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Competitive Regionalism in East Asia: Legal Context

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Introduction

Legalization of international economic relations draws more and more attention of international relations scholars. The success of the WTO dispute settlement mechanism and the proliferation of investor-state arbitration are the two major features of the contemporary international economic relations. Another trend that attracts academics is the regionalization of international trade and investment relations. An increasing number of FTAs and BITs are concluded either within regions or cross-regionally.

East Asia lagged behind these trends (both legalization and regionalization) until fairly recently. Many countries in East Asia preferred informal dispute management to adjudication of trade and investment disputes. Also, they preferred multilateral trade liberalization (WTO and APEC, in particular) to preferential trade arrangement. However, they finally made a policy shift toward legalization and regionalization in the early 2000s (Section 1). Why did East Asian countries join the global trends? The author argues that the key to the answer lies in the failure and/or stalemate of multilateral rule making (Section 2). The author also argues that there exists a nuance in legalization/regionalization in East Asia: there exists a contrast between modest and aggressive legalism in the sense that the latter prefers high level legal rule making in regionalization, while the former prefers more modest rule making (Section 3).

Finally, the author examines the implication of legal competition on the coherence of regional integration in East Asia. It concludes that a coherent East Asian regional integration should be aimed at as a mid-term goal, rather than a short-term goal to be realized in the near future (Section 4).

1. Legalization in International Economic Relations and the Possible Use of FTAs for Competitive Rule Making

Legalization of international economic relations: why and to what extent?

Legalization of international relations in general, and legalization of international economic relations in particular, draws more and more

attention of academia these days. By ‘legalization’ we mean obligation, precision and delegation.¹ Obligation means that states or other actors are legally bound by a rule or commitment in the sense that their behavior thereunder is subject to scrutiny under the general rules, procedures, and discourse of international law, and often domestic law as well. Precision means that rules unambiguously define the conduct they require, authorize or proscribe. Delegation means that third parties have been granted authority to implement, interpret and apply the rules; to resolve disputes; and possibly to make further rules.

As Abbott *et al.* put it,² international trade relations as exemplified by the WTO fall within the situations near the ideal type of full legalization in the sense that the WTO administered a remarkably detailed set of legally binding international agreements; it also operates a dispute settlement mechanism, including an appellate tribunal with significant authority to interpret and apply those agreements in the course of resolving particular disputes.

The unwillingness of developing countries to sign on to new rules on these issues in the absence of far more substantial agricultural liberalization in developed nations has in many ways contributed to the current stalemate of the Doha Development Agenda (hereinafter the ‘DDA’). In turn, the stagnation of the WTO negotiation process has created a strong incentive for nations to resort to regional and bilateral trade negotiations as an “insurance mechanism.”³ This hedging strategy revolves around not only keeping the momentum for more tariff liberalization, but also at a fundamental level to deepen the liberalization process through the inclusion of the new rules on trade and investment.

The US. has been one of the most active practitioners of this ‘bottom-up’ approach to international trade and investment rule-making. An early example of this strategy at work was the incorporation in NAFTA of the cutting-edge issues that would later on be incorporated in the WTO, such as intellectual property protection (TRIPs Agreement) and service liberalization (GATS). NAFTA went even farther with the adoption of a host state-investor dispute arbitration mechanism (Chapter 19) that has not been incorporated

¹ Abbott *et al.*(2001:17-18).

² Ibid., p.21.

³ Mansfield and Reinhardt(2003).

at the multilateral level⁴ and environmental and labor side agreements.⁵ More recently, the US' response to the stagnation of the DDA has been a strategy of 'competitive liberalization,' whereby bilateral trade negotiations with countries that agree to negotiate on the issues of critical interest to the United States receive a much greater priority.⁶

Japan has seen the benefit of FTA negotiation for international rule-making, too; take for instance the argument advanced by the leading business association that: "using the network of FTAs to disseminate fairer rules on anti-dumping out to other countries would help strengthen Japan's position in the next WTO negotiations."⁷ China is another country dissatisfied with current multilateral rules on anti-dumping and has used its cross-regional FTA negotiations to reward nations willing to recognize China as a market economy.⁸ In this way, China is strengthening its WTO campaign to scrap the application of the Communist economy methodology that facilitates the imposition of ad hoc and politically motivated anti-dumping duties on Chinese exports.⁹

Legalization in East Asia: shift from low- to higher-level

If North America provides an implicit benchmark for high legalization, the Asia-Pacific and East Asia offered an important example of low legalization or even an explicit aversion to legalization until recently.¹⁰ Before the end of Cold War, the Asia-Pacific region had produced few formal multilateral institutions. A modest wave of institution building in the 1990 (ASEAN and APEC) narrowed the institutional difference with other regions, but the density of institutions spanning the regions remains lower than that in Europe or the Americas. More importantly, those regional institutions

⁴ Hufbauer & Schott(2005:210-213).

⁵ Ibid., Chapters 2 and 3.

⁶ Feinberg(2005).

⁷ Keidanren(2000:6).

⁸ Article 2.2 of the WTO Anti-Dumping Agreement (hereinafter the 'ADA') provides that "(w)hen, because of the particular market situation..., such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country". Judging from the special market conditions of China, many countries including US, EC and South Africa regard it as 'non-market economy' and applied third country export price methodology. This has allegedly contributed to the higher dumping margins against Chinese products. See Brink & Kobayashi(2007:225-226).

⁹ Hoadley and Yang(forthcoming).

¹⁰ Kahler(2001).

constructed with Asian participation remained highly informal and explicitly rejected legalization in their design. Formal rules and obligations were limited in number; voluntary codes of conduct or general principles have been favored over precisely defined agreements; and disputes have been managed, if not resolved, without delegation to third-party adjudication.¹¹

Why legalization was low in Asia? One explanation widely accepted is that ASEAN and APEC are set apart from 'Western-style' institutions on the basis of radically different Asian *legal culture and institutions*.¹² However, this argument fails for several reasons. Most Asian societies, particularly in Southeast Asia, display legal pluralism rather than monolithic legal cultures and homogenous legal institutions. What appear to be cultural differences may in fact represent strategies pursued by political actors. The 'ASEAN (or Asian) way' of managing disputes or favoring informal institutions may result not only from the construction of social myths about harmony and a national past untouched by Western influence but also from conscious political programs to dampen adversarial conflict internally and internationally.¹³

The reluctance to legalization in Asia seems to have expired in the 2000s, however. Asian countries are increasingly resorting to the WTO dispute settlement mechanism, though with country-specific nuances.¹⁴ East Asian countries are finally joining the regionalization race through EPAs (economic partnership agreements), FTAs and BITs (bilateral investment treaties). Especially active are the ASEAN countries, which agreed in October 2003 to economic integration by 2020.¹⁵ In addition, ASEAN and China signed an agreement in November 2004 to liberalize trade in goods.¹⁶ Between ASEAN countries and Korea, basic agreement was signed for FTA frameworks in December 2005.¹⁷ A similar agreement is being negotiated between ASEAN

¹¹ Ibid., p.165.

¹² Ibid., pp.176-177.

¹³ Id.

¹⁴ Nakagawa(2007).

¹⁵ See Declaration of ASEAN Concord II (Bali Concord II), done in Bali, 7 October 2003. <http://www.aseansec.org/15159.htm>

¹⁶ Framework Agreement on Comprehensive Economic Cooperation between the Association of South East Asian Nations and the People's Republic of China, signed 6 October 2003, entered into force 21 December 2004. WTO Doc. WT/COMTD/N/20, WT/COMTS/51.

¹⁷ Framework Agreement on Comprehensive Economic Cooperation Among the

and India.¹⁸

Starting with the EPA with Singapore (signed in January 2002),¹⁹ Japan has since concluded EPAs with chapters on the promotion and protection of investment with the Philippines (September 2005),²⁰ Malaysia (December 2005),²¹ Thailand (April 2007),²² Brunei (June 2007)²³ and Indonesia (AugUSSt 2007).²⁴ It is also negotiating EPAs with India,²⁵ ASEAN,²⁶ Vietnam²⁷ and Korea.²⁸ Besides EPAs, Japan has accelerated negotiation of BITs. Before 2000, it had concluded BITs with only two East Asian countries (China (1988)²⁹ and Hong Kong (1997)³⁰). Since 2000, it concluded BITs with

Governments of the Member Countries of the Association of Southeast Asian Nations and the Republic of Korea, signed 13 December 2005.

<http://www.aseansec.org/18063.htm>

¹⁸ Trade Policy Bureau, METI(2006:458).

¹⁹ The Japan-Singapore Economic Partnership Agreement, signed 13 January 2002, entered into force 30 November 2002.

<http://www.mofa.go.jp/region/asia-paci/singapore/jsepa.html>; Protocol Amending the Agreement between Japan and the Republic of Singapore for a New-Age Economic Partnership, signed 19 March 2007.

http://www.mofa.go.jp/region/asia-paci/singapore/jsepa_a/index.html

²⁰ Agreement between Japan and the Republic of the Philippines for an Economic Partnership, signed 9 September 2006.

<http://www.mofa.go.jp/region/asia-paci/philippine/epa0609/index.html>

²¹ Agreement between the Government of Japan and the Government of Malaysia for an Economic Partnership, signed 13 December 2006, entered into force 13 July 2007.

http://www.meti.go.jp/policy/trade_policy/epa/html/malaysia_epa_text_e.htm

²² Agreement between Japan and the Kingdom of Thailand for an Economic Partnership, signed 3 April 2007.

<http://www.mofa.go.jp/region/asia-paci/thailand/epa0704/index.html>

²³ Agreement between Japan and Brunei Darussalam for an Economic Partnership, signed 16 June 2007. <http://www.mofa.go.jp/region/asia-paci/brunei/epa0706/index.html>

²⁴ Agreement between Japan and Indonesia for Economic Partnership, signed 20 August 2007. <http://www.mofa.go.jp/region/asia-paci/indonesia/epa0708/index.html>

²⁵ Negotiation was started in January 2007.

²⁶ On 25 August 2007, Japan and the ASEAN reached agreement on the substantive part (tariff reduction, etc.) of the Comprehensive Economic Partnership Agreement.

²⁷ Negotiation was started in January 2007.

²⁸ Negotiation was started in December 2003, but it has stalled, due mainly to the disagreement on the modalities of agricultural trade liberalization, since November 2004.

²⁹ Agreement between Japan and the People's Republic of China for the Promotion and Mutual Protection of Investment, signed 27 August 1988, entered into force 12 May 1989. http://www.meti.go.jp/policy/trade_policy/asia/china/html/investment_treaty.html

³⁰ Agreement between the Government of Japan and the Government of Hong Kong for the Promotion and Protection of Investment, signed 15 May 1997, entered into force 18 June 1997.

Korea,³¹ Vietnam³² and Cambodia.³³ In addition, it is negotiating a trilateral BIT with China and Korea³⁴ and a BIT with Lao People's Democratic Republic.³⁵

Japan's emphasis on regional/bilateral trade and investment rule-making can be understood within the context of its huge trade and investment interests in East Asia. Its FDI in the region rapidly increased in the 1990s. In 1997, when the Asian Financial Crisis broke out, it culminated to 1.58 trillion yen, comprising over 50% of its total FDI.³⁶ This trend continued after the Asian Financial Crisis, and Korea and the ASEAN 10 followed suit since the early 2000s. From 2000 to 2005, FDI flow from Japan, Korea and ASEAN 10 to East Asia increased from \$8.77 billion to \$23.88 billion, while the world's total FDI flow decreased from \$1.34 trillion to \$0.93 trillion.³⁷ Trade relationship within the region has also grown rapidly. The ratio of intra-regional trade (export and import combined) in East Asia grew from 35.7% in 1980 to 55.8% in 2005, nearing that of EU 25 (62.1%).³⁸ The deepening trade relationship in the region is reinforced by the increasing intra-regional FDI, in the sense that a substantive amount of FDI aims at exporting manufactured goods within the region. For those companies of East Asia investing in the region, protection of investment through clear and transparent rules and their enforcement through investor-state arbitration are of critical importance. As these are not provided through multilateral forum, they lobbied their governments to secure them through BITs, EPAs and FTAs.

On the side of host countries of FDI in East Asia, committing themselves

³¹ Agreement between Japan and the Republic of Korea for the Promotion and Protection of Investment, signed 22 March 2002, entered into force 1 January 2003.

http://www.mofa.jp/mofaj/kaidan/s_koi/korea02/toUShikyoutei/gaiyo.html

³² Agreement between Japan and the Socialist Republic of Vietnam for the Liberalization, Promotion and Protection of Investment, signed 14 November 2003, entered into force 19 December 2004.

<http://www.mofa.jp/region/asia-paci/Vietnam/agree0311.pdf>

³³ Agreement between Japan and the Kingdom of Cambodia for the Liberalization, Promotion and Protection of Investment, signed 17 June 2007.

³⁴ Negotiation was started in March 2007. See

<http://www.mofa.jp/mofaj/gaiko/investment/jck.html>

³⁵ Negotiation was started in March 2007. See

http://www.mofa.jp/mofaj/gaiko/investment/j_laos.html

³⁶ Trade Policy Bureau, METI, supra n.18, Chapter 3, Section 2, Figure 3-3-17.

³⁷ METI 2007, p.96, Figure 2-1-9.

³⁸ Ibid., p.98, Figure 2-1-13. The ratio of intra-regional trade of the NAFTA was 43.0% in 2005. Id.

to the promotion and protection of investment was deemed necessary to attract FDI. As Elkins, Guzman and Simmons (2006:812) lucidly put it, potential host countries are competing for credible property rights protections that foreign investors require. BITs, EPAs and FTAs (with investment chapters) are one of the most salient means for showing such credibility, though many studies assert that pulling power of BITs, EPAs and FTAs is limited, because foreign investors take into consideration many other factors in deciding where and whether to invest.³⁹ Both pushing and pulling powers thus functioned as catalyst to the proliferation of BITs, EPAs and FTAs in East Asia.

Why, then, East Asian countries joined the global race toward regionalism? The author argues that the key to the answer lies in the failure of multilateral rule making.

2. Legal Competition in East Asian: Multilateral versus Regional/Bilateral Rule Making

Multilateral versus regional/bilateral rule making: investment rules

Two failed attempts of multilateral rule-making for the promotion and protection of foreign investment in the late 1990s triggered the regional/bilateral rule-making in East Asia. One was the failed attempt to conclude the Multilateral Agreement on Investment (MAI), sponsored by the OECD (Organization for Economic Cooperation and Development) in 1998.⁴⁰ The other was the failed attempt to add 'trade and investment' to the agenda of the first negotiating round of the WTO at its 1999 Seattle Ministerial Conference.⁴¹

The failure of the MAI negotiation fermented the impression that developing countries, though they had been willing to conclude BITs on an individual basis,⁴² were still reluctant to commit themselves to multilateral

³⁹ See, for example, Neumayer & Spess(2005); Salacuse & Sullivan(2006).

⁴⁰ See OECD, Multilateral Agreement on Investment.

http://www.oecd.org/document/35/0,2340,en_2649_201185_1894819_1_1_1_1,00.html

⁴¹ See WTO, The Third WTO Ministerial Conference.

http://www.wto.org/English/thewto_e/minist_e/min99_e/min99_e.htm

⁴² The number of BITs began to increase in the late 1980s and the pace was accelerated

rules for the promotion and protection of foreign investment. On the other hand, the Members of the WTO, at its First Ministerial Conference held in Singapore in December 1996, agreed to establish a working group to examine ‘the relationship between trade and investment’ at the first negotiating round of the WTO.⁴³ However, the Seattle Ministerial Conference failed to establish the working group, and the Hong Kong Ministerial Conference finally dropped ‘the relationship between trade and investment’ from the agenda of the DDA in December 2005.⁴⁴

These failed attempts forced the developed countries in East Asia and their global firms to shift the forum for investment rule-making from multilateral to regional/bilateral forum. In Japan, the Keidanren published a policy statement titled ‘*Challenges for the Upcoming WTO Negotiations and Agenda for Future Japanese Trade Policy*’ in May 1999.⁴⁵ While expressing expectations of the upcoming WTO negotiations, it emphasized the importance of strengthening Japanese governmental efforts to develop a network of BITs and FTAs because they are ‘extremely important in terms of the foreign business activities of Japanese companies’.⁴⁶ In response, the Japanese Ministry of Economy, Trade and Industry (hereinafter the ‘METI’), for the first time in its history, officially admitted in its *White Paper on International Trade 2000*⁴⁷ that regional integration through BITs and FTAs could have economic value for Japan, and that it should be pursued ‘as a supplement to the multilateral trading system’.⁴⁸ In August 2000, the METI published a special report titled ‘*The Economic Foundations of Japanese Trade Policy – Promoting a Multi-Layered Trade Policy*’.⁴⁹ It advanced the policy stance expressed in the *White Paper on International Trade 2000* a step further. While admitting that ‘Japan continues to promote international rule-making on the multilateral level, with policy based on strengthening the WTO-centered multilateral trading system’, it noted that Japan ‘has also

in early to mid-1990s. See UNCTAD(2000).

⁴³ WTO, Singapore Ministerial Declaration, 13 December 1996, para.20.

http://www.wto.org/english/thewto_e/minist_e/min96_e/wtodec_e.htm

⁴⁴ WTO, Hong Kong Ministerial Declaration, 18 December 2005.

http://www.wto.org/english/thewto_e/minist_e/min05_e/final_text_e.htm

⁴⁵ <http://www.keidanren.or.jp/english/policy/pol102/index.html>

⁴⁶ Ibid., Section 3(1). For the role of Keidanren in the policy shift of the Japanese government, see Yoshimatsu(2005) and Nakagawa(2006).

⁴⁷ Online available. <http://www.meti.go.jp/english/report/index.html>

⁴⁸ Ibid., p.39.

⁴⁹ Online available. <http://www.meti.go.jp/english/report/index.html>

begun to develop bilateral investment liberalization frameworks', and announced that Japan would henceforth promote a 'multi-layered trade policy' with efforts to strengthen the multilateral trading system and promote regional cooperation.⁵⁰

This 'multi-layered trade policy', whose focus was clearly on investment rule-making at regional/bilateral level, has since been repetitively emphasized by the Japanese government. And, as was seen in Section 1 above, Japan accelerated negotiations of BITs and EPAs with investment chapters with East Asian countries where Japanese companies have large investment interests.

Multilateral versus regional/bilateral rule making: anti-dumping and trade facilitation

The rivalry between multilateral rule-making and regional/bilateral rule-making has another aspect in East Asia. The advancement of regional/bilateral rule-making in the region may have regressive effects on the ongoing and future multilateral rule-making. This is especially prominent in those areas of trade rules currently under negotiation within the framework of the DDA where the WTO rules are allegedly insufficient or inadequate, so that their reform is needed. The most salient example is the rules on trade remedies (anti-dumping, counter-subsidies and safeguards), and particularly rules on anti-dumping.

Many East Asian countries, notably China, Korea and Japan, have been the most frequent targets of the foreign anti-dumping actions, mostly by the US and the EU. These countries have been alleging that the US and the EU are abusing their anti-dumping laws in violation of WTO Anti-Dumping Agreement (hereinafter the 'ADA'). Korea and Japan have resorted to the WTO dispute settlement procedure against these laws and practices.⁵¹ They, together with Hong Kong, Singapore, Thailand and Mexico, also joined the so-called '*friends*' of the rules negotiation of the DDA, and have been making systematic proposals for the revision of the ADA.⁵²

⁵⁰ Ibid., Chapter 2, Section 3.

⁵¹ See Nakagawa(2007).

⁵² See, for example, the paper titled "Anti-Dumping: Illustrative Major Issues" submitted to the Negotiating Group on Rules of the DDA on 26 April 2002 (TN/RL/W/6) by Brazil, Chile, Columbia, Costa Rica, Hong Kong, Israel, Japan, Korea, Mexico, Norway, Singapore, Switzerland, Thailand and Turkey.

With the stalemate of the DDA, some of these East Asian countries began to insert special rules on trade remedies which are more stringent than those of the ADA in their FTAs. For instance, Article 6.2 of the Korea-Singapore FTA,⁵³ while maintaining the parties' rights and obligations under Article VI of GATT 1994 and the ADA (Article 6.2.1), provides for two special rules to be applied between them which are more stringent than those of the ADA: (1) prohibition of the so-called 'zeroing'⁵⁴ (see Article 2.4.2 of the ADA); and (2) the lesser duty rule (see Article 9.1, second sentence of the ADA). Also, the Korea-European Free Trade Association (EFTA) FTA,⁵⁵ while retaining basically all the rights and obligations under the ADA, adopted the lesser duty rule (Article 2.10.1(b)).⁵⁶ In addition, the Korea-EFTA FTA stipulates that the Parties 'shall endeavor to refrain from initiating anti-dumping procedures against each other' and consult 'with the other with a view to finding a mutually acceptable solution,' though it does not mandate any specific additional legal requirements (Article 2.10.1(a)). These rules correspond to the proposals of the '*friends*' of the rules negotiation of the DDA. Ahn (2007: 218) predicts that such '*rule diversification*' may constitute important precedents for the ongoing DDA negotiation and the development of the trade remedy system under the WTO.⁵⁷

Another area of '*rule diversification*' is trade facilitation. Trade facilitation, sometimes called simplification of customs clearance procedure, is the only survivor of the so-called 'Singapore issues' of the DDA.⁵⁸ By the 'July Package,' the Members of the WTO agreed on 1 August 2004 to

⁵³ Korea-Singapore Free Trade Agreement, signed 4 August 2005, entered into force 2 March 2005.

http://www.iesingapore.gov.sg/wps/wcm/connect/resources/file/ebb417fbd629/KSFTA_final_KSFTA.pdf?MOD=AJPERES

⁵⁴ 'Zeroing' is the methodology of calculating dumping margin by which the investigating authority does not include in the numerator used to calculate weighted average dumping margins any amounts by which average export prices in individual averaging groups exceeded the average normal value for such groups. The dumping margin is thus calculated higher than otherwise. See Pandey(2005:3).

⁵⁵ Signed 15 December 2005.

<http://secretariat.efta.int/Web/ExternalRelations/PartnerCountries/Korea>

⁵⁶ It provides that "the Party taking such a decision, should apply the 'lesser duty' rule, by imposing a duty which is less than the dumping margin where such lesser duty would be adequate to remove the injury to the domestic industry".

⁵⁷ Also see Kawashima(2006) on the regulation of anti-dumping in regional integration.

⁵⁸ See Messerlin & Zarrouk (2000: 586) on trade facilitation at Singapore Ministerial Conference.

commence negotiations on trade facilitation within the framework of the DDA.⁵⁹ Annex D of the ‘July package’ set the modalities of negotiation. Under this mandate, Members are directed to clarify and improve GATT Article V (Freedom of Transit), Article VIII (Fees and Formalities connected with Importation and Exportation), and Article X (Publication and Administration of Trade Regulations),⁶⁰ and to identify their trade facilitation needs and priorities.⁶¹ Since then, many Members of the WTO submitted proposals for the clarification and improvement of GATT Articles on trade facilitation,⁶² as well as communications on their facilitation needs and priorities.⁶³

In parallel with the DDA negotiation on trade facilitation, the East Asian countries have been incorporating special rules on trade facilitation in their FTAs. Even before the start of the WTO, trade facilitation was a priority issue for rule-making/rule-clarification in the region. The APEC took up trade facilitation as one of its ‘pillars’ from its start, and has been conducting a series of research and discussion on it.⁶⁴ The Bogor Declaration, adopted at the third APEC Leaders’ Meeting in November 1994, emphasized the importance of trade facilitation because ‘trade liberalization efforts alone are insufficient to generate trade expansion.’⁶⁵ And the Manila Action Plan (Part 3: Collective Action) adopted at the fourth APEC Leaders’ Meeting in November 1996 listed collective action plan for trade facilitation, including: (1) harmonization of tariff nomenclature among APEC members to the six digit level through the adoption of the WCO Harmonized System(HS); (2) provision of a publicly available information manual on APEC members’ Customs laws, regulations, administrative guidelines, procedures and

⁵⁹ WTO, Decision Adopted by the General Council on 1 August 2004, para.1(g).

⁶⁰ Ibid., Annex D, para.1.

⁶¹ Ibid., para.4.

⁶² For the most recent compilation of such proposals, see WTO, Trade Negotiation Committee, Negotiating Group on Trade Facilitation, WTO Negotiations on Trade Facilitation Compilation of Members’ Textual Proposals, TN/TF/W/43/Rev.12, 25 July 2007.

⁶³ For a recent list of such communications, see WTO, Trade Negotiation Committee, Negotiating Group on Trade Facilitation, List of Documents, Note by the Secretariat, Revision. TN/TF/W/106/Rev.3, 20 December 2006, pp.11-12.

⁶⁴ Ravenhill(2000).

⁶⁵ APEC Economic Leaders’ Declaration of Common Resolve, Bogor, 15 November 1994. http://www.apecsec.org.sg/apec/leaders_declarations/1994.html

rulings; and (3) computerization of APEC Customs procedures.⁶⁶

As the APEC process slowed down in the late 1990s,⁶⁷ East Asian countries, in particular Japan, shifted the priority negotiating forum on trade facilitation to EPAs. Japan's first EPA with Singapore⁶⁸ shared two chapters on trade facilitation. In Chapter 4 – Customs Procedures, each Party shall (a) make use of information and communications technology, (b) simplify its customs procedures, and (c) make its customs procedures conform to relevant international standards (e.g., those made under the World Customs Organization (WCO)).⁶⁹ In Chapter 5 – Paperless Trading, each Party recognized that paperless trading⁷⁰ will significantly enhance the efficiency of trade through reduction of cost and time, and shall co-operate with a view to realizing and promoting paperless trading between them.⁷¹ Similar provisions were adopted in the following Japan's EPAs; with Malaysia⁷² (Chapter 4), with the Philippines⁷³ (Chapter 4), with Thailand⁷⁴ (Chapter 4) and with Indonesia⁷⁵ (Chapter 4).

Other FTAs concluded in the region followed suit. For instance, Chapter 5 of the Korea-Singapore FTA,⁷⁶ titled 'Customs Procedures', provides that the Parties shall co-operate on, among others, paperless customs clearance (Article 5.13(b)). For this purpose, the Parties shall: (1) simplify and streamline customs procedures through the domestic integration of customs systems with other controlling agencies, with a view to enhancing paperless customs clearance; and (2) endeavor to provide an electronic environment that supports business transactions between their respective customs

⁶⁶ APEC, Manila Action Plan for APEC (MAPA 1996) Volume III, A. Overview.

<http://www.mofa.go.jp/policy/economy/apec/1996/mapa/vol3/vol3over.html>

⁶⁷ This does not mean that APEC process has stalled since the late 1990s. See, for instance, APEC Economic Leaders' Declaration, Shanghai, 21 October 2001, Appendix 1, Shanghai Accord, II. Clarifying the Roadmap to Bogor, Follow up on the Trade Facilitation Principles.

http://www.apec.org/apec/leaders_declarations/2001/appendix_1_-_shanghai.html

⁶⁸ Supra n.19

⁶⁹ Ibid., Article 36.

⁷⁰ 'Paperless trading' was defined as 'trading using electronic filing and transfer of trade-related information and electronic versions of documents such as bills of lading, invoices, letters of credit and insurance certificates.' Ibid, Article 40.

⁷¹ Id.

⁷² Supra n.21.

⁷³ Supra n.20.

⁷⁴ Supra n.22.

⁷⁵ Supra n.24.

⁷⁶ Supra n.53.

administrations and their trading communities (Article 5,13(b)(i) and (ii)). Enhancing rules on trade facilitation, in particular simplification and streamlining of the customs procedure through paperless trade, and cooperation aiming at this goal has thus become priority target of FTA negotiations in the region.

Trade facilitation yields large economic benefits, especially when the level of tariffs is low.⁷⁷ As multilateral negotiation on trade facilitation under the DDA has been slow, partly because of the involvement of many developing countries and the need for ‘capacity building’ and ‘special and differential treatment (S&D)’, building-up rules and commitments on enhanced trade facilitation through bilateral/regional channels is an effective way of improving trade facilitation. Moreover, such rules and commitments may have regressive effects on the rule-making on trade facilitation under the DDA (e.g., simplified customs clearance, harmonization of tariff headings, etc.), and they should do so because regional fragmentation of rules on trade facilitation will generate considerable amount of regulatory cost on both governments and firms (‘spaghetti bowl’).

In effect, Japan and other East Asian countries have made many proposals reflecting their rule-making efforts in the region at the DDA negotiation on trade facilitation. To mention a few: Japan, together with Mongolia and Switzerland, made a proposal on (1) prompt publication of all laws, regulations, judicial decisions and administrative rulings relating to trade in goods and (2) establishment of enquiry points⁷⁸; Hong Kong, together with Switzerland, made a proposal on the reduction/limitation of formalities and documentation requirements (revision of Article VIII of GATT 1994)⁷⁹; Korea made a proposal on single window/one-time submission of customs documents (revision of Article VIII of GATT 1994).⁸⁰ Though these are confined to the subject matter which falls within the ambit of the

⁷⁷ Wilson, Mann & Otsuki(2003:18) estimates that 0.55% improvement of Port Efficiency indicator, 5.5% improvement of Customs Environment indicator and 3.7% improvement of E-business indicator would generate an increase in trade equal to complete elimination of tariffs in the APEC region, whose applied rates in the ad valorem term is 6.5% in the region.

⁷⁸ WTO, Negotiating Group on Trade Facilitation, Communication from Japan, Mongolia, and Switzerland, 7 June 2006. TN/TF/W/114.

⁷⁹ WTO, Negotiating Group on Trade Facilitation, Communication from Hong Kong, China and Switzerland, 4 July 2006. TN/TF/W/124.

⁸⁰ WTO, Negotiating Group on Trade Facilitation, Communication from Korea, 21 July 2006. TN/TF/W/138.

revision of existing WTO rules on trade facilitation, the other rules covered by the bilateral/regional rule-making on trade facilitation, in particular those relating to electronic or paperless customs clearance procedures, may be taken up at the DDA trade facilitation negotiation in due course. In this sense, trade facilitation, alongside with trade remedies rules, has become another area of '*rule diversification*' for East Asian countries, aiming at having regressing effects on the ongoing DDA.

Multilateral versus bilateral/regional rule making: intellectual property

Finally, the author would like to mention one more subject matter where the fit between multilateral and bilateral/regional rules is of great importance: protection of intellectual property rights (hereinafter 'IP'). The TRIPs Agreement did a great job in enhancing multilateral rule making on the protection of intellectual property rights. However, that was not the end of the story. Some of the recent EPAs and FTAs by East Asian countries contain chapters on IP, whereby additional and more stringent protection of IP, as well as intergovernmental cooperation on the enforcement of those rights, are provided.

For instance, Chapter 10 of the Japan-Singapore EPA⁸¹ provides for an enhanced co-operation in the areas of IP protection through (1) exchanging information and sharing experiences on IP and on relevant IP events, activities and initiatives organized in their respective territories, (2) jointly undertaking training and exchanging of experts in the field of IP, and (3) disseminating information, sharing experiences and conducting training on IP enforcement (Article 96.3). It also provides for the facilitation of patenting process whereby Singapore shall, in accordance with its laws and regulations, take appropriate measures to facilitate the patenting process of an application filed in Singapore that corresponds to an application filed in Japan (Article 98.1). Such 'TRIPs plus' provisions are also contained in the other EPAs and FTAs concluded by Japan,⁸² and Korea.⁸³

⁸¹ See supra n.19.

⁸² See, for instance, Chapter 9 of the Japan-Malaysia EPA (supra n.21), Chapter 10 of the Japan-Philippines EPA (supra n.20), Chapter 10 of the Japan-Thailand EPA (supra n.22) and Chapter 9 of the Japan-Indonesia EPA (supra n.24).

⁸³ See, for instance, Chapter 17 of the Korea-Singapore FTA (supra n.53) and Chapter 18 of the Korea-US. FTA (Free Trade Agreement between the United States of America and the Republic of Korea, signed 30 June 2007.

[http://www.UStr.gov/Trade Agreements/Bilateral/Republic of Korea FTA/Final Text/S](http://www.UStr.gov/Trade%20Agreements/Bilateral/Republic%20of%20Korea%20FTA/Final%20Text/S)

As there has been no negotiation conducted within the framework of the DDA for the enhancement/strengthening of the TRIPs Agreement,⁸⁴ such ‘TRIPs plus’ provisions of the EPAs and FTAs will be the only measures available for the enhancement/strengthening of IP and their enforcement.

3. Legal Competition among Different FTA Models in East Asia

Modest versus aggressive legalism

Finally, there exists another aspect of legal rivalry in the regionalism in East Asia, namely, the rivalry between more legalistic approach taken by Japan, Singapore and Korea and less legalistic approach taken by ASEAN countries except Singapore and China.

As C. Fred Bergsten lucidly points out,⁸⁵ most of the intra-Asian FTA to date, especially those including China, are of relatively low quality in terms of issue coverage while the US consistently seeks (even if it does not always obtain or even accept itself) “good standard” FTAs with comprehensive coverage over trade and investment. Our concern lies in whether there is a discrepancy on the extent of legalization within intra-Asian FTAs and EPAs, and the answer seems to be affirmative.

Let us start with the China-ASEAN FTA.⁸⁶ This FTA, besides the broad commitment for comprehensive economic cooperation (Articles 1 and 2) and liberalization of trade in goods (Article 3) and trade in services (Article 4) and investment (Article 5), does not contain hardly any legal rules for the promotion and protection of trade and investment in the region.⁸⁷ The China-Chile FTA,⁸⁸ another FTA concluded by China, contains some legal rules, but their coverage is far more limited than that of the EPAs and FTAs concluded by Japan, Singapore and Korea. For instance, the former contains chapters on rules of origin (Chapters 4 & 5), trade remedies (Chapters 6),

[ction_Index.html](#))

⁸⁴ To the contrary, WTO member countries agreed to loosen the obligations of the TRIPs Agreement relating to compulsory licensing for drugs for the sake of developing countries. See Decision of the General Council on the Amendment of the TRIPs Agreement, 6 December 2005. WT/L/641, 8 December 2005.

⁸⁵ Bergsten(2007:2).

⁸⁶ See supra n.19.

⁸⁷ For instance, the Framework Agreement does not contain preferential rules of origin.

⁸⁸ Free Trade Agreement between the Government of the People’s Republic of China and the Government of the Republic of Chile, signed 18 November 2005, entered into force 20 January 2007. WTO Doc. WT/REG230.

sanitary and phytosanitary measures (Chapter 7) and technical barriers to trade (Chapter 8), but does not contain chapters on IP, competition law and policy, trade facilitation and investment, all of which are the common features of the EPAs and FTAs concluded by Japan, Singapore and Korea.

In this sense, the EPAs and FTAs concluded by Japan, Singapore and Korea are more highly legalized than those concluded by ASEAN countries except Singapore and China. These former are more akin to those concluded by the US in terms of issue coverage. Why is it so?

One plausible explanation is that ASEAN countries except Singapore and China are not ready for such legalization. These countries are latecomers in legalization of international economic relations. The so-called 'ASEAN way' of informal and gradual liberalization has long been maintained.⁸⁹ China acceded to the WTO only as late as December 2001, and has since been trying hard to come up with its obligations under the WTO Agreement and its Accession commitments.⁹⁰ It has not yet been ready to commit itself to 'WTO plus' legalization.

Another explanation is that Japan, Singapore and Korea, like US., Mexico and Chile, have been making use of their EPAs and FTAs for enhancing/strengthening legal rules for the promotion and protection of trade and investment. As we saw in the preceding sections, under the current stalemate of the DDA, bilateral/regional rule making through EPAs, FTAs and BITs is the only viable means for achieving such purpose. These countries in East Asia are trading countries with huge trade and investment stakes abroad, and enhancing/strengthening legal rules for the promotion and protection of trade and investment is their priority goals in their international economic diplomacy.

China's transitional review mechanism will expire in 2011.⁹¹ It will not be until then, at the earliest, that China will start moving toward 'WTO plus' legalization at regional/bilateral level.

The situation is different in the case of the ASEAN countries other than Singapore. Individually, these countries have committed themselves to

⁸⁹ Kahler(2001:167-171).

⁹⁰ See, Protocol on the Accession to the People's Republic of China, Annex 1A. Information to be provided by China in the context of the Transitional Review Mechanism. WT/L/432, 23 November 2001.

⁹¹ Ibid., Article 18.4.

enhancing/strengthening legalization. For instance, Thailand,⁹² Philippines⁹³ and Malaysia⁹⁴ signed EPAs with Japan, whereby they committed themselves to many 'WTO plus' legal obligations. Vietnam⁹⁵ and Cambodia⁹⁶ concluded BITs with Japan and the Lao People's Democratic Republic is negotiating a BIT with Japan.⁹⁷ As ASEAN-wide regional integration initiative such as ASEAN+3⁹⁸ or ASEAN+6⁹⁹ is painstaking and is not plausible at least in the near future, these member countries of the ASEAN have opted themselves to individual commitment for higher legalization with their East Asian trading partners.

US/EU versus Japan: rivalry in competition law and policy

Finally, we should mention another aspect of legal rivalry in the regionalism in East Asia which goes beyond the region, namely, the rivalry of rules originated in US/EU and those originated in Japan. This is taking place in an area beyond the coverage of the current multilateral rule-making; competition law and policy.

Multilateral rule-making on competition law and policy has occasionally been attempted, but has never been successful.¹⁰⁰ The most recent attempt was the WTO Singapore Ministerial Declaration, whose paragraph 20 announced the WTO Members' agreement to establish a working group to study 'the interaction between trade and competition policy.' However, together with 'the relationship between trade and investment',¹⁰¹ this 'Singapore issue' was dropped from the agenda of the DDA in December 2005.

While the multilateral rule-making attempts repetitively failed ever since the early post-WWII period, EU and US have been active in the formation/strengthening their own competition law and policy and its global diffusion.

⁹² See supra n.22.

⁹³ See supra n.20.

⁹⁴ See supra n.21.

⁹⁵ See supra n.32.

⁹⁶ See supra n.33.

⁹⁷ See supra n.35.

⁹⁸ ASEAN plus Japan, China and Korea.

⁹⁹ ASEAN+3 plus India, Australia and New Zealand.

¹⁰⁰ For the past attempts of multilateral rule-making on competition law and policy, see Nakagawa(2004a), (2004b).

¹⁰¹ See supra n.44 and corresponding text.

Contemporary competition law has its origins in the US Sherman Anti-Trust Act (1890). After the WWII, US pressured its European allies such as the UK and Australia and the recently defeated Japan and Germany to adopt anti-trust laws.¹⁰² With the intensifying international business transactions, extraterritorial application of US anti-trust laws caused international conflicts.¹⁰³ In order to prevent such conflicts, US has been concluding bilateral anti-trust cooperation agreements with its major trade/investment partners (e.g., West Germany (1976), Australia (1982), Canada (1984, revised in 1995), EC (1991, supplemented in 1998) and Japan (1999)), under which US anti-trust authorities abstain from applying its anti-trust law extraterritorially (positive comity).¹⁰⁴

While these movements were based on the premise that each contracting party maintain its own competition law, EU and US have been trying to diffuse its own competition law and policy globally since the 1990s.

EU has been inserting a clause requiring enactment of competition law according to EU competition law in its Association Agreements with Central and Eastern European countries, and providing them technical assistance for that purpose. This has been explained as a precondition on the part of these countries to join the EU.¹⁰⁵

On the other hand, US took the initiative in establishing the International Competition Network (hereinafter the 'ICN') in 2001.¹⁰⁶ The ICN has established working groups on such key issues of international concern as cartels, mergers, advocacy and telecom, and has been producing recommendations or 'best practices,' though individual competition authorities decide whether and how to implement them, through unilateral, bilateral or multilateral arrangements, as appropriate.¹⁰⁷ As of January 2008, 103 competition authorities of 92 jurisdictions are the members of the ICN,¹⁰⁸ which means most of those jurisdictions which have competition

¹⁰² Jones(2006:25-26).

¹⁰³ See the epoch-making judgment of the US Federal Circuit Court on ALCOA case. *US v. Aluminium Co. of America (ALCOA)*, 148 F.2d 416 (1945).

¹⁰⁴ Pitofsky(1999:405-409).

¹⁰⁵ Nakagawa(2004b:31)

¹⁰⁶ *Ibid.*, pp.36-37.

¹⁰⁷ See ICN, About the ICN.

<http://www.internationalcompetitionnetwork.org/index.php/en/about-icn>

¹⁰⁸ ICN Membership contact list (January 2008).

http://www.internationalcompetitionnetwork.org/pdf/ICN_Contact_List.pdf

laws are its members. Through this multilateral forum and other channels, US has been trying to diffuse its own competition law and policy globally as '*international best practices*'.

Japan, while actively participating in these movements (ICN, bilateral anti-trust cooperation agreements, etc.), has been trying to diffuse its Antimonopoly Act to East Asia. Japan's EPAs with East Asian countries contain chapters on competition law and policy,¹⁰⁹ whereby Japan offers technical assistance and information exchange the enactment and implementation of competition law and policy according to Japan's Antimonopoly Act.¹¹⁰ Japan's Fair Trade Commission (hereinafter the 'JFTC') has been providing technical assistance ('capacity building') to, among others, Korea, Thailand, China, Malaysia, Mongolia, Indonesia, Vietnam, Philippines, Myanmar and Laos.¹¹¹ It also took initiative in launching East Asian Competition Policy Forum (EACPF), website forum which provides a platform for sharing and exchanging information and experiences on competition law and policy in East Asia, in 2003.¹¹²

These activities have so far achieved results to some extent. In particular, the JFTC provided extensive technical assistance to China in enacting its Anti-monopoly Law in August 2007,¹¹³ whose basic principles and rules are quite similar to Japan's Antimonopoly Act. Also, Japan's technical assistance to Vietnam has contributed to the enactment of Vietnamese Law on Competition.¹¹⁴

An increasing number of countries/jurisdictions have come to enact competition laws, and EU and US have been most influential in this process. However, Japan has achieved a moderate success in diffusing Japanese Anti-Monopoly Act in East Asia.

¹⁰⁹ See, for instance, Chapter 12 of the Japan-Singapore EPA (supra n.19)

¹¹⁰ Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (Act No.54 of 14 April 1947).

¹¹¹ Japan, Fair Trade Commission, Technical Assistance Projects Provided. <http://www.jftc.go.jp/eacpf/05/technical-a.pdf>

¹¹² East Asia Competition Policy Forum, Profile. <http://www.jftc.go.jp/eacpf/about.html>

¹¹³ Adopted 30 August 2007, scheduled to enter into force 1 August 2008. As an explanation in Japanese, see <http://www.jftc.go.jp/worldcom/html/country/china2.html>

¹¹⁴ Adopted 9 November 2004, entered into force 1 July 2005. As an explanation in Japanese, see <http://www.jftc.go.jp/worldcom/html/country/vietnam.html>

4. Implications of Legal Competition on the Coherence of Regional Integration in East Asia

Will legal competition contribute to the coherent regional integration of East Asia?

Katzenstein & Shiraichi argue that porous regional dynamics in East Asia tend to discourage a 'national model' to dictate the regional integration.¹¹⁵ Is that the case for EPAs and FTAs in East Asia? The answer seems to be yes and no.

As was shown in section 3 above, there has been a discrepancy between high legalization and low legalization in East Asia. Given this, at least in the foreseeable future, regional/bilateral networks of FTAs, EPAs and BITs will not form a coherent and integrated set of legal rules for the protection and promotion of trade and investment in the region. To the contrary, a more plausible future would be an accumulation of scattered and contradictory legal rules in the region with gross country bias (few rules in China and ASEAN except Singapore and more and more detailed rules in Japan, Singapore and Korea and their counterparts). This might be a worst scenario.

A better scenario would be brought about by the policy change of China and ASEAN countries other than Singapore to the direction of higher legalization. We already pointed out such symptom in ASEAN countries in the last section. Individually, these countries have agreed to higher legalization through FTAs, EPAs and BITs. And Japanese government is planning to conclude either EPAs or BITs with all the members of ASEAN 10 except Myanmar.¹¹⁶ Although it takes at least a few years in achieving this, the day will surely come when almost all the ASEAN countries commit themselves to high level legalization on trade and investment.

Another positive symptom is the recent visit of Chinese President Hu Jintao to Japan (6 to 11 May 2008). The Joint Statement of 7 May announced that "(t)he two sides resolved to engage particularly in the following areas of cooperation so that Japan and China, which have a major

¹¹⁵ Katzenstein & Shiraishi(2006).

¹¹⁶ METI, Japan's Policy on FTAs/EPAs, March 2005, slide no.9. (Available from http://www.meti.go.jp/english/policy/index_externaleconomicpolicy.html) Also see METI, [The Report of the Joint Study Group on the Possible Trilateral Investment Agreements among China, Japan, and Korea](#) (November 29, 2004).

influence on the world economy, can contribute to the sustainable growth of the world economy: ...

To promote mutually beneficial cooperation and expand common benefits in a wide range of fields, including *trade, investment, information and communication technology, finance, food and product safety, protection of intellectual property rights, business environment, agriculture, forestry and fisheries industries, transport and tourism, water, and healthcare.*¹¹⁷ (Italics added by the author)

If both governments are to think seriously about this commitment, they might resume negotiation of currently stalled Japan-China-Korea trilateral investment agreement,¹¹⁸ or even they might think seriously about ASEAN+3 (not to say ASEAN+6¹¹⁹) FTA.¹²⁰ At the end of the day, this will lead East Asia to a coherent regional integration with highly advanced legalization.

It is, however, too optimistic to imagine the early realization of such scenario. Even now, the unorganized accumulation of FTAs, EPAs and BITs in the region is producing incoherent network of trade and investment rules ('spaghetti bowl'). In order for a coherent regional integration to come into existence, there is a strong need of an institutional mechanism for coordinating and fine-tuning the existing FTAs, EPAs and BITs. As there is a persistent conflict between Japan and China as to such mechanism (ASEAN+3 or ASEAN+6?),¹²¹ such a mechanism will not be formed in the near future. The best one can say is that a coherent East Asian regional integration should be aimed at as a mid-term goal.

¹¹⁷ Joint Statement between the Government of Japan and the Government of the People's Republic of China on Comprehensive Promotion of a "Mutually Beneficial Relationship Based on Common Strategic Interests." 7 May 2008.

<http://www.mofa.go.jp/region/asia-paci/china/joint0805.html>

¹¹⁸ See MOFA, On the fourth negotiation of Japan-China-Korea Investment Agreement, held in Tokyo on 12-13 March 2008.

http://www.mofa.go.jp/mofaj/gaiko/investment/jck2/04_gh.html

¹¹⁹ See Kawai & Wignaraja(2007).

¹²⁰ See The fifth ASEAN economic ministers and the ministers of People's Republic of China, Japan and Republic of Korea consultation, 14 September 2002, Bandar Seri Begawan, Brunei Darussalam, Joint Press Statement. (Available from http://www.meti.go.jp/english/policy/index_externaleconomicpolicy.html)

¹²¹ See Kawai & Wignaraja(2007).

Conclusion

Given the stalemate of the DDA and the manifest failure of the MAI negotiation, we cannot foresee the resurrection of multilateral rule making for the promotion and protection of trade and investment. The current trend of regional/bilateral rule making through FTAs, EPAs and BITs will continue to prevail at least for a foreseeable future. East Asia is no exception. Legalization through regional/bilateral means has both advantages and disadvantages. It is faster than multilateral rule making, and one strategically can pick and choose like-minded partners. On the other hand, it may bring about intricate and contradictory network of rules which is practically applicable ('spaghetti bowl'). Also, it may enlarge the discrepancy between modest and aggressive legalism in the region, and may thus have detrimental effect on both multilateral rule making and coherent regional integration.

To avoid such disastrous outcome while seeking advantages of regional/bilateral rule making, there is a strong need of an institutional mechanism for coordinating and fine-tuning the existing FTAs, EPAs and BITs in East Asia. Both Japan and China should cooperate for the establishment of such a mechanism. Pragmatic and forward looking leadership is most required in international economic diplomacy in East Asia.

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