail to the extent of the inconsistency.

that, for example, Asian WTO Members have generally not been high safeguards users – rather, the major users have been the United States, the European Communities, Argentina, and Chile. Instead, challenges have been brought by several Asian countries against the United States; China, Chinese Taipei, Japan, and Korea in the case of *US – Steel Safeguards*, and Korea in the *US – Line Pipe* case. As a result, the practical import of this question may, at least for the time being, not be high for FTAs between Asian countries. Nevertheless, we might pause to consider the issue further.

Let us assume that a WTO Member considers the exemption of FTA partners from safeguard action to be a policy worthy of being included in a particular FTA. Doctrinally, there has been much discussion about whether the 'parenthetical list' in GATT Article XXIV:8 (above) prohibits the imposition of safeguards (or any other trade remedy measures, for that matter) between FTA partners.[9] In the Uruguay Round, the following language was proposed to govern the relationship between Article XIX and Article XXIV, but was not adopted:

> When an action is taken by a member of a customs union or free-trade area . . . it [need not] [shall not] be applied to other members of the customs union or free trade area. However, when taking such action it should be demonstrated that the serious injury giving rise to the invocation of Article XIX is caused by imports from non-members; any injury deriving from imports from other members of the customs union or free-trade area shall not be taken into account in justifying the Article XIX action.[10]

The tension that arises here between the words 'need not' and 'shall not' in square brackets is that between (i) permitting the exclusion of intra-FTA safeguards and (ii) prohibiting intra-FTA safeguards outright. It may also be recalled that in the *Argentina – Footwear (EC)* dispute**,** the panel had rejected Argentina's contention that it was, in fact, required not to apply safeguards under MERCOSUR in respect of MERCOSUR members.[11] The panel's conclusions were driven by the narrower doctrine of parallelism – that the inclusion of an FTA or customs union Member in the analysis of imports in the safeguards investigation meant that that Member also had

[9] See, for instance, Mitsuo Matsushita, Thomas J. Schoenbaum, and Petros C. Mavroidis, *The World Trade Organization: Law, Practice, and Policy* (Oxford, 2003), pp. 360–363.

[10] Matsushita et al, *The World Trade Organization*, p. 362, referring to WTO, Committee on Regional Trade Agreements, '*Systemic Issues Related to "Other Regulations of Commerce"* ', WT/REG/W/17, 31 October 1997, p. 4.

[11] Panel Report, *Argentina – Footwear (EC)*, para. 8.93.

to be included in the application of the safeguard measure. The Appellate Body similarly considered that (i) when a WTO Member conducts an investigation on the basis of imports from all countries, that Member may not exclude from the safeguard its FTA partners.[12] However, the Appellate Body went on to add that (ii) it was not ruling on whether, assuming imports from another customs union member was excluded from the analysis, a member of a customs union can indeed exclude another member of that customs union from safeguard measures.[13] The problem arises because the Appellate Body avoided the general question about the relationship between Articles XIX and XXIV. It was not clear, at that point, that the doctrine of parallelism provided a comprehensive solution.[14] In other words, why not just exclude customs union and FTA members from the investigation?

Subsequent disputes raised the same question. The panel in the *US – Line Pipe* case held that the United States' exemption of Canada and Mexico from the application of safeguard measures was not a violation of Article XIX of the GATT 1994. Specifically, the panel concluded that Article XXIV of the GATT 1994 provided a justification for the United States' exclusion of Canada and Mexico from the application of the safeguard measures at issue.[15] Korea appealed and the Appellate Body in that case sought to maintain a neutral stance on the issue. The Appellate Body considered that the panel's reasoning above was 'moot' and had 'no legal effect' because the doctrine of parallelism had, in any case, not been met. As such, the question of the relationship between Article XIX and XXIV was irrelevant for the purposes of resolving that dispute. The Appellate Body's reasoning therefore did 'not prejudge whether Article 2.2 of the *Agreement on Safeguards* permits a Member to exclude imports originating in member states of a free-trade area from the scope of a safeguard measure.'[16]

Is a customs union or an FTA Member entitled to exclude imports from customs union or FTA Members from the application of a safeguard measure imposed on imports from other WTO Members, as long as these other customs union or FTA Members are excluded from the

[12] Appellate Body Report, *Argentina – Footwear (EC)* paras. 111–113.
[13] Ibid., para. 114.
[14] See also the *US – Wheat Gluten* case, which went on to uphold the doctrine of parallelism.
[15] Panel Report, *US – Line Pipe*, paras. 7.144–7.146. The panel rejected the claim by Korea that the United States had not fulfilled the parallelism requirement, because Korea had not made out a prima facie case in this respect (Panel Report, *US – Line Pipe*, para. 7.171).
[16] Appellate Body Report, *US – Line Pipe*, para. 198.

analysis of imports during the investigation? In the *US – Steel Safeguards* dispute, the panel ruled that account must be given to the 'fact that [the] excluded imports may have [had] some injurious impact on the domestic industry'.[17] This ruling was subsequently upheld by the Appellate Body.[18] But it raises the question, 'What then if such excluded imports really had no such impact?' The response of the panel and the Appellate Body in *US – Steel Safeguards* is for the safeguards user to show that this is the case. In particular, the Appellate Body upheld two key conclusions reached by the panel and which the United States had challenged. First, that the injurious effect of excluded imports should be accounted for (that is, the 'excluded sources accounting requirement'). Secondly, that the safeguards user should show explicitly that imports included in the application of safeguards measures satisfy the conditions for the application of safeguards – that is, where excluded imports had been included within the initial safeguards investigation, the included imports 'alone, and in and of themselves', satisfied the conditions for the application of safeguards. These requirements, which are based ultimately on the non-attribution principle under Article 4.2(b) of the *Agreement on Safeguards*, appear to suggest that imports from FTA partner countries will always have to be accounted for in any safeguards investigation.

2. A GATS illustration: the investment/mode-3 services overlap

It may be useful to consider another example in this context. The Asian FTAs concluded in the wake of the NAFTA would do well to limit innovation in their drafting language to what is necessary. Speaking only from experience of the FTAs concluded by Singapore (which have been the most numerous ones concluded by an Asian country), where well-understood and accepted language in the WTO agreements may be 'bilateralized', then such language should be adopted if what is prized is interpretative uniformity, consistency and predictability. Elsewhere, however, questions arise that have no WTO counterpart and one could turn, for example, to the most well-established and widely understood 'comprehensive' FTA, namely, the NAFTA. However, the NAFTA's answers may not necessarily reflect preferred policy choices in Asia and here we begin to encounter a different class of problem from those considered above.

[17] Panel Report, *US – Steel Safeguards*, para. 10.598.
[18] Appellate Body Report, *US – Steel Safeguards*, paras. 440–453.

Mention has been made of the potential overlap between 'mode-3' services supply (that is, supply through the establishment of a commercial presence) and investment disciplines. More specifically, for instance, the definitions of 'commercial presence' and 'service supplier' in the GATS resemble the definitions of 'investment' and 'investor' under the NAFTA. Assuming that a comprehensive FTA with chapters on goods, services, and investment is being sought, how does the legal advisor and treaty draftsman choose to account for the investment dimension when discussing mode-3 services supply, and vice-versa? Could the definition of an investor provide wider protection to the investor/supplier than the definition of a service supplier, for example? How should the services and investment chapters in the FTA relate to each other? Is it even always wise to try and imagine the possible sorts of scenarios in which the problem could arise in practice and to address them *ex ante* through a relation clause which governs that relationship *a priori*? The NAFTA's investment chapter states in Article 1112.1 that

> [i]n the event of any inconsistency between this Chapter and another Chapter, the other Chapter shall prevail to the extent of the inconsistency.

But it is hard to see why this approach should always govern our choices.

3. A third illustration: the Government Procurement Agreement

Aside from the WTO multilateral agreements, problems could also arise in respect of the inclusion of a subject-matter that falls under a WTO plurilateral agreement, such as the *Agreement on Government Procurement* (*GPA*).

When the GATT came into being in 1947, it was generally accepted that procurement was excluded from the application of the GATT's MFN clause (mainly due to the political sensitivity of the procurement issue).[19] Likewise, Article XIII:1 of the GATS excludes government procurement from the GATS MFN clause. GATS Article XIII:1 states that

> Articles II [most favoured nation treatment], XVI [market access] and XVII [national treatment] shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of services purchased for governmental purposes and not with a view to commercial resale or with a view to use in the supply of services for commercial resale.

[19] For a contrary viewpoint, see Arie Reich, 'The New GATT Agreement on Government Procurement: The Pitfalls of Plurilateralism and Strict Reciprocity' (1997) 31 *Journal of World Trade* 2, 125–151, 142–143.

Therefore, leaving aside state-owned enterprises, procurement itself was left out of MFN treatment. The problem arises when we consider that, equally, the legal basis for establishing a customs union or an FTA as an exception to the MFN rule is only contained in the GATT and the GATS, but not in the *GPA*. There is no *GPA* equivalent of GATT Article XXIV and GATS Article V. At the same time, Article III.1(b) of the *GPA* states that

> [w]ith respect to all laws, regulations, procedures and practices regarding government procurement covered by this Agreement, each Party shall provide *immediately and unconditionally to the products, services and suppliers of other Parties offering products or services of the Parties, treatment no less favourable than . . . (b) that accorded to products, services and suppliers of any other Party*'. (Emphasis added)

The better view, it might seem then, is that there is no MFN exemption under the *GPA* and that any more favourable treatment granted an FTA partner ought to be extended to all other *GPA* partners.

VI. Scope of MFN coverage for federal states

In addition to such categories of problems, FTA legal advisors would typically also wish to extend the coverage of concessions to the units of a federal state, an area in which GATT and GATS provisions are not as clear as would be desirable. In principle, any offensive negotiating strategy directed against a federal state would seek to include the most favourable treatment granted by a unit of a federal entity to any other unit of that federal entity or any other party, whichever is more advantageous. Indeed, the most robust, known version of such a clause combines both MFN and national treatment and requires the better of the two – in other words, the most advantageous treatment within the range of such forms of treatment given to any other country, any other unit within the federal entity, *or indeed to that unit itself*. Let us begin with a comparison of the GATT and the GATS. GATT Article XXIV:12 states that

> [e]ach contracting party shall take such reasonable measures as may be available to it to ensure observance of the provisions of this Agreement by the regional and local governments and authorities within its territories.

Its analogue is GATS Article I:3, which requires that

> [i]n fulfilling its obligations and commitments under the Agreement, each Member shall take such reasonable measures as may be available to it to

> ensure their observance by regional and local governments and authorities and non-governmental bodies within its territory . . .

What does the reference to 'reasonable measures' mean? Is this then only a 'good faith obligation'? The MFN provision under GATT Article I:1 is otherwise silent on the issue:

> [A]ny advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

The MFN provision in GATS Article II:1 similarly provides only that,

> [w]ith respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country.

Both these MFN provisions therefore refer only to the treatment given by a 'contracting party' or 'Member' to 'any other country'. This also holds true for the national treatment provisions under the GATT and the GATS. Thus, the (non-fiscal measures) national treatment provision under GATT Article III:4, for example, states that

> [t]he products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.

Its analogue is GATS Article XVII, which also states only that

> each *Member* shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers. (Emphasis added)

These national treatment clauses only speak of the 'territory of any other contracting party' and 'any other Member'.

These forms of language, with the exception of the oblique language of GATT Article XXIV:12 and GATS Article I:3 do not resolve the question whether *individual States* within a federal structure should *themselves* provide MFN and national treatment to an FTA partner or, indeed, whether the larger federal entities to which they belong should *ensure* (or

be held legally responsible for) such treatment. In contrast, NAFTA Article 1202, in relation to the national treatment requirement in the services trade, states, for example:

> 1. Each Party shall accord to service providers of another Party treatment no less favorable than that it accords, in like circumstances, to its own service providers.
>
> 2. The treatment accorded by a Party under paragraph 1 means, with respect to a state or province, treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that state or province to service providers of the Party of which it forms a part.

This is the NAFTA's 'Best-in-or-out-of-state' clause, which is also to be found in NAFTA Article 301 (goods trade) and Article 1102.3 (investment). Such a clause may also be linked with a clause adapted from that contained (in the NAFTA services example, above) in Article 1204:

> Each Party shall accord to service providers of another Party the better of the treatment required by Articles 1202 [national treatment] and 1203 [MFN].

This is a straightforward 'better-of-national-or-MFN-treatment' clause. When combined with the 'best-in-or-out-of-state' clause above, it is easy to imagine that the resulting obligation is quite powerful, provided that the FTA parties desire such an outcome. In effect, the outcome is a guarantee that the most advantageous treatment is granted within the range of such forms of treatment given to (i) any other country, (ii) any other unit within the federal entity (the import of the language 'of the Party of which it forms a part'), or indeed (iii) *to that unit itself* (should national treatment grant a better standard of treatment than MFN).

One reason, we might speculate, for the difference in approach towards federal entities under the WTO agreements and some of the FTAs we have today is that the WTO agreements and an FTA like the NAFTA lie at two extreme ends of a spectrum. The NAFTA was negotiated between three federal states, albeit with differing internal constitutional arrangements, whereas the WTO, with its more extensive membership, simply avoids the issue with the language we have seen. But this is not to suggest that the NAFTA-type approach above has only been applied between federal states–see, for example, the US–Singapore FTA. How FTA parties will choose to design legal solutions for themselves here would ultimately depend not only on the kind of membership each FTA contemplates, but also the individual negotiating

dynamics and realms of negotiating possibilities which each FTA uniquely presents.

VII. Some thoughts on dispute settlement

Finally, there arises the opportunity here to raise a broad general problem having to do with FTA dispute settlement arrangements.[20] For the sake of analytical clarity, we could perhaps imagine three levels to the problem at varying degrees of generality. At the most abstract level, there is today (i) the problem of competing jurisdiction between international courts and tribunals (for example, between the WTO and some other dispute settlement forum). At a rather more concrete level, we have also seen how, (ii) in the investment disputes context, MFN clauses may serve to extend third-country FTA dispute procedure benefits to investor plaintiffs of the country in respect of which such MFN treatment has been granted (which I shall refer to below as the '*Maffezini* problem'). Finally, and at an even more concrete level, (iii) 'non-investment disputes' may be subsumed under the concept of an 'investment dispute', and thus the '*Maffezini* problem' just referred to might, in this way, be amplified because it will be imported into non-investment disputes as well. Much would of course depend upon the ingenuity of litigators in these contexts. I propose to deal with the latter two, relatively specific, kinds of problems above – that is, (ii) and (iii) above – before turning to the more general problem of competing jurisdiction.

1. The 'Maffezini' or 'Maffezini-type' problem

Let us start with the problem posed by the investment dispute in *Maffezini v Spain*.[21] Under an investment treaty, MFN treatment given by State A to investors of State B means that, if State A enters into a treaty with State C, and under that treaty grants investors of State C more favourable treatment than the treatment granted to investors of State B, investors from State B automatically become entitled to the more favourable treatment accorded to investors from State C. In *Maffezini*, there were two bilateral investment treaties (BITs) between Spain and Argentina, on the one hand, and Spain and Chile, on the other hand. A

[20] For a study of specific categories of FTA dispute settlement provisions, see Chang-Fa Lo's chapter in this book. See also Hsu Locknie, 'Dispute Settlement Systems in Recent Free Trade Agreements of Singapore: ANZSCEP, JSEPA and ESFTA' (2003) *Journal of World Investment*, 277–314.

[21] ICSID Case No ARB/97/7.

dispute – not related to the MFN principle – arose in respect of the first treaty. Spain objected to the jurisdiction of the arbitral tribunal, on the grounds that the first treaty required the exhaustion of domestic remedies; in other words, the foreign investor (in this case the investor from Argentina) was required to pursue his claim in Spanish courts before resorting to arbitration. Hence, the issue was a procedural rule under the terms of the dispute settlement provisions of the bilateral investment treaty (BIT) between Spain and Argentina. The investor-claimant instead relied, however, on the second treaty to which Argentina was not a party – namely, the BIT between Spain and Chile – and which did not impose an equivalent domestic remedies rule; in other words, under the Spain–Chile BIT, a Chilean investor was not required to exhaust local remedies before resorting to arbitration. The Argentine investor claimed that MFN treatment covered also such procedural requirements and, consequently, that it (the Argentine investor) was entitled to the less onerous procedural arrangement. That argument in *Maffezini* was successful. Clearly, this *Maffezini* 'problem' that ensues could also apply outside the investment context. At the most basic level, one can envisage an FTA with an investment chapter resembling a typical bilateral investment treaty. But, as has been mentioned, one could also be faced with a services dispute, or some other dispute subsumed under the rubric of an investment dispute.

Treaty drafters and policy makers will, therefore, have to negotiate with an eye on the possible dynamics of future negotiations with other parties. This could prove a daunting task when we account for the fact that what drives a policy decision to include an MFN clause in an FTA chapter, say, the investment chapter, may not always account for the full ramifications of every procedural rule or device contained in the FTA investment dispute settlement provisions. Put simply, there is a potentially very wide scope of application of the MFN principle that may be impossible to predict *ex ante*.

Some might, however, hold the view that the *Maffezini* problem is not as serious as it appeared at the time *Maffezini* was decided. Indeed, critics of *Maffezini* could point to the importance of accounting for the specific intentions of treaty parties as opposed to some arbitral sleight of hand that results in using one treaty to interpret another. Thus, in two recent cases, *Salini v Jordan*,[22] which involved a dispute over the tribunal's jurisdiction over contractual claims under the MFN clause in the Italy–Jordan BIT, and *Plama*

[22] ICSID Case No. ARB/02/13.

v Bulgaria,[23] which concerned the MFN clause in the Bulgaria–Cyprus BIT, the two International Centre for Settlement of Investment Disputes tribunals appear to have departed from the *Maffezini* approach. In both cases, the tribunal ruled that it would not presume that the MFN clause in the BIT extends to commitments undertaken in relation to dispute settlement (that is, a blanket exclusion of dispute settlement provisions from MFN coverage), unless it could be shown that this was indeed what the parties had specifically intended. Hence, these investment cases provide some comfort to trade negotiators and their legal advisors. Having said that, it is another matter altogether to declare, quite simply, that we have therefore seen the last of *Maffezini*. That would be too much wishful thinking in place of prudence and pragmatism. Moreover, in July 2005, another tribunal went on seemingly to confirm *Maffezini*, and considered that an MFN clause can after all extend to procedural advantages. The tribunal ignored *Plama* altogether and took the view instead that the *absence* of an intention to extend MFN coverage to dispute settlement undertakings must be established.[24] Which line of cases will hold for the future? Calling it a matter of proof of treaty intent surely does not solve the practical problem that arises as a result.

2. The larger 'international tribunals' problem

Taking a larger imaginary step back from all this, just thinking about the *Maffezini* problem in the context of the further problem of extended coverage to non-investment disputes should lead us to consider its potential combination with a broader phenomenon in international dispute settlement; namely, the extent to which there are today numerous potentially overlapping and interlocking agreements that could trigger formal dispute resolution in an unpredictable manner. This is the problem of competing jurisdictions which I have already referred to.[25] Although it is a general international law problem, it nonetheless has some real salience in the trade context. We have seen this, for example, in *EU v Chile (Swordfish Stocks)*.[26] There, Spanish fishermen had wanted to dock in

[23] ICSID Case No. ARB/03/24, especially at para. 212.

[24] *Gas Natural SDG S.A. v Argentine Republic*, Decision of the Tribunal on Preliminary Questions of Jurisdiction, ICSID Case No. ARB/03/10. See the remarks by Mr Luis Paradell, representing Gas Natural, in Luke Eric Peterson, 'Tribunal OKs Treaty Shopping for Better Arbitration Options in Gas Natural Case', 13 July 2005, available at <www.bilaterals.org>.

[25] See section VII above.

[26] 'Dispute Settlement: EU Chile-Swordfish; Asbestos Appellate Body: EU Requests WTO Panel to Rule on Swordfish Dispute' 43(4) *ICTSD Bridges Weekly Trade News Digest*, 14 November 2000.

Chilean ports and airfreight their catch to the European Communities but were refused. Chile alleged that they had been engaged in illegal fishing in the Chilean Exclusive Economic Zone. The European Communities however considered Chile's refusal a violation of WTO law and filed proceedings under the GATT and the GATS alleging that Chilean law breached MFN treatment as it discriminated against the European Communities. Chile argued that the dispute involved the UN Convention on the Law of the Sea[27] (Articles 64 and 116, amongst others), specifically, in respect of measures for the conservation of the swordfish population. As a result, two cases were initiated, turning on the same facts, but in different fora. One case was before the WTO, while the other was pending before the International Tribunal for the Law of the Sea. What are the rules of international law about what each tribunal should do in such a case? In the *Chile – Swordfish* case, Chile and the European Communities settled and, therefore, it is not known how that would have applied in the WTO dispute settlement context. Likewise, in the *Argentina – Poultry Anti-Dumping Duties* dispute, Argentina's objection to the filing of the WTO dispute by Brazil, in the light of an earlier action brought by Brazil under MERCOSUR's dispute settlement mechanism, signals the same sort of difficulty.[28]

The problem of competing jurisdictions as such is something familiar to public international lawyers, and other such examples exist. For instance, the dispute between Ireland and the United Kingdom in the *MOX Plant* [29] case involved the competing jurisdiction of the European Court of Justice (ECJ) and the tribunal under the UN Convention on the Law of the Sea.[30]

Here lies a lesson about what Asian countries that are members of FTAs, as well as FTA parties everywhere, should do when drafting dispute resolution arrangements in their FTAs. The basic problem is that FTAs create another layer of dispute settlement mechanisms, and the proliferation of FTAs could tend to multiply the number of available mechanisms, each happily going its own way in terms of individual drafting and design

[27] Done 10 December 1982, 1833 UNTS 3, 397, 21 ILM 1261 (1982).

[28] Panel Report, *Argentina – Poultry Anti-Dumping Duties*, paras. 7.34–7.42.

[29] Arbitral Tribunal established pursuant to Article 287 and Article 1 of Annex VII, of the UN Convention on the Law of the Sea, *Ireland v United Kingdom*, available at <http://www.itlos.org/cgi-bin/cases/case_detail.pl?id=10&lang=en> (last visited 27 June 2006).

[30] The tribunal suspended its proceedings in deference to the ECJ. For the arguments made before the International Tribunal of the Law of the Sea in seeking to have the case suspended, see Mr Plender, ITLOS/PV.01/08, 20 November 2001, 23–24, available at <http://www.itlos.org>.

idiosyncrasies with highly unpredictable results ensuing. One way of approaching the matter might be that proposed in respect of the Free Trade Area of the Americas; namely, that the MFN clause in the investment chapter should simply not apply to the international dispute settlement provisions.[31] My point, however, is broader than the one dealt with by this limited solution; namely, that what we are going to see is a very complex array of MFN clauses that extend *beyond* the investor-State dispute-type situation, which *Maffezini* and the line of International Centre for Settlement of Investment Disputes cases following *Maffezini* have dealt with (see section V.2 above).

We are facing not only a problem that non-investment disputes could become subsumed under the investment rubric under FTAs that contain deep and overlapping services and investment coverage. A broader problem also exists – namely the problem of competing jurisdictions between separate dispute settlement mechanisms. At present, international lawyers are only beginning to grapple with, for example, the kinds of problems posed by the *Chile – Swordfish* and *MOX Plant* arbitrations.[32] Addressing the matter in an express provision in the FTA, such as, for example, under either a provision akin to NAFTA Chapter Twenty's Article 2005.1 (choice of forum by a NAFTA party, which, once made, is final), or Article 2005.3 or Article 2005.4 (exclusive jurisdiction

[31] Footnote 13 to Article 5 (MFN) of Chapter XVII (Investment) of the 2003 'Third' Draft Agreement (Derestricted, FTAA.TNC/w/133/Rev.3, 21 November 2003) states:

> One delegation proposes the following footnote to be included in the negotiating history as a reflection of the Parties' shared understanding of the Most-Favored-Nation Article and the Maffezini case. This footnote would be deleted in the final text of the Agreement:
>
> The Parties note the recent decision of the arbitral tribunal in Maffezini (Arg.) v Kingdom of Spain, which found an unusually broad most favoured nation clause in an Argentina-Spain agreement to encompass international dispute resolution procedures. See Decision on Jurisdiction §§ 38–64 (January 25 , 2000), reprinted in 16 ICSID Rev. – F.I.L.J. 212 (2002). By contrast, the Most-Favoured-Nation Article of this Agreement is expressly limited in its scope to matters 'with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.' The Parties share the understanding and intent that this clause does not encompass international dispute resolution mechanisms such as those contained in Section C.2.b. (Dispute Settlement between a Party and an Investor of Another Party) of this chapter, and therefore could not reasonably lead to a conclusion similar to that of the Maffezini case.

[32] The author is grateful to Philippe Sands QC for recently bringing these issues into sharper focus.

granted to a NAFTA panel at the insistence of a NAFTA party)[33] may, at the end of the day, be the best thing we can do at present. It may be argued that, if a FTA is a later treaty between two or more WTO Members, the FTA's dispute resolution should simply prevail over the WTO dispute settlement system, even if Article 23.2(a) of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU) (exclusivity of the DSU procedure) seems to compel a different conclusion[34] Nonetheless, the matter *is* complex and would still require, in that case, the interpretation and application of principles of treaty law in relation to which, shall we just say here, there is still many a slip 'twixt the cup and the lip'. Other issues include the manner in which different dispute settlement mechanism for different policy areas (for instance, investment under NAFTA Chapter 11) dovetail into the general, overall policy preferences within a particular FTA. To return to our well-worn example, when is a dispute a services dispute, and when is it an investment dispute in the case of mode-3 services (that is, with respect to 'commercial presence')? Thus, there is this two-dimensional problem of 'internal' (that is, internal to the FTA) and 'external' relations with various forms and systems of dispute settlement. Things can get very complicated indeed and the challenge for negotiators trying to come up with bullet-proof drafting will always exist, given unanticipated subsequent litigator creativity.

VIII. Conclusion

What perhaps underlies some of the problems identified above is that we cannot assume that the '*Esperanto*' language of the GATT will necessarily suffice to fully comprehend the various kinds of FTA provisions that are emerging. For the most comprehensive kinds of FTAs today, which touch on antitrust regulatory cooperation and banking supervision, the 'trade model' of global regulation might also not prove a sufficient or even

[33] For a dispute relating to environment or conservation, or to a sanitary or phytosanitary (SPS) measure or standards-related measure.

[34] *Contra* the example of the NAFTA given in Michael J. Trebilcock and Robert Howse, *The Regulation of International Trade* (3rd edn, London/New York, 2005), p. 149. However, equally, in the case of an FTA dispute settlement provision that, unlike NAFTA, comes later in time than the DSU, and that specifies either a choice of procedure or exclusive recourse to the FTA's dispute settlement mechanism, it would be a highly implausible argument for a party to that FTA to then claim exclusive recourse to the WTO dispute settlement mechanism.

appropriate framework.[35] Equally, it seems unsatisfactory that we should engage in an exercise of perpetual invention and experimentation for each FTA. This chapter by necessity has had to be highly selective in terms of the issues discussed. It could have dealt with other areas of pressing importance, not least the design of rules of origin. But its aim has only been illustrative, and the intent is merely to suggest that it might be useful to focus more on the sorts of legal problems encountered in the very design of FTAs. A natural place to start would be under the auspices of the WTO. In the light of the proliferation of Asian FTAs, Asia, too, might be a natural place to start some serious scholarly discussion and work on these issues. Perhaps the time has also come to consider putting together a set of draft articles for a global model FTA.

[35] For a general theoretical exploration of the significance of differing models of international legal regulation and control in the era of 'disaggregated states', see Anne-Marie Slaughter, *A New World Order* (Princeton/Oxford, 2004).

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Dispute Settlement, Negotiations, and Regionalism in Asia

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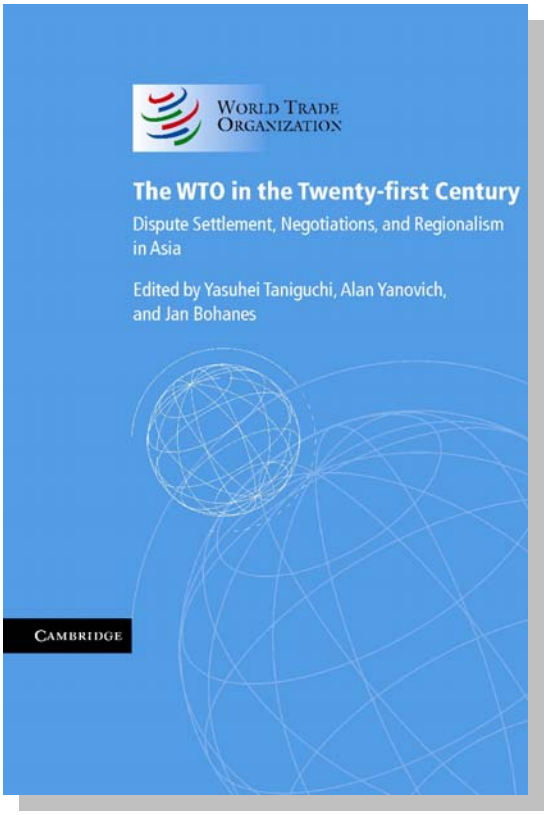

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