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The Trans-Pacific Strategic Economic Partnership Agreement: High Standard or Missed Opportunity?

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V. Trans-Pacific strategic economic partnership agreement: High standard or missed opportunity?

By Henry Gao

Introduction

Since its inception in 2005, the Trans-Pacific Strategic Economic Partnership Agreement (P4 Agreement) has enjoyed great attention and has been referred to by many commentators as a "high-standard" free trade agreement (FTA).[1] There is, in fact, no official definition of what constitutes a "high standard" FTA; however, since the central purpose of FTAs is to reduce trade barriers and promote trade liberalization, the degree of trade liberalization should be used as the basis for judging whether the "standard" of an FTA is "high" or not. To be more specific, in line with the requirements under General Agreement on Tariffs and Trade (GATT) Article XXIV and General Agreement on Trade in Services (GATS) Article V, a "high standard" FTA should satisfy the following requirements:

(a) With regard to trade in goods, coverage of substantially all the trade between the parties, and elimination of duties and other restrictive regulations of commerce on such trade;

(b) With regard to trade in services, a substantial sectoral coverage, and an absence or the elimination of substantially all discrimination in national treatment in the sectors covered.

In addition, since a claim for "high standard" obviously involves some element of comparison, the P4 Agreement should also provide for trade liberalization opportunities and rules restricting trade protection better than:

(a) Those provided for under the WTO Agreements;

(b) Those provided for under other agreements concluded between other WTO members who are not parties to the P4 Agreement;

(c) Those provided for under the other agreements concluded between the parties to the P4 Agreement and non-members to the P4 Agreement;

(d) Those provided for under the pre-existing agreements concluded between the members of the P4 Agreement themselves before the P4 Agreement was concluded.

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[1] See, for example: Ministry of Trade and Industry of Singapore Media Info-note on the P4 Agreement, 18 July 2005; and the Statement of United States Trade Representative Susan Schwab on the launch of the United States negotiations to join the Trans-Pacific Strategic Economic Partnership Agreement, 22 September 2008, available online at www.ustr.gov/schwab-statement-launch-us-negotiations-join-trans-pacific-strategic-economic-partnership-agreement.

The following sections review the main components of the P4 Agreement and compare them with those of other agreements in order to assess whether the former actually lives up to its reputation of being a "high standard" FTA.

A. Market access for goods

As FTAs have traditionally been viewed as a tool for dismantling tariff barriers, the reduction and elimination of tariffs on goods have been regarded as a key benchmark for measuring trade liberalization under an FTA. The emphasis on tariff reduction is reflected in GATT Article XXIV, which notes that an FTA will "eliminate tariffs" on "substantially all the trade" between the constituent members of an FTA. There are two components to this requirement.

The first component is a high coverage of the goods traded. There has been much debate on the exact meaning of "substantially all the trade", for example, whether:

(a) It demands a qualitative approach (no exclusion of major sectors) or a quantitative approach (a minimum numerical benchmark for the trade volume covered);

(b) The percentage is measures by tariff lines or the actual trade volume;

(c) The trade includes actual trade only or potential trade as well;

(d) The percentage will be measured in terms of the total trade of all the members combined or merely the separate exports and imports of each member on an individual basis or both. So far, the only body that can give an official interpretation of the term; WTO has not been able to articulate clear guidelines, largely due to the difficulties created by the consensus-based, decision-making rule. In practice, most FTAs around the world have chosen to adopt a quantitative approach, which is usually set at no less than 90 per cent of the actual trade between the members.

Second, the duties will be "eliminated" on the trade covered. The choice of the word "eliminate" rather than "reduce" means that what is required is zero tariffs, rather than low tariffs. Thus, legally speaking, even an FTA that reduces all tariffs from 100 per cent to 0.01 per cent ad valorem across the board would not satisfy the requirement here as the tariffs will have not been "eliminated".

In the case of the P4 Agreement, the tariff reductions in the following countries are:

(a) Singapore – almost all imports already enjoy duty-free treatment. The only exceptions are alcoholic drinks such as stout, porter, beer and ale, which are subject to a duty of S$ 16 per litre, and samsu (rice-wine), which is subject to a duty of S$ 8 per litre.[2] Upon the conclusion of the P4 Agreement, Singapore agreed to eliminate these duties with immediate effect, bringing tariffs on all imports to zero;

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2 List of Dutiable Goods, available at www.customs.gov.sg/leftNav/trad/List+of+Dutiable+Goods.htm.

(b) Brunei Darussalam – imports from Singapore already enjoy the preferences under the ASEAN Free Trade Area (AFTA), which provided for the reduction of 99 per cent of the tariffs to 0-5 per cent by 2002[3] and the total elimination of all tariffs by 2010.[4] At the same time, Brunei Darussalam applied zero tariffs on 92 per cent of the imports from New Zealand prior to the conclusion of the P4 Agreement. Brunei Darussalam agreed to bind the tariffs for these products at zero upon the entry into force of the P4 Agreement. The remaining tariffs would be eliminated according to the following schedule: (i) duties on forestry products, which account for 1.79 per cent of the imports from New Zealand, were to be eliminated by 1 January 2010; (ii) duties on certain machinery products, which account for 1.19 per cent of the imports from New Zealand, will be eliminated by 1 January 2012; and (iii) duties on vehicle and vehicle parts, rubber articles as well as the other machinery products, which account for 5.29 per cent of the imports from Chile, will be eliminated by 1 January 2015. Brunei Darussalam excludes products such as alcohol, tobacco and firearms from its tariff elimination schedule for moral, human health and security reasons;

(c) New Zealand – imports from Singapore already enter the country duty-free as the result of the New Zealand-Singapore Closer Economic Partnership. Similarly, 99 per cent of the imports from Brunei Darussalam (mostly oil) and 67 per cent of the imports from Chile also enjoyed zero tariffs even before the conclusion of the P4 Agreement. On 1 May 2006, New Zealand had to remove tariffs on another 29 per cent of the imports from Chile. The remaining tariffs would be eliminated according to the following schedule: (i) duties on jewellery, ceramics and skincare products, which account for 0.03 per cent of the imports from Chile, were to be eliminated by 1 January 2008; (ii) duties on whiteware and aluminium products, which account for 1.54 per cent of the imports from Chile, were to be eliminated by 1 January 2010; (iii) duties on textiles, apparel, footwear and carpet products, which account for 1.92 per cent of the imports from Chile, will be eliminated by 1 January 2015;

(d) Chile – 89.3 per cent of the imports from New Zealand and Singapore were to receive duty-free treatment when the Agreement came into force on 8 November 2006. The remaining tariffs would be eliminated as follows: (i) for Singapore, duties on 9.57 per cent of the imports within the following three years, and the remaining imports within the following six years;[5] (ii) for New Zealand, most of the tariffs will be eliminated by 1 January 2015, with tariffs on Chile's most sensitive dairy products – butter, milk powder and whey – which account for 9.26 per cent of the imports from New Zealand to be eliminated on 1 January 2017.

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3 See ASEAN Free Trade Area: An Update at www.aseansec.org/7665.htm.

4 Protocol to Amend the Agreement on the Common Effective Preferential Tariff (CEPT) Scheme for the ASEAN Free Trade Area for the Elimination of Import Duties, 31 January 2003. Available at www.aseansec.org/14183.htm.

5 See www.fta.gov.sg/fta_tpfta.asp?hl=12.

Now compare the above tariff reduction schedules provided for under the P4 Agreement, with those under the other agreements. Of the four countries, Singapore has long maintained a zero-tariff policy on all imports except alcoholic beverages and tobacco products. As the result, 99 per cent of all imports enter Singapore duty-free. Thus, even though Singapore has concluded FTAs with countries in many parts of the world, it does not make much sense to compare Singapore's tariffs under the P4 Agreement with those under other agreements. On the other hand, Brunei Darussalam has only a very small trade volume and most of its trade is with Singapore. Moreover, other than the P4 Agreement, Brunei Darussalam only has one FTA – the EPA with Japan – that was not concluded as part of the collective FTA initiative by ASEAN. Thus, comparing the P4 Agreement with Brunei Darussalam's other FTAs is also unlikely to yield meaningful results. Therefore, the focus is on New Zealand and Chile (more so on Chile as the trade regime of New Zealand is in general already very liberal), which have similar trade volumes and trade-to-GDP ratios, a more diversified trade pattern and are parties to a wider range of FTAs in addition to the P4 Agreement.

First, consider the coverage of tariff lines and actual trade. Generally, the broader the coverage, the more liberal is the agreement. The P4 Agreement covers 100 per cent of the imports of Chile and New Zealand. While this compares favourably against the FTAs that Chile signed pre-P4, such as the Canada-Chile Free Trade Agreement (CCFTA), which excludes dairy products, it is the same as the post-P4 FTAs, such as the one with Australia.

The next factor is the depth of initial tariff reduction. The more liberal FTAs would usually include a higher percentage of duty-free products when such agreements enter into force. Under P4, only 89.3 per cent of the imports from New Zealand and Singapore enjoyed zero tariffs when the Agreement entered into force. While this is higher than under CCFTA, which liberalized only 75 per cent of the trade upon initial implementation,[6] it is lower than the one provided for under the FTA with Australia, which was 96.9 per cent of the trade from Australia upon entry into force.[7]

The third factor is the length of the phase-in period for the remaining tariff eliminations. The shorter the time frame, the more liberal the agreement. The P4 Agreement allows Chile 10 years to implement the duty-free obligations on dairy products from New Zealand. Again this is shorter than CCFTA (15+ years for milling wheat, sugar and beef) but longer than the FTA with Australia (six years).

The last factor is the real economic impact of the Agreement. The higher the real economic impact, the more liberal is the agreement. While it is always difficult to measure the economic impact of an FTA accurately, a proximate substitute would be the amount of tariffs saved, which can be estimated by multiplying the amount of trade covered with the difference between the MFN tariff rate and FTA tariff rate. The MFN tariff rates of the four countries are all quite low; calculated on a trade-weighted average basis, the rates in 2006

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6 See www.agr.gc.ca/itpd-dpci/ag-ac/4957-eng.htm.

7 Australia-Chile Free Trade Agreement, Summary of Key Obligations, Available at www.dfat.gov.au/GEO/chile/fta/FTA_key_obligations.html.

were 5.1 per cent for Brunei Darussalam, 6 per cent for Chile, 3.5 per cent for New Zealand, and zero per cent for Singapore.[8] Combined with the low trade volume of all countries (except Singapore, which already enjoys duty-free treatment on most of its exports to the other three countries), the tariff savings are insignificant. For example, based on the 2004 trade figures, New Zealand estimated that the P4 Agreement would only result in savings of NZ$ 2.2 million on its exports to Chile[9] and NZ$ 52,000 on its exports to Brunei Darussalam,[10] while New Zealand will end up with duties foregone of NZ$ 300,000 from Chile[11] and NZ$ 1,800 from Brunei Darussalam.[12] Even if it is assumed that the conclusion of the Agreement will generate 100 per cent more trade between the parties, the economic impacts seem to be insignificant. Indeed, exports from New Zealand to Chile only increased from NZ$ 36.6 million in 2004[13] to NZ$ 44.9 million in 2008[14] while the imports contracted from NZ$ 26.1 million in 2004[15] to NZ$ 21.6 million in 2008,[16] and any future economic impact of the agreement would probably also be negligible.

B. Rules of origin

The classic justification for Rules of Origin (ROO) is to prevent free-riders, i.e., those non-members of an FTA that evade tariffs by trans-shipping their products from a low MFN-tariff FTA member to a member with higher MFN tariffs. Overly-restrictive ROO, however, can constitute undue barriers to trade between FTA members and non-members, reducing the potential for trade between the two. As one of the original intentions of the P4 Agreement was to entice other countries to join, it adopted a more liberal ROO regime.

In general, ROO regimes include two dimensions: (a) sectoral, product-specific ROOs; and (b) general, regime-wide ROOs. In terms of product-specific ROOs, there are two basic criteria to determine origin: (a) wholly obtained or produced; and (b) substantial transformation. Substantial transformation, in turn, includes three main components that can be used either alone or together: (a) change in tariff classification (CTC); (b) value content (VC); or (c) technical requirement.

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8 WTO Tariff Profiles. Available at http://stat.wto.org/TariffProfile/WSDBTariffPFView.aspx?Language=E&Country=BN,CL,NZ,SG.

9 New Zealand Ministry of Foreign Affairs and Trade, Trans-Pacific Strategic Economic Partnership Agreement National Interest Analysis, July 2005; p. 15.

10 Ibid., p. 16.

11 Ibid., p. 47.

12 Ibid., p. 48.

13 Ibid., p. 15.

14 See www.mfat.govt.nz/Countries/Latin-America/Chile.php.

15 WTO Secretariat report on the P4 Agreement.

16 See www.mfat.govt.nz/Countries/Latin-America/Chile.php.

According to Article 4.2 of the P4 Agreement, a good is considered as originating from the members if one of the following conditions is fulfilled:

(a) The good is wholly obtained or produced entirely in the territory of one party, pursuant to the definition in Article 4.1;

(b) The good is produced entirely in the territory of one or more parties, exclusively from materials whose origin conforms to the provisions of this Chapter; or

(c) The good is produced in the territory of one or more parties, using non-originating materials that conform to a change in tariff classification, a regional value content, or other requirements specified in Annex II, and the good meets the other applicable provisions of this Chapter."

Of these three criteria, the first two are quite straightforward as they involve only parties to the Agreement. The last requirement, however, is much more complicated. The main text of the Agreement does not provide for a single set of rules. Instead, Annex II of the Agreement lists the detailed rules that each product has to meet to be considered as a good originating from the members. These include all three components of the substantial transformation test: For most goods, CTC applies and may require a change of either HS chapter (CC), HS heading (CTH) or HS subheading (CTSH). The corresponding rules are listed either at the HS heading (4-digit) or HS subheadings (6-digit) levels.

Many products also include a regional value content (RVC) test as an alternative rule to the CTC criterion. Under this test, the relevant CTC rules will not apply if the RVC of a product or the originating materials constitute a minimum percentage in the overall FOB value of the product. The default RVC is 45 per cent, except for textiles, clothing and footwear products for which it has been raised to 50 per cent. Finally, goods falling under Chapters 15 (animal or vegetable fats and oils products) and 27 to 40 (mineral, chemical and plastic products) are subject to technical requirement rules.

While a high RVC requirement can guarantee that only goods genuinely originating from members are eligible for RTA tariff savings, it also impedes trade flow from non-members and can sometimes even deny the benefits for products that would have been treated as originating goods under a regime with lower RVC requirements. Thus, the higher an RVC requirement, the more restrictive the Agreement. As noted by Estevadeordal, Harris and Suominen (2009), the 45 per cent to 50 per cent RVC under the P4 Agreement is higher (more restrictive) than two-thirds of all the 70+ agreements examined.

Another indicator of the restrictiveness of a ROO regime is cumulation (or accumulation) rules, which allow an RTA member to use materials from another country without losing the preferential status of the final product. The more restrictive ROOs tend to include only the possibility for bilateral cumulation, i.e., only goods or materials originating in an RTA member may be considered in determining the origin of the final product. The more liberal ROOs, on the other hand, also include extended cumulation, where the inputs from non-members may also count in the origin determination of the final product.

The P4 Agreement provides for bilateral cumulation under Article 4.5, but extended cumulation is not allowed. To a certain extent, this rather harsh rule is softened slightly by the exception in Article 4.12 allowing outward processing, whereby products undergoing processing in a non-party prior to final manufacture in a party will be considered as originating, provided that the total value of non-originating materials does not exceed 55 per cent of the customs value of the final good. However, this exception has only a minor impact as it applies to just a small set of products, listed in Annex 4.B of the P4 Agreement, that includes mostly machinery and appliance products.

The third indicator is the de minimus rule, which allows goods that do not conform to the CTC rules to be treated as originating if the value of non-originating materials does not exceed a maximum percentage of the value of the final product. Article 4.6 of the P4 Agreement provides for a 10 per cent *de minimus* rule. This is higher than the rules under most other FTAs and is quite liberal.

The last factor to be considered is the complexity of the ROO regime, also referred to as sectoral selectivity in ROOs, which measures the number and types of ROOs in FTAs.

Those with a larger number and type of ROO are more complex than those with a smaller number or even one type of ROO. While complexity does not necessarily translate into restrictiveness, more complex regimes typically would raise the cost of compliance, and inhibit rather than encourage trade flows. According to Estevadeordal, Harris and Suominen (2009), the P4 Agreement is among the most complex FTAs, and is more complex than more than two-third, of the FTAs studied.

C. Non-tariff barriers

In addition to the elimination of duties, Article XXIV.8(b) also requires FTAs to eliminate “other restrictive regulations of commerce” (ORRC). The exact scope of this term, like the vaguely-worded “substantially all trade”, also remains largely an unsolved mystery. Granted, the term tells us two things. First, ORRC does not include tariffs, which obviously would be covered by the word “duties” in the same sentence. Second, what matters most is not the form of the regulation, but its effect on commerce. As long as a regulation has a “restrictive” effect on trade, it could be potentially covered by ORRC. Beyond this, however, we enter uncharted waters. To start with, all regulations, be it border measures or those regulating the domestic market, invariably affect trade to a certain extent and can be deemed as “restricting” commerce. Does this mean that they are all ORRC? It would be ridiculous to think that Article XXIV.8(b) would cast such a wide net. Of all the non-tariff measures that are covered by WTO (such as TBT measures, SPS measures and trade remedy measures), which ones are covered and which ones are not? Of these, the most difficult question arises from the inclusion of trade remedy measures, i.e., antidumping, subsidy-countervailing and safeguard measures. This raises the following issues.

First, are they “regulations of commerce”? The answer seems obvious as the initiation and conduct of various trade remedy investigations are usually governed by regulations. However, because the final measures usually take the form of additional duties

imposed on imports and such duties are of the same form as the normal customs duties, it could be argued that they fall under “duties” rather than ORRC.

Second, even if for the sake of argument we assume that they are “regulations of commerce”, are they of a “restrictive” nature? Again this question appears to be easily answered – don’t all trade remedy measures restrict trade by imposing additional burdens on imports? Further reflection reveals, however, that this question is not as simple as it first appears. To the extent that antidumping and subsidy-countervailing measures are supposed to address “unfair trade”, they do not restrict but instead facilitate “proper trade” by supposedly removing the distortions created by such unfair trade practices. In addition, even safeguard measures serve a useful purpose by providing a safety valve to deal with the temporary difficulties created by a sudden rise of imports; without such an escape clause, the entire free trade agreement might never be approved by the legislature and no additional trade could be generated. In other words, while trade remedy measures might appear to restrict trade, their ultimate purpose is to facilitate trade, and thus should not be condemned.

Third, even assuming that the trade remedy measures are “restrictive regulations of commerce”, does the requirement of elimination of ORRC mean that trade remedy measures must be banned in FTAs? Consider the following two scenarios: one is an FTA that bans the application of trade remedy measures between members, but allows the application towards non-FTA members; the other scenario is an FTA that allows the application of trade remedy measures to both members and non-members. Which scenario is in line with the requirement to “eliminate” ORRC? To answer this question, we first have to deal with another question, i.e., to the extent that the meaning of ORRC embodies the consideration of the trade-restrictive effect of a measure, should we consider the effect of the measure on trade among members only, or on trade between members and non-members as well? In the author’s view – to the extent that in the same paragraph ORRC precedes the clause “on substantially all the trade between the constituent territories in products originating in such territories” – it means that only the effect on intra-FTA trade will be considered. Thus, because trade remedy measures – if allowed between members – would create trade-restrictive effect on members, they should be eliminated accordingly.

In reality, however, many FTAs, including the P4 Agreement, do allow the application of trade remedy measures among members. Do they all violate the requirement of the elimination of ORRC? No, not as such. The above analysis is incomplete as it ignores the exception contained in parentheses in the same sentence that allows the continued application of ORRCs “permitted under Articles XI, XII, XIII, XIV, XV and XX” even after the formation of an FTA. Again, however, the list of exceptions has been subject to contradicting interpretations. One view is that the list is exhaustive, i.e., only those Articles that are listed might be cited as a way to avoid the general obligation to eliminate ORRCs. Because the provisions authorizing the trade remedy measures – Articles VI and XIX – are not in the list, they will not be included in the exceptions, which means that they must be eliminated in an FTA. The other approach, however, treats the list as illustrative, i.e., it also includes implicitly similar provisions that are not explicitly mentioned. For example, the security exceptions clause under Article XXI is not listed here. However, because its twin clause under

Article XX is included, surely Article XXI should also be included. It would be absurd if countries are allowed to impose trade restrictions upon the breakout of a serious pandemic but not a major war – national security considerations are definitely more important than public health concerns.

To summarize the above discussion, it is unclear whether trade remedy measures among members are eliminated upon the formation of an FTA. However, one fact is clear: these measures, if allowed among members, have a restrictive effect on intra-FTA trade. Thus, a "high-standard" FTA that aims to facilitate greater trade liberalization among members will eliminate, or at least restrict, the use of trade remedy measures.

Unfortunately, in this regard, the P4 Agreement again fails to live up to its reputation. First, as a general matter, the Agreement allows a member to adopt non-tariff measures either "in accordance with its rights and obligations under the WTO Agreement" or "in accordance with other provisions of this Agreement."[17] This could be interpreted to mean that even measures that are inconsistent with WTO rules could be maintained as long as that is allowed by the Agreement. 32. In particular, the Agreement allows Chile to maintain the following measures: (a), a price band system for various edible vegetable oils, sugar, wheat and wheat flour;[18] (b), a quantity-based safeguard for certain dairy products during the phase-in period for the tariff liberalization on these products;[19] and (c) measures related to imports of used vehicles.[20]

Second, in terms of the generic trade remedy measures, the P4 Agreement provides that the members retain their "the rights and obligations" under the WTO Agreements on Safeguards, Antidumping, and Subsidy and Countervailing Measures, as well as GATT Articles XIX and VI. Moreover, the Agreement explicitly provides that the members get no "additional rights or obligations" with regard to trade remedy measures taken pursuant to these WTO Agreements. This means that members may simply apply safeguard measures as was done before the conclusion of the FTA. The investigating member faces no more restrictions than the ones provided for under the WTO Agreements, while the member under investigation cannot claim better treatment than that accorded to non-members.

This is a rather disappointing outcome and compares unfavourably with other FTAs. As noted by Teh, Prusa and Budetta (2007), a large number of FTAs have adopted RTA-specific rules that tighten discipline on the application of trade remedies on RTA members, with some even abolishing certain trade remedy measures. These include some of the FTAs signed by the members of the P4 Agreement. For example, Singapore and New

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17 Article 3.8.

18 Article 3.12. In October 2000, Argentina challenged Chile's price band system in WTO. The Appellate Body ruled in its report of September 2002 that the price band system was inconsistent with Article 4.2 of the Agreement on Agriculture. In November 2001, Chile amended Article 12 of Law No. 18.525 so that maximum applied rates resulting from the application of the price band system were no more than its bound rates in WTO. However, this means that the rates may still be higher than the zero tariffs provided for under the P4 Agreement.

19 Article 3.13.

20 Annex 3.A.

Zealand agreed in ANZSCEP to tighten the thresholds for the commencement and application of antidumping investigations by raising the *de minimis* dumping margin from 2 per cent to 5 per cent, and the margin of negligible imports from 3 per cent to 5 per cent.[21]

The Canada-Chile FTA, EFTA-Chile FTA and EFTA-Singapore FTA banned antidumping measures, while Singapore agreed to prohibit safeguard measures in its FTAs with Australia and New Zealand. As many of these more liberal FTAs were concluded before the P4 Agreement, the question is why the members have not chosen to consolidate the more liberal approach that they have agreed to in the other FTAs into the P4 Agreement, and to make it a trade-remedy-free agreement. Indeed, even though such a move might be considered a bold one, it could be argued that the negotiation for the P4 Agreement provided the most opportune occasion for such action. On the one hand, of the four parties, Singapore, Brunei Darussalam and New Zealand rarely apply any trade remedy measures against any country; Chile has made use of these measures against other countries, yet it has rarely used them against Singapore, Brunei Darussalam and New Zealand.[22] On the other hand, given the small trade volume between the parties, it is much less costly for the members to abolish trade remedy, a move to which there should be little resistance. Unfortunately, the P4 Agreement failed to seize the opportunity.

D. Opening up the services market

According to GATS Article V, an Economic Integration Agreement for services will satisfy the following conditions:

(a) Substantial sectoral coverage, and

(b) Provision 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), through the (i) elimination of existing discriminatory measures, and/or (ii) prohibition of new or more discriminatory measures.

Article V requirements are similar to the requirements under Article XXIV to "eliminate duties and other restrictive regulations of commerce on substantially all the trade". The similarity in the wording, however, also means that the Article V requirements suffer from the same interpretative problems. First, "substantial sectoral coverage" is rather vague. While a footnote to the Article provides some clarification by stating that the factors to be considered in evaluating the coverage of an Economic Integration Agreement include "number of sectors, volume of trade affected and modes of supply", it still does not provide a clear numerical benchmark and leaves many important questions unanswered:

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[21] Article 9. This has been inherited by the P4 Agreement, but only applies to bilateral trade between New Zealand and Singapore.

[22] For an overview of Chile's antidumping and safeguard measures from 1981 to 2002, see Sáez, 2005.

(a) What is the exact meaning of the word "substantial"? Is it close to "substantially all", meaning close to 100 per cent, or does it refer to somewhat significant, meaning that more than 50 per cent would suffice? Or could it even include less than 50 per cent?

(b) For the number of sectors, should only the 12 broad sectors be considered, or should the more than 160 sectors listed in the Services Sectoral Classification List also be considered?[23]

(c) Does the "volume of trade" refer to the value of the trade, or the number of services transactions, or number of services suppliers or customers?

(d) In terms of modes of supply, the same footnote states that an agreement "shall not provide for the a priori exclusion of any mode of supply". Does that mean all four modes must be listed in every sector or subsector that is included in the schedule? Even if all four modes are included, can a party inscribe "unbound" in any mode? Is it acceptable if a schedule only includes horizontal commitments on a mode while offering no sector-specific commitments on the mode?

The same interpretive difficulties also arise from the requirement for "elimination of substantially all discrimination". While the text of the Article states that the discriminations will be those regulated by Article XVII, i.e., only national treatment discriminations, and not market access or MFN discriminations, it still leaves many gaps wide open:

(a) Does this requirement apply to all the sectors covered in the schedule?

(b) Does it apply to all four modes?

(c) Should the word "substantially all" be understood in terms of the number of discriminatory measures or should the volume or value of trade affected by individual measures also be taken into account?

d) When considering the effect on trade should such consideration only cover existing trade, or should any potential trade that could arise from the elimination of certain measures also be considered?

While these questions are very important, it is obviously beyond the scope of this chapter to provide the answers. Instead, as stated above, the purpose of the study described here was to evaluate the claim that the P4 Agreement was a "high standard" free trade agreement. For that purpose, it was only necessary to compare the P4 Agreement to other FTAs and Economic Integration Agreements in terms of whether it was a better or worse deal. In other words, there was no need to find out exactly how much the P4 Agreement was worth. While referring to hard trade figures (as in the trade in goods section above) provides the most reliable way of comparison, that was not possible in the current study as services trade flows are notoriously difficult to capture and all the data available so far are at best "guestimates". Fortunately, however, comparing trade numbers is not the only approach available. So long as the same methodology is used to evaluate the degree of

[23] MTN.GNS/W/120, 10 July 1991.

trade liberalization of different agreements, it is possible to gain reasonable idea of the extent of openness in different agreements. The study detailed in this chapter adopted the methodology used by Fink and Molinuevo (2008) for quantifying services commitments. That methodology identifies the "value added" of FTAs for each of the 154 sub-sectors and four modes of supply by classifying the resulting 616 entries per FTA schedule into the following four categories:

(a) Sub-sectors and modes for which only a GATS commitment exists or an FTA does not offer any improvement (GATS only);

(b) Sub-sectors and modes for which a partial GATS commitment exists and an FTA eliminates one or more remaining trade-restrictive measures (FTA improvements);

(c) Sub-sectors and modes for which no GATS commitment is available, but an FTA commitment is made (FTA new sectors);

(d) Sub-sectors and modes for which neither a GATS nor an FTA commitment exists (Unbound).

Categories (a), (b), and (c) are further divided into partial and full commitments, with the latter defined as not listing any remaining trade-restrictive measures.

When the P4 Agreement was initially signed by the four members, only Singapore, Chile and New Zealand made commitments on services. According to Article 20.5 of the Agreement, Brunei Darussalam was to submit its services schedule for acceptance by the other parties within two years upon the Agreement's entry into force. Prior to that, Brunei Darussalam could not benefit from the services commitments offered by the other three members. As the Agreement entered into force for Brunei Darussalam on 12 July 2006, the decision was supposed to be made by 12 July 2008. However, nothing has happened so far. This means that Brunei Darussalam's services trade with the other three parties is still wholly excluded from the Agreement. Because of the low level of Brunei Darussalam's services trade,[24] trade in the sector between Brunei Darussalam and the other three members is probably very small; however, the fact that the services sector of one member has been excluded still casts some doubt on whether the "substantial sectoral coverage" requirement has been fulfilled.

Outwardly, the services commitments made by the three remaining countries appear to be quite liberal as the Agreement adopts a "negative list" approach in scheduling the commitments, meaning that obligations on national treatment, MFN and market access apply to all covered sectors in all four modes unless otherwise noted.[25] However, closer observation reveals that the commitments are not as broad and deep as might be first thought.

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[24] In 2005, Brunei Darussalam's services trade in the world rankings was 100. This was dwarfed by the rankings of Chile, New Zealand and Singapore.

[25] Article 12.8.

First, several sectors were excluded from the whole Agreement. Following the example of GATS, air transport services and services supplied in the exercising of governmental authority have both been excluded. Moreover, the Agreement also removed the entire financial services sector from its coverage. Given the importance of that sector, both on its own and as an infrastructural sector, the exclusion again raises questions regarding the fulfillment of the "substantial sectoral coverage" requirement.

Second, the obligations only apply to the extent that there are no reservations listed in Annexes III and IV. Annex III lists the existing non-conforming measures. To some extent the potential damaging effect of Annex III has been softened slightly by the "ratchet" clause in Article 12.8:1(c), which provides that a party may only amend an existing non-conforming measure to make it more liberal, but not more restrictive.

However, the "ratchet" clause could potentially be defeated by Annex IV reservations, which allows the parties to adopt or maintain new measures that do not conform to the basic obligations. As all three members made many reservations under both Annexes, it seems that the "elimination of substantially all discrimination" is also being evaded.

These worries are confirmed by Fink and Molinuevo (2008), which compares the levels of liberalization among Singapore's FTAs. In terms of the width of coverage and depth of commitments, even though Singapore's commitments in the P4 Agreement are better than many of the other FTAs it has signed, there are still some FTAs with higher levels of liberalization than the P4 Agreement. One notable example is the FTA with the United States, in which Singapore agreed to higher commitments in the financial services, recreational, cultural and sporting services, and transport services sectors. Even the FTA with Jordan features better commitment in the construction and related engineering services sector, while the commitments in the distribution services and environmental services sectors are better in the FTA with the Republic of Korea. In terms of the modes of supply, the FTA with Australia has better commitments in every mode except mode 4, while the FTAs with the Republic of Korea, the United States and Panama include higher commitments in all modes.

E. Conclusion: High standard or missed opportunity?

As the above discussion shows, the trade liberalization provided for under the P4 Agreement is rather modest, sometimes even lower than the commitments made by the parties themselves in other agreements. On top of this, the existing trade regimes of the members were already very liberal before the conclusion of the P4 Agreement, and the trade volume of each member (except Singapore) as well as that between members is rather small. Thus, it is unlikely that the Agreement will bring significant economic benefits. Why, then, did the parties negotiate the Agreement in the first place?

In a special lecture delivered at the Victoria University of Wellington in 2005, Chilean Ambassador to New Zealand Juan Salazar explored the reasons. While Salazar's talk focused on the rationale for the Closer Economic Relations Agreement between Chile and

New Zealand, it was applicable largely to the larger P4 Agreement as well as the other parties share similar circumstances as the two. According to Salazar, "the Chile-New Zealand initiative was, from the very beginning, not supposed to be a typical Free Trade Agreement" that aimed at "increasing bilateral flows of merchandise". Instead, the parties really wanted to use the Agreement to build "a larger scheme for a Closer Economic Partnership" with the following goals:

(a) To act as a benchmark for trade liberalization among APEC economies and create a demonstration effect for the WTO;

(b) To promote political cooperation between the two countries as they share similar political philosophies;

(c) To forge potential strategic alliance on a wide array of areas ranging from agricultural, education to technology.

Of the three objectives, the first is most relevant from the perspective of trade policy and worth further discussion. According to Salazar, as Chile, New Zealand and Singapore are all small, open and export-oriented economies, they have to push harder for world trade liberalization than their larger and less export-dependent countries. When multilateral negotiations do not move forward, they have to resort to bilateral or regional initiatives to create more market access opportunities for their exports and, eventually, increase the momentum for trade liberalization on a wider platform. While the Chile-New Zealand-Singapore partnership might not have sufficient political clout to have a big impact on the progress of negotiations at WTO, the P4 Agreement could serve as a stepping-stone for an expanded "P+" agreement within APEC.

While this analysis appears to be plausible on paper, it is doubtful that the P4 Agreement can really achieve this purpose. In the author's view, before the P4 Agreement can become the nucleus of a wider economic integration process, it needs to satisfy three requirements.

First, at the economic level, the Agreement itself must offer a high level of trade liberalization. While the existing members of the Agreement might not have put economic benefits at the top of their list when they entered into the Agreement, other potential members will not find it worthwhile to join unless they can enjoy substantial economic gains. However, as indicated above, while the market access opportunities provided for under the Agreement are quite substantial, they do not always compare favourably against those under other agreements. Moreover, not only must the existing members conform to such a "high standard", they must also be able to hold the new members against the same standard. As even the existing members – most are considered to be among the most open economies – did not feel comfortable with offering many real concessions, it is highly unlikely that new members will be able to follow suit. This raises another question: in the future expansion of the Agreement, will the priority be placed on getting the largest number of countries with a lower level of trade liberalization and smaller set of issues covered, or on achieving the widest coverage of issues and highest level of liberalization with a smaller group of countries? In the author's view, since the P4 Agreement strives to build up a "high standard" agreement for others to follow, the latter approach should be adopted and quality

should not be sacrificed for the sake of quantity. Otherwise, the Agreement will lose its credibility and languish into another agreement that is indistinguishable from most of the preferential trade agreements. Unfortunately, this is probably easier said than done, especially when considering the eagerness of the current members of the P4 Agreement to invite other countries to join the pact. However, the members will have to accept this trade-off if they really want to create something special.

Second, at the political level, the members to the Agreement must find a way to deal with the pressures from political and economic powers that wish to accede to the Agreement. As Baldwin, Evenett and Low (2009) observed, "[t]he world of trade negotiations is governed by something of the law of the jungle, where nations with big markets have more leverage than those with small markets... The jungle law is much more in evidence when large countries sit down with small ones [in a regional or bilateral negotiation] than it is in a WTO context". Of the four existing members of the Agreement, Chile is the largest in terms of land area and population. Have the other three members managed to escape the law of the jungle? Not really. If the commitments made by the four members are compared, the ones by Chile are generally lower than those of the other members. Also, as discussed above, there are many exceptions tailor-made just for Chile. It might be argued that the special treatment for Chile is justified as it is a developing country and has the lowest per capita GDP among the four countries. However, if the P4 Agreement really wants to set the "Golden Standard" for FTAs, it will have to hold every country, be it rich or poor, large or small, to the same standard. If a country is not ready, the members will just have to pass it over and keep the high standard, rather than letting that country in and diluting the degree of trade liberalization.

It might also be argued that since Brunei Darussalam, the smallest and weakest member among the parties, also got away with lower concessions, the fact that Chile's concessions are lower than the others does not necessarily mean that Chile has abused its negotiating power. However, the author would again disagree. Brunei Darussalam is an entirely different story to that of Chile, as the former country's market is too small and insignificant for the other parties. Looking at the negotiating history of the P4 Agreement, it can see that the talks stopped several times due to the reluctance of Chile. While there might have been real political difficulties at home, such reluctance on the side of Chile, coupled with the eagerness on the side of New Zealand, gave Chile more bargaining power in the process. That is why Chile, from a mercantilist point of view, gained much more than the other parties in the final Agreement. This sets a rather bad example for the other potential members – if the P4 Agreement cannot even handle the pressure from a country that is, at best, a regional power, how can it deal with the pressure from global powers such as the United States and China? Until the parties to the Agreement can find a way to handle the pressure from more powerful countries, it is better to keep the membership among smaller open economies. Otherwise, the plague of protectionism will creep in and the P4 Agreement will degenerate into another ordinary spoke of a hub country.

Third, at the technical level, the Agreement provides the necessary elements and mechanisms for making the regional preferences multilateral. One of the stated objectives of the Agreement is to serve as a model FTA within the Asia-Pacific region and gradually

expand to other countries in the region.[26] In a way, this is similar to the concept of "multilateralizing regionalism" as argued a seminal article by Baldwin (2006). In that article as well as in a sequel by Baldwin, Evenett and Low (2009), the necessary elements and mechanisms for multilateralizing both tariff and non-tariff commitments were discussed. Unfortunately, few of these elements and mechanisms are featured in the P4 Agreement. For example, the multilateralization of tariff preferences needs liberal ROOs and extended cumulation rules. As discussed above, however, the ROO in the P4 Agreement is rather restrictive and complicated, and only bilateral cumulation is allowed. Baldwin also noted that the experiences of the Information Technology Agreement and Pan-European Cumulation System have shown that the unbundling or fragmentation of offshoring to "spoke" economies would create enough political economy forces to resolve the spaghetti bowl problem.

In the case of the P4 Agreement, however, its members do not have a great deal of intra-industry trade and it is unlikely that the same political economic forces will be found forming within the four parties. While Chile and New Zealand share many similarities in the agricultural sector, this will not lead to the same unbundling process as that seen in the Pan-European Cumulation System; This is because agricultural products, unlike industrial products, are generally not sent back and forth between different countries for processing before the final product is produced. While the prospect for more intra-industry trade might become more promising when more countries in East and South-East Asia join the P4 Agreement, it remains to be seen whether other countries in the region are actually interested in joining. In the case of trade remedies, Baldwin (2006) called for (a) the elimination of trade remedy measures or at least limited recourse to trade remedies through mechanisms such as notification and consultation procedures, or (b) higher thresholds for the initiation, investigation and application of these measures. Again, however, the P4 Agreement provides nothing useful in that area, as it merely affirms the rights and obligations of the parties under the respective WTO Agreements.[27]

Compared to these areas, the trade in services chapter appears to be more encouraging, as it offers both mechanisms suggested by Baldwin (2006), i.e., the "third party" MFN clause and the "leaky" or liberal ROO. However, the potential effects of these two provisions might be more limited than originally thought. First, as mentioned above, both the MFN and Market Access clauses in the services chapter can be limited by the reservations parties have scheduled in Annexes III and IV. This explains why many concessions given by some of the parties to other countries (such as the United States) cannot be found in the P4 Agreement. Second, the liberal ROO is also subject to the limitations that the parties might impose on a service supplier pursuant to Article 12.12, which authorizes denial of benefits to service suppliers under certain circumstances. Overall, the P4 Agreement needs to be substantially revamped to make it friendlier to multilateralization.

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[26] See the last sentence of the preamble to the P4 Agreement. See also the Overview on the P4 Agreement by New Zealand's Ministry of Foreign Affairs and Trade, available at www.mfat.govt.nz/Trade-and-Economic-Relations/Trade-Agreements/Trans-Pacific/index.php.

[27] Chapter Six in the P4 Agreement.

In conclusion, contrary to the frequently-repeated rhetoric that the P4 Agreement is a high-standard FTA, the author argues that it is not unusual. To achieve its stated goal of becoming a stepping stone for wider trade liberalization efforts in the Asia-Pacific region, it will need to revamp substantially both the market access and rules component of the package to make it more attractive. Otherwise, the P4 Agreement might go down in trade liberalization history as the “P-fail Agreement”.

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