

Building Blocks for the FTAAP: 21st Century New Issues

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What is New in 21st Century Trade?

- **Pervasive Influence of Production Networks and Global Value Chains**
 - **Shift in Emphasis**
 - **From: Supplying Goods and Services Across Border**
 - **To: Conducting International Business Across and Within Borders**
- **Rise and International Spread of the Digital Economy**
 - **Emphasis on**
 - **E-Commerce**
 - **Intellectual Property Protection in the Digital Age**
 - **Cross Border Data Flows**
 - etc etc

Need for New Approaches

21st Century Trade Demands New Approaches to

- **Services**
- **Investment**
- **Intellectual Property Protection**
- **Competition Policy**
- **Electronic Commerce**
- **Trade Facilitation**
- **Capital movements**
- **Logistics and infrastructure**

“New” Issues: Selected Issues from Three Diverse Examples

- **Intellectual Property**
- **E-Commerce**
- **Rules of Origin**

Intellectual Property (1)

Need a principles-based framework

- **welfare maximisation as the objective**
- **crucial difference between trade liberalisation and intellectual property protection**
 - **trade liberalisation: more liberalisation generally improves welfare**
 - **IP: welfare is maximised by optimising level of IPR protection**
 - **Too little reduces welfare → insufficient innovation**
 - **Too much reduces welfare → excessive capture of monopoly rents
→ limits on access to ideas, information**

Intellectual Property (2)

Need to develop

- Paradigm based on optimisation rather than maximisation of IP protection
- Empirical resources to allow quantification of effects of competing proposals

Constraints

- “blue sky” approach infeasible
- all potential FTAAP partners have existing obligations
- some existing commitments may be problematic
 - e.g. contradictory commitments on geographic indications (GIs) in separate FTAs
- need careful assessment of how far potential FTAAP framework is constrained by existing commitments

Intellectual Property (3)

Issues to Consider in FTAAP - Patents

- **scope to adapt territoriality of patent law to encourage innovation within GVCS**
- **encouragement for innovation via flexibilities for experimental use**
- **curbs on excessive patent length by limiting “evergreening mechanisms e.g.**
 - **patent term extensions e.g. for new uses (e.g. new patient groups and new dosages for pharmaceuticals)**
 - **tighter definition of inventive steps (say what it does not cover)**
- **careful definition of utility/usefulness**
- **better articulated links between IP and investment**
 - **Ensure steps to limit excessive patent length (e.g. by setting limits on inventive steps or by adopting tight definitions of utility) cannot be classified as expropriation for ISDS purposes**

Intellectual Property (4)

Issues to Consider in FTAAP - Copyright

- **avoid extensions of copyright term unsupported by evidence of social benefit**
- **ensure that FTAAP makes sufficient allowance for balancing flexibilities and exemptions to facilitate activities with public good characteristics e.g. news reporting, teaching, scholarship and research e.g. fair use**
 - **(build on TPP language on this issue?)**

Electronic Commerce (1)

Rapid spread of e-commerce and even more rapid technology development highlight several areas requiring coordinated action by APEC economies

(Jim Foster, (Keio University International Center for Internet and Society))

- Can APEC develop appropriate approaches for inclusion in FTAAP?
- Will require extensive work programmes by APEC in its role of “FTAAP incubator”
- **A Common Framework for Privacy?**
 - uncertainty created by gaps in legal frameworks for privacy hinder cross-border data flows and create compliance problems for SMEs
 - can APEC develop consensus around “accountability” based privacy governance?
- **Regional Coordination on Cybersecurity**
 - threat increasingly recognised
 - excessive cost and complexity of nationally mandated measures but capacity and resource constraints (an aspect of the “digital divide”) inhibit a region-wide response
 - is there a solution?

Electronic Commerce (2)

- **Standards for Internet Service**
 - Feasibility of a “common cyberspace” among APEC economies?
 - Problems include uneven adoption, slow and non-transparent processes
 - Need for attention to consumer requirements and expectations
- **Cross Border Data Flows and Trade**
 - Contentious issue in many economic relationships (including US-EU, also TPP)
 - Can APEC build consensus on framework for facilitating cross-border data flows?
- **Addressing the “Digital Divide”**
 - Requires attention to technological, human capacity, cultural, geographic and socio-economic dimensions
- **Internet Fragmentation**
 - Spread of separate national legal and policy frameworks may reinforce national, cultural and linguistic differences
 - Resulting increased reliance on encryption may undercut law enforcement and challenge sovereignty
 - Can APEC develop consensus around practical solutions to preserve integrity of the internet?

Rules of Origin (1)

- **Crucially important for seamless flow of goods in the region**
- **Assume added importance from the increased role of value chains and production networks**
- **Must facilitate efficient regional allocation of production activities**
- **FTAAP provides attractive opportunity to rationalize the “noodle bowl” of complex and inconsistent rules of origin across the region**
 - **potential to achieve an equivalent to the EU PECS system**

Rules of Origin (2)

Desirable characteristics include:

- **Transparency, simplicity, flexibility**
 - Avoidance of onerous rules designed as deliberate impediments to trade
 - Exemptions where tariff of preference-receiving country exceeds tariff of importing country?
- **Full regional cumulation**
 - Also diagonal cumulation with FTAAP parties' FTA partners?
- **Choice of RVC, CTC, or PSR rules based on criteria of facilitating trade**
 - Co-equal rules (e.g. RVC and CTC) where practical and beneficial
- **Transparent, practical operational certification procedures (OCPs)**
 - Avoidance of unnecessary costs, uncertainties, risks
 - Self-certification where possible

Rules of Origin (3)

Outlook for TPP and RCEP rules as building blocks for FTAAP rules

- **TPP ROO outcome appears better than expected (includes some regional cumulation, self-certification) but problems remain (e.g. extent of use of “yarn forward” rule)**
- **RCEP potential to develop progressive, forward-looking ROO by building on best practice among “ASEAN-Plus” FTAs**
 - **but this will be both politically and technically challenging**
- **FTAAP should aim to build on “best practice” features of TPP and RCEP**