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BANGLADESH-BHUTAN PTA: LESS IS MORE?

*Md. Rizwanul Islam**

ABSTRACT

While in the General Agreement on Tariffs and Trade (GATT) years, generally developed economies pursued preferential trade agreements (PTAs), and the states of the global South were also pursuing PTAs between and among each other. The recently concluded Bangladesh-Bhutan Preferential Trade Agreement (BBPTA) is an addition to this list. This article argues that the seemingly narrow scope of the BBPTA is somewhat deceptive. This is so because it covers products which are actually traded between the parties, and they create a substantial margin of preference. Thus, though the relatively liberal and simple rules of origin of the BBPTA is a cause of comfort for competitors from third parties, for some products they may witness reduced market share. Having said this, due to the opening of their sensitive industries, the two state parties would seem to have committed to market liberalisation. Thus, arguably the less coverage of the PTA could mean more for their trade relationship.

INTRODUCTION

The Bangladesh-Bhutan Preferential Trade Agreement signed on 6 December 2020, is one more addition to the mushrooming trend of PTAs.¹ Even PTAs between states of the global South are consistently on the rise.² Historically, Bhutan and Bangladesh have strong diplomatic ties. Bhutan was the first country to recognize Bangladesh on 6 December 1971, even ten days before Pakistan formally surrendered to the joint forces of Bangladeshi liberation fighters and the Indian army on 16 December 1971.³ Thus, the signing date of the PTA is no coincidence, but has a historical symbolism. While Bangladesh is a party to several multi-state PTAs, this is Bangladesh's first ever bilateral PTA.

Relying on the official documents of the Ministry of Commerce of the Government of Bangladesh and other sources, this article discusses the background of signing the Treaty and critically analyzes its text. It demonstrates that the actual trade creation through the BBPTA may be more than what appears on its face. However, because of the very liberal rules of origin, the Treaty is unlikely to cause any significant trade diversion. On the other hand, due to the high applied tariff in the two state parties, the economic welfare reducing trade diversion for some products may be a risk. This article also demonstrates that apart from tariff preference, the BBPTA hardly creates any value for either of the state parties, as the rights created by the BBPTA do not go beyond anything that they were already entitled to under the Agreement on South Asian Free Trade Area (SAFTA).⁴ Having said that, because of its nominal substantive rules and simple preferential rules of origin, the Treaty may enhance economic welfare, albeit limitedly. The BBPTA would not appear to pose any significant administrative challenges for

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¹ As of June 5, 2021, as per the WTO Secretariat Website, there were 350 various forms of preferential trade agreements notified to the WTO. See *WTO Regional Trade Agreements Database* <http://rtais.wto.org/UI/PublicMaintainRTAHome.aspx> (last visited June 5, 2021). Throughout the article the term PTA has been used to convey the same meaning as RTA connotes in the WTO parlance. The choice is based on the reality that not all RTAs involve states located within the same region.

² *Id.* As of 5 June 2021, 62 PTA are under the Enabling Clause, WTO RTA database.

³ Diplomatic Correspondent, *Bhutan Was First to Recognise Bangladesh*, Dhaka, The Daily Star, (March 8, 2015), <https://www.thedailystar.net/bhutan-was-first-to-recognise-bangladesh-54336>, (last visited May 23, 2021).

⁴ Agreement on South Asian Free Trade Area (SAFTA), Jan. 6, 2004, [international source].

traders of either state parties or for the multilateral trading system.

I. BACKGROUND OF AND MOTIVATIONS FOR NEGOTIATING BBPTA

While PTAs would be driven by economic motives, it is well-established in the literature that their economic motive maybe intermingled with strategic objectives.⁵ Given that states are monolithic political actors representing the interest groups, this is hardly surprising. In the case of the BBPTA, this seems to be the case too. Traditionally, the bilateral relationship between the two countries has been quite robust. The formal diplomatic relationship between the two countries was established on 12 May 1973 and Bangladesh was the second state with whom Bhutan set up formal diplomatic ties.⁶ In 1979, Bangladesh was also the second state to exchange diplomatic representation with Bhutan at the ambassadorial level.⁷ They also had trade arrangements in place for more than four decades. The two state parties started to trade under a bilateral agreement which was signed in 1980, which ultimately took effect in 1988 when India allowed them transit rights necessary for moving products to and from landlocked Bhutan.⁸ Bangladesh and Bhutan renewed that agreement in 2003 and 2009.⁹ The state parties have been using “Burimari (Bangladesh)—Changrabandha (India)—Jaigaon (India)—Phuentsholing (Bhutan) as the transit route for [their] bilateral trade.”¹⁰ During the visit of the Bhutanese Prime Minister to Bangladesh from 12 to 15 April, 2019, the exchange of duty free market access for the goods of two states in each other’s market was officially discussed.¹¹ Following this, the first official meeting for the negotiations of the BBPTA took place in Thimphu from 21 to 23 August, 2019.¹² They subsequently negotiated the BBPTA on 16 June, 2020 via video conferencing.¹³ At this meeting, the parties finalized the draft version of the text of the BBPTA and the rules of origin.¹⁴

Interestingly, from the standpoint of Bangladesh, the import of a major Bhutanese product seems to have been a factor propelling it to agree to the BBPTA. The import of boulder stone, which is used as an input for mega building projects, played a role in negotiating the BBPTA.¹⁵

⁵ Md. Rizwanul Islam, *Hark! Are PTAs Swallowing up the WTO and Global Economic Welfare? A Legal and Political Economy Critique of PTAs*, 12 SING. Y.B. INT’L L & CONTRIB. 133, 135 (2008); M. Rafiqul Islam, *The Australian Policy and Practice of Preferential Bilateral Trade: A Benign or Malign Alternative to the WTO Multilateral Free Trading System?*, 2(2) J. INT’L TRADE L. & POL’Y 43, 57 (2003).

⁶ See Ministry of Foreign Affairs: Royal Government of Bhutan, *Bilateral Relations: Bangladesh*, https://www.mfa.gov.bt/?page_id=8824 (last visited May 14, 2021).

⁷ Peter Macalister-Smith, *Bhutan*, MAX PLANCK ENCYCLOPEDIA OF INT’L L. (2008).

⁸ U. N. Conference on Trade and Development, *Who Is Benefiting from Trade Liberalization in Bhutan: A Gender Perspective*, 12 (2011).

⁹ *Id.*

¹⁰ *Id.*

¹¹ Ministry of Commerce of the Government of Bangladesh, Memo No: 26.00.0000.141.38.003.19-37, *Summary for the Meeting of the Cabinet, Subject: Approval of the Draft of Bangladesh-Bhutan Trade Agreement* (in Bengali) 6 September 2020, (on file with the author) [Summary for the Cabinet Meeting]; Ministry of Commerce of the Government of Bangladesh, *Minutes of the Meeting for Expansion of Bilateral Trade between Bangladesh and Bhutan and the Bilateral Preferential Trade Agreement with Other States*, November 6, 2019 (on file with the author) ¶ 2 [Minutes of the Meeting of November 6, 2019].

¹² *Summary for the Meeting of the Cabinet, supra* note 11.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*; Ministry of Commerce, Government of Bangladesh, *Subject: Approval of the Proposal/Counter Proposal (Policy Option) Execution of Preferential Trade Agreement between Bangladesh and Bhutan on the Meeting to be Held on 10-11 March 2020*, February 9, 2020, (on file with the author) ¶ 9; Minutes of the Meeting of November 6, 2019; Ministry of Commerce of the Government of Bangladesh, *supra* note 11, ¶ 4. This seems to be a trend of the recent decades where the global value chain is often integrated across states.

It was also a consideration that the loss of import revenue may be offset by the benefit of duty-free export of Bangladeshi products to the Bhutanese market.¹⁶ In terms of the strategic and broader motivation of Bangladesh, it has so far signed few a PTAs, which are: South Asian Preferential Trade Arrangement, SAFTA, Asia Pacific Trade Agreement, Trade Preferential System among Member States of Organisation of Islamic Cooperation (TPS-OIC), a PTA among Developing-8 Member States¹⁷ and no bilateral PTA at all. Bangladeshi trade officials seem to have a conviction that Bangladesh needs to sign more PTAs, and a PTA with a relatively smaller player like Bhutan would be low-hanging fruit.¹⁸ There seems to be an expectation that the loss of revenue would also be compensated for the domestic fiscal measures such as value-added tax or income tax on investing companies.¹⁹ Such a position may be attributable to either the comparatively smaller size of the Bhutanese economy or a relatively limited experience and bargaining power of Bhutanese officials, or both. Bangladeshi trade policymakers are also bracing for the loss of preference in the market of some key export destinations when the state officially graduates to the status of a developing country.²⁰ PTAs and free trade agreements (FTAs) are being thought of as an option to offset the loss of preference in foreign markets.²¹ While this should materialize in practice, to achieve greater economic welfare gain, Bangladesh would need to sign PTAs with those states with which it has a greater trade potential. Indeed, Bhutan is neither among the major exporting nor importing state for Bangladesh.²² Market size aside, many of Bangladesh's major trade partners are advanced economies, namely the U.S. and EU, and they tend to sign PTAs covering many non-trade issues. And to what extent the negotiating experience with Bhutan would be replicable to advanced economies remains doubtful. Thus, it is difficult to see Bangladesh being able to sign PTAs with those economies in the near future without undertaking significant legal and policy overhaul.

From the viewpoint of Bhutan, Bangladesh would appear to be an important trading partner. And in terms of market size and trade volume, Bangladesh is important to Bhutan as the former happens to be the second largest export destination and the eighth largest import source for the latter.²³ The PTA could have a broader strategic motivation too. Bhutan has been an observer of the WTO for more than two decades.²⁴ Thus, it is possible that this PTA with a relatively modest target of trade liberalisation could offer them an opportunity for their trade negotiators to gain the experience of negotiating trade deals, as some scholars have suggested that PTAs may serve as a laboratory of trade liberalisation.²⁵ While in the case of power

¹⁶ *Id.*

¹⁷ It is a kind of sub-group of Organisation of Islamic Cooperation (OIC) member states.

¹⁸ Chairperson of Nat'l Tariff Comm'n of Bangladesh as stated in Minutes of the Meeting of 6 November 2019, *supra* note 11, ¶ 5.

¹⁹ Syful Islam, *Commerce Ministry Makes Fresh Move to Allay FTA Fear*, The Financial Express (Feb. 27, 2021), <https://thefinancialexpress.com.bd/trade/commerce-ministry-makes-fresh-move-to-allay-fta-fear-161439329>.

²⁰ *Bangladesh Signs Preferential Trade Agreement with Bhutan*, The Dhaka Tribune (Dec. 6, 2020), <https://www.dhakatribune.com/bangladesh/2020/12/06/bangladesh-signs-preferential-trade-agreement-with-bhutan>.

²¹ *Id.*

²² World Trade Org. Trade Pol'y Rev. Body, *Bangladesh – Trade Policy Review: Report by the Secretariat*, WTO Doc. 130-31, WT/TPR/S/385, (February 6, 2019).

²³ *Bilateral Relations.: Bangladesh*, *supra* note 6.

²⁴ The working party for the accession of Bhutan to the WTO had been established on October 6, 1999; *see* World Trade Org., *Bhutan: Accession*, https://www.wto.org/english/thewto_e/acc_e/a1_bhoutan_e.htm (last visited May 5, 2021).

²⁵ *See* Michael Ewing-Chow, *Southeast Asia and Free Trade Agreements: WTO Plus or Bust?*, 8 S.Y.B. Int'l L. 193, 198 (2004), <http://www.asianlii.org/sg/journals/SGYrBkIntLaw/2004/12.pdf>; *compare* Islam, *supra* note 5, at 144.

asymmetries between the parties to a bilateral PTA, the possibility for a mutually beneficial deal may be somewhat reduced²⁶ in the case of parties like Bangladesh and Bhutan, both of which are relatively small players in the global arena, making the possibility of a lopsided deal occurring less likely.

II. THE SCOPE OF TARIFF LIBERALISATION

In theory, the text of the BBPTA aspires to progressively liberalize tariff and para-tariff on the bilateral trade between the parties.²⁷ However, the text provides for neither any modality nor even any schedule for negotiations for the progressive reduction of tariffs. Thus, the lack of conviction of the state parties in this regard is palpable. As the parties have termed the treaty as a preferential trade agreement, as opposed to a free trade agreement, it appears that the possibility of further tariff reduction is not a priority for them. The lack of a commitment to any drastic reduction in tariff across the board is also evident from the aspiration in the preamble that the parties aim for “progressive reduction and elimination of barrier to bilateral trade through a *bilateral preferential trading arrangement*.”²⁸

The BBPTA follows a positive list approach, i.e., only products listed in the text are eligible for preferential treatment. The scope of the tariff reduction is in addition to the goods listed in Annex C (listing eighteen Bhutanese products) and Annex D (listing ninety Bangladeshi products), which were enjoying duty free entry in their respective partner markets even before the BBPTA came into force.²⁹ This was done on the basis of a mutual understanding without the framework of a written agreement since 2010.³⁰ While Bangladesh granted those eighteen products from Bhutan not only waiver from import duty but also waiver from supplementary duty as well as regulatory duty, the Bhutanese waiver to Bangladeshi products was limited to import duty, and they are still subject to the payment of sale or excise duty in Bhutan.³¹ There may be several reasons for the significant disparity in the number of products enjoying special access under the arrangement since 2010. It could be due to the balance of trade being in favour of Bhutan; it might have agreed to offer concessions on a longer list of products. Another explanation could be Bhutan having a more limited export basket than Bangladesh, so a fewer list of products enjoying special concession would have been significantly beneficial to Bhutan. Another explanation could be that some of the imports from Bangladesh to the Bhutanese market were to be used as inputs in producing other finished products. Thus, any lowering of the import tariff of primary or secondary products would have been helpful for the Bhutanese industry.

Considering that the average applied tariff rate of Bangladesh is considerably high—around 14.8%—and even higher for agricultural products—around 18.1%—a zero tariff would also appear to confer Bhutanese producers a significant edge in the Bangladeshi market over producers

²⁶ Md. Rizwanul Islam, *Economic Integration in South Asia: Charting a Legal Roadmap* 103-07 (Martinus Nijhoff Publishers (2012)).

²⁷ Preferential Trade Agreement between the Royal Government of Bhutan and the People’s Republic of Bangladesh, *Bangl.-Bhutan*, Dec. 6, 2020, Article IV:2 (on file with the author).

²⁸ *Id.*, emphasis added.

²⁹ *Id.* at art. VI.

³⁰ *Summary for the Meeting of the Cabinet, Subject: Approval of the Draft of Bangladesh-Bhutan Trade Agreement*, *supra* note 11 (it would seem to be a clear violation of Bangladesh’s legal obligation under Article I of the GATT. Neither from the WTO RTA database nor its searchable documents online can be gleaned that there was any notification regarding this arrangement, let alone any waiver from the WTO regarding this apparent breach of the MFN obligation).

³¹ *Minutes of the Meeting for Expansion of Bilateral Trade between Bangladesh and Bhutan and the Bilateral Preferential Trade Agreement with Other States*, *supra* note 11, ¶ 1.

from third parties.³² And as the bound tariff rate is even higher, the producers of Bhutan can rely on the preferential margin without being encumbered by the concern of a future tariff hike taking advantage of the water between the bound and applied tariff rate. Based on the recent practice, it may be assumed that the prospect of increasing applied tariff to the bound level may not be too high. Although B has only bound around 19% of all tariff lines, and the average gap between applied and bound (Most Favoured Nations (MFN)) rates is exorbitantly high, in recent years, the authorities have not used this water.³³

As Bangladesh, even under its PTAs, does not waive supplementary duty or regulatory duty,³⁴ the market access benefit for these Bhutanese products seems to be of particular significance. The National Board of Revenue of Bangladesh (NBR) has not objected to this special provision for imports from Bhutan but has suggested that in the future PTAs' exports to Bangladesh do not enjoy any exemption duties other than customs duties.³⁵ What particular consideration may have been at play here is not clear, but it could be guessed that solid bilateral political commitments may have played a decisive role.

Products featuring in the eligible list of Annex A (exports from Bhutan to Bangladesh) are both agricultural and industrial goods such as milk, natural honey, wheat, jams, mineral water, quartzite, cement clinkers, Portland cement, soap, particle board of wood, wooden furniture, etc. Products featuring in the eligible list of Annex B (exports from Bangladesh to Bhutan) are also agricultural and industrial products such as pineapple juice, guava juice, orange juice, green tea, particle board, men's jackets, garments of babies, etc. Some of these products are major export items for the two parties. In particular, for Bangladesh, textile and tea are among its major export items, and for Bhutan, wood, juice, cement, etc. are major export items.³⁶ Thus, the low coverage of the tariff lines may actually mask its bilateral trade potential in the context of the two state parties, if not in the global trade, as neither is a significant player globally.

Although the list of products may seem too short, in terms of trade potential, they would seem to be significant. Many of these products feature in the respective sensitive list of products which are not eligible for any form of tariff preference under the SAFTA. To explain it further, products such as ginger (HS Code 0910.11), milk (HS Code 0401.20), homogenised preparations of jams, fruit jellies, marmalades (HS Code 2007.10), mineral waters and aerated waters (HS Code 2201.10), cement clinkers (HS Code 2523.10), Portland cement (HS Code 2523.29), soap (HS Code 3401.11), wooden furniture of a kind used in offices (HS Code 9403.30), wooden furniture of a kind used in the bedroom (HS Code 9403.5), etc. feature in the revised sensitive list of Bangladesh for LDC contracting parties of SAFTA (i.e.

³² *Trade Policy Review: Report by the Secretariat, Bangladesh*, *supra* note 22, at 45.

³³ *See id.* at 44-45.

³⁴ Nat'l Bd. of Rev., Bangladesh, Memo No: 08.01.0000.055.24.003.20.6, *The Submission of the Opinion of National Board of Revenue of Bangladesh on "Rules of Determination of Origin of Goods for Bhutan-Bangladesh Preferential Trade Agreement" (BB-PTA) along with the Draft Text on "Bhutan-Bangladesh Preferential Trade Agreement"* 3 (August 17, 2020) (in Bengali) (on file with the author).

³⁵ *Id.*

³⁶ World Trade Org., Bhutan Tariff Profile (2020), https://www.wto.org/english/res_e/statis_e/daily_update_e/tariff_profiles/BT_E.pdf (last visited May 16, 2021); *Trade Policy Review*, *supra* note 22, *passim*.

Afghanistan, Bhutan, and Nepal).³⁷ Thus, under the SAFTA regime, Bhutanese producers would not have received any preferential benefit for these products in the Bangladeshi market. On the Bhutanese side, products such as green tea (HS code 0902.10), pineapple juice (HS code 2009.49), orange juice (HS Code 2009.19), textile products such as men's or boys' suits, ensembles, jackets, blazers, trousers (HS Code 6203.39, 6203.49) and baby garments and clothing accessories (6209.90), etc. feature in its SAFTA sensitive list of products.³⁸ While sometimes a positive list of tariff coverage may be misleading in that the products may not have actual trade potential between the state parties,³⁹ a negative list would normally mean some sort of domestic sensitivity or opposition to the opening to foreign producers. In other words, as they feature in the sensitive list of the two state parties within their SAFTA commitment, it would appear that there is a sizeable domestic industry who seek protection from imports. Hence, these products have featured in their respective SAFTA sensitive list. Thus, they are not subject to the SAFTA liberalisation commitment. Under the SAFTA, the sensitive list was to disappear within 10 years of the entry into force of the Agreement, i.e. 2016, and all products were to enjoy market access by paying duty ranging from none to five per cent.⁴⁰

However, the goal has remained elusive. Hence, in the near future, traders from both state parties will appear to trade under the BBPTA rather than under the SAFTA.⁴¹

III. SIMPLE RULES OF ORIGIN UNLIKELY TO RESULT ANY SIGNIFICANT TRADE DIVERSION?

Only products that satisfy the rules of origin as contained in Appendix I of the BBPTA would qualify for the preferential tariff.⁴² The rules of origin of the BBPTA are relatively simple. Of course, products wholly produced or obtained within the territory of one of the parties to the PTA would be eligible to be treated as an originating product eligible for the tariff preference under the BBPTA.⁴³ Of course, only a few products such as mineral products, live animals, plants, and fishing products can fall under this category. In the contemporary economy of complex value chain, few products would be produced in the territory of one state. Thus, the rules on products which consist of inputs of multiple states are very important.

For products not wholly produced in either of the state parties, the BBPTA adopts the change of tariff heading (CTH) rule, i.e., when a final product belongs to a tariff line, which is

³⁷ *Revised Sensitive List (Phase-II) of Bangladesh for LDCs Under SAFTA*, Bangladesh Trade Portal, [https://www.bangladeshtradeportal.gov.bd/kcfinder/upload/files/Bangladesh%20Revised%20Sensitive%20List%20\(Phase-II\)%20for%20LDCs_HS%202012.pdf](https://www.bangladeshtradeportal.gov.bd/kcfinder/upload/files/Bangladesh%20Revised%20Sensitive%20List%20(Phase-II)%20for%20LDCs_HS%202012.pdf) (last visited May 18, 2021). It is important to note that although the Maldives graduated to the status of a developing country, it is entitled to the benefits of LDCs under the SAFTA and subsequent treaty arrangements by virtue of Article 12, which states "Notwithstanding the potential or actual graduation of [the] Maldives from the status of a Least Developed Country, it shall be accorded in this Agreement and in any subsequent contractual undertakings thereof treatment no less favourable than that provided for the Least Developed Contracting States."

³⁸ Dep't of Com., Gov't of Sri Lanka, Final Sensitive List at 6-digit as per HS 2007 (REV): Bhutan, http://www.doc.gov.lk/images/pdf/our_services/safta/bhutan_revised_sensitive_list_2_hs_2007.pdf (last visited May 18, 2021). Noticeably, unlike Bangladesh, Bhutan maintains an identical list of tariff preference for both LDCs and non-LDCs.

³⁹ This was precisely the case within the framework of the South Asian Preferential Trade Agreement, as a few of the products with actual trade potential between SAARC member states were included into the positive list of products eligible for preferential market access; see Islam, *supra* note 26, at 139.

⁴⁰ SAFTA, *supra* note 4, at art. 7.

⁴¹ For more on this, see below the discussion in part 6 of this article (Trade Liberalisation With The SAARC Framework and BBPTA).

⁴² BBPTA, *supra* note 27, art. VIII.

⁴³ *Id.* at app. I, r. 6.

different from those of all non-originating material from third party states, it would qualify for preferential treatment.⁴⁴ Alternatively, to qualify under the rules of origin of the BBPTA, total value of the non-originating materials must not be higher than 70%, and the last processing must take place in the territory of the contracting parties.⁴⁵ Irrespective of any value addition or change of tariff heading, any process to ensure the preservation of products, or any routine process such as washing, painting, change of packaging, affixing of marks on products, simple mixing, or assembly of products, etc., would be disregarded for conferring the status of originating products.⁴⁶

Despite some degree of convergence in some major sectors of the economy such as chemicals and footwear, the complexity of rules of origin in PTAs continues to pose problems, particularly in agricultural products, textiles, iron, steel, and machinery.⁴⁷ This appears to be a nonissue in the BBPTA. There are no product-specific rules of origin, and the general rules apply for all products otherwise eligible for preferential treatment. Thus, it would seem that the rules of origin of the BBPTA fulfil all the hallmarks of the textbook for an ideal set of rules of origin: simplicity, transparency, and applicability across the products.⁴⁸ The quite liberal rules of origin should be helping producers of the two countries to enjoy preferential market access easily. Again, this simple set of rules of origin would not seem to cause any significant trade or investment diversion.⁴⁹

However, some of the positive impact of the simple rules of origin may be undermined by the substantial gap between the MFN applied tariff and preference margin under the BBPTA. Therefore, the possibility of some trade diversion would seem to exist due to the fact that the gap between preferential tariff under the BBPTA and the applied MFN tariff for some products is way too high. For example, the MFN applied rate for milk (HS Code 0401.20), or natural honey (HS Code 0409.00), is 25%,⁵⁰ and clearly the preference margin here would be too high and may strain the access of some third-party producers of some products in the Bangladeshi market. The same appears to be true in the case of Bhutan where the applied tariff rate seems to be too high. To take but one example, the tariff for other textile materials (HS Code 6203.39) is 30%, which should give Bangladeshi producers a significant edge over producers from third parties who would have to pay the MFN tariff. Thus, here too the prospect of some trade diversion looms large.⁵¹ This would appear to be further exacerbated by the abolition of regulatory and supplementary duty for the Bhutanese products which would be covered by the BBPTA.⁵²

IV. OTHER BASIC PROVISIONS

⁴⁴ *Id.* at r. 7(2)(a).

⁴⁵ *Id.* at r. 7(2)(b)

⁴⁶ *Id.* at r. 8

⁴⁷ Hasegawa Jitsuya, *Standardization of Complex and Diversified Preferential Rules of Origin*, 55 J. WORLD TRADE 545, 546 (2021).

⁴⁸ Paul Brenton, *Preferential Rules of Origin*, PREFERENTIAL TRADE AGREEMENT POLICIES FOR DEV.: A HANDBOOK 161, 164 (Jean-Pierre Chauffour & Jean-Christophe Maur eds., The World Bank, 2011).

⁴⁹ See Patricia Augier, Michael Gasiorek, & Charles Lai Tong, *The Impact of Rules of Origin on Trade Flows*, 20 ECON. POL'Y, 567, 567-624 (2005) (for an analysis of how complex rules of origin can impact trade and investment.)

⁵⁰ BANGLADESH NATIONAL BOARD OF REVENUE, *Tariff Schedule*, <https://nbr.gov.bd/taxtype/tariff-schedule/eng> (last visited June 4, 2021).

⁵¹ Department of Revenue and Customs, Ministry of Finance, Royal Government of Bhutan, *Bhutan Trade Classification and Tariff Schedule* (6th ed., 2017).

⁵² See National Board of Revenue, *supra* note 34 and accompanying text.

The BBPTA's main value is in the preferential market access for the products of the parties covered by it. Beyond this, the other rules of the BBPTA are quite basic in their scope. The BBPTA contains a standard national treatment obligation,⁵³ general and security exceptions,⁵⁴ and prohibitions of quotas⁵⁵ modelled after the GATT. The national treatment obligation's scope is not limited to the products that are subject to the tariff reduction scheme. This reading is based on the following words in Article 5 of the text of the Treaty in which they agree to provide "*each other's products imported into their territory, treatment no less favourable than that accorded to like domestic products.*"⁵⁶ Products imported into their territory should, in their ordinary meaning, connote all products from each other's territory, not just those mentioned in the respective Annexes of the BBPTA. As Bhutan is yet to be a WTO party, this may appear to confer an advantage on the trade between the two parties. However, as the two states are already parties to the SAFTA, Bhutan was already entitled to the national treatment protection as afforded by Article 5 of the SAFTA.

There is no commitment whatsoever to eliminate antidumping or countervailing duties in the trade between the two state parties.⁵⁷ There is also no commitment on accepting price undertaking or any other special concession. As only Bangladesh is a WTO member, even the GATT or provisions of the Anti-dumping Agreement would not seem to limit the scope for adopting antidumping or countervailing measures. However, as Bangladesh is yet to conduct any antidumping or countervailing measures for the foreseeable future, this may not create any practical challenge for the bilateral trade. This feature too is in line with the SAFTA. Moreover, there is also no specific commitment on curbing the use of antidumping or countervailing duties in the trade between parties, beyond a simple hortatory commitment that the parties would consider the special situation of LDCs in adopting antidumping or countervailing measures.⁵⁸

The BBPTA does not provide any detailed provision on dispute settlement mechanism. The text of the BBPTA provides that any disputes relating to it would be resolved through mutual consultation.⁵⁹ This is in keeping with the trend in Asian FTAs or PTAs where there is an overwhelming emphasis on diplomacy over dispute settlement as a mechanism for settlement of disputes.⁶⁰ To oversee the implementation of the BBPTA, the parties have agreed to set up a Joint Trade Committee (JTC), consisting of bureaucrats at the Additional Secretary or Joint Secretary level.⁶¹ The BBPTA provides that the JTC would sit for a meeting at least once annually.⁶²

V. LACK OF COVERAGE OF SERVICES

The limited ambition of the BBPTA would again be evident from the non-inclusion of trade in services from its scope. Globally, trade in services has grown and so has the number of PTAs with coverage on trade in services, which would be evident from the fact that as of mid-July

⁵³ BBPTA, *supra* note 27, art. V.

⁵⁴ *See id.*, art. VII.

⁵⁵ *See id.*, art. IX.

⁵⁶ General Agreement on Tariffs and Trade, art. 5, Oct. 30, 1947. Emphasis added.

⁵⁷ BBPTA, *supra* note 27, art. XIV.

⁵⁸ SAFTA, *supra* note 4, art. XI.

⁵⁹ BBPTA, *supra* note 27, art. XVIII.

⁶⁰ Michael Ewing-Chow, Alex WS Goh, & Akshay Kolshe Patil, *Are Asian WTO Members Using the WTO DSU 'Effectively'?* 16 J. INT'L ECON. L. 669–705 (2013).

⁶¹ BBPTA, *supra* note 27, at Article XVII:1.

⁶² *Id.*

2021, there are 181 PTAs notified to the WTO.⁶³ As scholarly works have shown that South Asian states probably have a greater prospect of trade integration in services than in goods,⁶⁴ the omission of services would probably reduce the potential of the BBPTA. Even the official statement of the parties would connote that they envisage the need for expanding bilateral trade in services. For example, with its acute shortage of skilled medical practitioners, Bhutan expressed the intention to employ medical practitioners from Bangladesh in its public hospitals; the two parties have signed a memorandum of understanding in this regard.⁶⁵

Thus, it seems that the parties did not want to commit to any binding commitment of trade in services; rather, they wanted to conduct this on a voluntary basis. However, the stance of the parties would be somewhat at odds with the position of the LDCs in the WTO where they advocate for preferential access from the developed world to their services market, particularly under mode 4.⁶⁶ On the overall South Asian front, members of the South Asian Association for Regional Cooperation (SAARC) signed the SATIS in 2010, and technically, the SATIS has been in force since 2012.⁶⁷ However, negotiations on schedules of commitments of the parties have not been concluded yet.⁶⁸ Thus, SATIS remains, for now, nothing but a piece of aspiration of the SAARC member states. Hence, it is where the BBPTA seems to have missed an opportunity for some trade creation.

VI. TRADE LIBERALISATION WITH THE SAARC FRAMEWORK AND BBPTA

The BBPTA is, in some ways, a fitting vindication of the “spaghetti bowl syndrome” that Professor Bhagwati has famously coined.⁶⁹ As both state parties are also parties to the SAFTA, this PTA could be perceived as a testament to their lack of conviction on the progress of the SAFTA. For many outstanding political issues, the SAFTA is yet to achieve its true potential.⁷⁰ It may be mentioned that both of these states are also members of the Bay of Bengal Initiative for Multi-Sectoral Technical and Economic Cooperation (BIMSTEC), which is also working on a PTA, but since the tariff regime under this is yet to be functional, they are beyond the scope of this paper. There are quite a few functional PTAs between SAFTA parties already (such as between India and Nepal, India and Bhutan, India and Afghanistan, Pakistan and Sri Lanka, etc.).

The above trend of parties to a regional trade agreement signing bilateral PTAs with their regional PTA partners does not seem to be present among members of the Association of Southeast Asian Nations, European Union, or Mercosur. In many cases, either because of more

⁶³ WORLD TRADE ORGANIZATION, REGIONAL TRADE AGREEMENTS DATABASE (The number would be 188, if we add the seven accessions also notified under the WTO). *See generally* Martin Roy, Juan Merchetti and Hoe Lim, *Services Liberalization in the New Generation of Preferential Trade Agreements: How Much further Than the GATS?*, 6 WORLD TRADE REVIEW 155-19, 2 (2009) (for an overview of services trade liberalization commitment under various PTAs).

⁶⁴ *See* RUPA CHANDA, INTEGRATING SERVICES IN SOUTH ASIA: TRADE, INVESTMENT AND MOBILITY 40 (Oxford University Press 2011).

⁶⁵ Joint Statement on the State Visit of H.E. Dr. Lotay Tshering, Prime Minister, Royal Government of Bhutan, to the People’s Republic of Bangladesh, *Bangl.-Bhutan*, ¶ 16, Apr. 12-15, 2019 (on file with the author).

⁶⁶ *See* Claudia Manrique Carpio & Jaime Comas Mir, *The Least-Developed Countries Services Waiver: Any Alternative Under the GATS?*, 6(1) GOETTINGEN J. INT’L L. 115, 121 (2014).

⁶⁷ *Trade Policy Review*, *supra* note 22, at 33.

⁶⁸ *Trade Policy Review*, *supra* note 22, at 33.

⁶⁹ *See* JAGDISH BHAGWATI, TERMITES IN THE TRADING SYSTEM: HOW PREFERENTIAL AGREEMENTS UNDERMINE FREE TRADE 251 (Oxford University Press 2008).

⁷⁰ *See* Md. Rizwanul Islam, *A Diagnosis of the Crawling Trade Liberalisation under the Auspices of the South Asian Association for Regional Cooperation*, 11 J. WORLD INV. & TRADE, 293-308 (2010), for an overview of the geopolitical factors posing challenges to trade expansion between SAARC member states.

liberal rules of origin or more extensive tariff liberalisation, traders of some of the SAFTA state parties do use the bilateral PTA in place rather than the SAFTA.⁷¹ Thus, the BBPTA would likely further solidify that trend. As Bangladesh has apparently decided to sign a PTA with Nepal in the near future, the SAFTA would likely become of even lesser importance and push the regional economic integration in South Asia even more on the margin.⁷² While the thorough overhaul of the SAFTA and SATIS would clearly create a much more integrated market for the whole of South Asia, the political volatility and the concomitant ebb and flow in the diplomatic relationship between member states of the SAARC would appear to imply that such progress is far off. As already pointed out, the SAFTA is yet to achieve its tariff reduction targets originally envisaged, and any further form of regional market integration under its auspices does not seem to be on the horizon.

VII. BBPTA'S COMPLIANCE WITH THE WTO RULES

There is a substantial body of literature on the issue of compliance of the PTAs with the WTO rules.⁷³ They need not be replicated here. However, in view of Bangladesh's legal obligations as a member state of the WTO, a few observations about the potential compliance of the BBPTA with the WTO would be in order. As Bangladesh is yet to notify the PTA to the WTO or to have even made an early announcement under the Transparency Mechanism of 2006, it is not entirely sure if the BBPTA would be notified under Article XXIV of the GATT or the Enabling Clause.⁷⁴ Hence, the discussion that follows will analyse the BBPTA in light of both Article XXIV of the GATT and the Enabling Clause.

Clearly, with the very limited scope of coverage of the BBPTA in terms of the products, it would fail to comply with the internal trade liberalisation requirement of the GATT Article XXIV(8). While both WTO member states and scholars have differed on the meaning of "substantially all trade[.]" it would be ludicrous to claim that the limited product coverage of the BBPTA would meet any threshold of "substantially all". It would appear that Article XXIV only views PTAs with partial product coverage as interim agreements, which would eventually lead to a full-fledged FTA or customs union (CU) because Article XXIV(5)(c) of the GATT clearly states that "any interim agreement referred to in subparagraphs (a) and (b) shall include a plan and schedule for the formation of such a customs union or of such a free-trade area

⁷¹ Islam, *supra* note 26, at 195-201; Md. Rizwanul Islam, *Constraints of the Agreement on South Asian Free Trade Area and SAARC Agreement on Trade in Services Militating against Sub-regional Trade Proliferation in South Asia*, 7 *BYU INT'L LAW & MGMT. REV.* 1, at 3-8 (2010).

⁷² Press Release, The Off. of the Prime Minister of Bangl., Subject: Approval of the Execution of Preferential Trade Agreement between Bangladesh and Bhutan on the Meeting to be Held on 10-11 March 2020 (Feb. 23, 2020) (on file with the author) (stating that it is also necessary to sign a bilateral preferential trade agreement with Nepal and to ask the Ministry of Commerce to take action on an urgent basis. Nepal is not the only state with which Bangladesh is negotiating a PTA; it is only considering the case for bilateral PTAs with Indonesia, Malaysia, China, and so on); see Minutes of the Meeting of Nov. 6, 2019, *supra* note 11, at 7.

⁷³ See, e.g., Zakir Hafez, *Weak Discipline: GATT Article XXIV and the Emerging WTO Jurisprudence on RTAs*, 79 *N.D. L. REV.* 879-919 (2003); Md. Rizwanul Islam & Shawkat Alam, *Preferential Trade Agreements and the Scope of GATT Article XXIV, GATS Article V and the Enabling Clause: An Appraisal of GATT/WTO Jurisprudence*, 56 *NETH. INT'L L. REV.* 1-34 (2009); Gabrielle Marceau & Cornelis Reiman, *When and How is a Regional Trade Agreement Compatible with the WTO?*, 28 *LEGAL ISSUES OF ECON. INTEG.*, 297-334 (2001); ANDREW MITCHELL & N. LOCKHART, *LEGAL REQUIREMENTS FOR PTAS UNDER THE WTO in SIMON LESTER, BILATERAL AND REGIONAL TRADE AGREEMENTS: COMMENTARY AND ANALYSIS* 81-114 (Bryan Mercurio & Lorand Bartels eds., Cambridge Univ. Press 2016).

⁷⁴ See Ben Sharp, *Comparing Preferential Trade Agreement Scrutiny under GATT Article XXIV and the Enabling Clause: Lessons Learned from the Gulf Coop. Council*, 7 *Manchester J. INT'L ECON. L.* 56 (2010), for an analysis on the difference between the requirements under Article XXIV of the GATT and the Enabling Clause.

within a reasonable length of time.”⁷⁵ Thus, in order to comply with the provision of Article XXIV, a PTA needs to transform to an FTA or CU at the expiry of the interim phase.⁷⁶ Understanding on Article XXIV has clarified that only in exceptional cases the period of culmination into FTA or CU should be more than ten years. Thus, Article XXIV does not envisage the scope for an evergreen PTA with minimal internal trade coverage between its parties. Because the text of BBPTA nowhere alludes to any eventual plan to move beyond exchanging preference between the two parties, it clearly falls short of the requirement of Article XXIV(5)(c) that within a reasonable length of time it results in an FTA or CU.

Regarding the external trade requirement, such as not creating any undue trade barriers for third parties, it may be surmised that due to the limited product coverage and simple rules of origin, it would comply with the external trade requirement of GATT Article XXIV. However, of course, both Bangladesh and Bhutan, not being economically developed countries,⁷⁷ their PTA could and would probably be notified to the WTO under paragraph 2(c) of the Enabling Clause. Article 2(c) of the Enabling Clause allows developing and LDC member states to engage in mutual reduction or elimination of tariffs in accordance with criteria or conditions which may be prescribed by the *contracting parties*.⁷⁸ The precise scope of paragraph 2(c) of the Enabling Clause is yet to be clarified. However, it can be said that legally, an agreement notified under paragraph 2(c) of the Enabling Clause may serve as an exception to Article I of the GATT as long as the state notifying it to the WTO can prove that there is a genuine link between the differential treatment accorded to a PTA partner and the arrangement at issue.⁷⁹ As the Appellate Body (AB) has explained in *Brazil — Certain Measures Concerning Taxation and Charges*:

Paragraph 2(c) excepts differential and more favourable treatment accorded pursuant to “[r]egional or global arrangements entered into amongst” developing country Members from a finding of inconsistency with Article I of the GATT 1994. Paragraph 2(c) limits the kind of differential and more favourable treatment to the: (i) mutual reduction or elimination of tariffs; and (ii) mutual reduction or elimination of non-tariff measures. In case of the latter, paragraph 2(c) adds that the “mutual reduction or elimination of non-tariff measures” have to be “in accordance with criteria or conditions which may be prescribed” by the WTO Members. Paragraph 2(c) does not exclude the possibility that developing country Members that are parties to regional or global arrangements may adopt such instruments that they may deem appropriate for the mutual reduction or elimination of tariffs and non-tariff measures. However, it suffices that the instrument adopted that way, to be justified under paragraph 2(c) for the differential and more favourable treatment it accords, has a “genuine” link or a rational connection with the regional or global arrangement adopted and notified to the WTO.⁸⁰

Thus, the AB here has followed a less stringent test than the one the Panel followed in the same case, that “for any differential and more favourable treatment” to be justified under

⁷⁵ See Lorand Bartels, *Interim Agreements under Article XXIV GATT*, 8 World Trade Rev. 339-350 (2009), for a detailed overview of the law and practice on interim agreements under the GATT and WTO.

⁷⁶ Islam, *supra* note 26, at 41.

⁷⁷ PTAs involving only developed countries would need to be notified under Article XXIV of the GATT.

⁷⁸ Hafez, *supra* note 73, at 201.

⁷⁹ See *infra* note 80 and the accompanying text.

⁸⁰ Appellate Body Report, *Brazil — Certain Measures Concerning Taxation and Charges*, ¶ 5.423, WTO Docs. WT/DS472/AB/R, WT/DS497/AB/R 13, AB-2017-7, AB-2017(adopted on Jan. 11, 2019).

paragraph 2(c) of the Enabling Clause, there must exist a close and genuine link to a regional arrangement entered into amongst less developed contracting parties.”⁸¹ However, one issue would be that Bhutan is a non-WTO member state and it is uncertain whether a PTA signed by a WTO member with non-WTO member states would or would not comply with the Enabling Clause because paragraph 2(c) of the Enabling Clause refers to the arrangements among less developed *contracting parties*.⁸² Thus, a literal interpretation would indicate that a PTA that a WTO member signed with a non-WTO member state cannot be within the scope of the Enabling Clause. However, this is yet to be determined in the GATT or WTO jurisprudence, and alternative interpretation is possible.⁸³

And in any case, for the BBPTA to benefit from the Enabling Clause, it must be properly notified to the WTO under Article 2(c) of the Enabling Clause. The Appellate Body report in *Brazil — Taxation* has explained the value of this procedural requirement, where it has been observed that:

Paragraph 4(a) of the Enabling Clause envisages a degree of specificity in the notification adopted thereunder. At a minimum, a notification pursuant to paragraph 4(a) should state under which provision of the Enabling Clause the differential and more favourable treatment has been adopted. Paragraph 4(a) indicates that arrangements or measures adopted under different subparagraphs of paragraph 2 would have to be notified to the WTO so as to put other Members on notice regarding the relevant differential and more favourable treatment sought to be accorded and justified under the Enabling Clause.⁸⁴

CONCLUSION

With the burgeoning number of PTAs having increasingly deep coverage in terms of rules, the BBPTA appears to be a minority. Apart from liberalizing tariff on their trade in certain goods, the two parties seem to have done nothing through it. This, accompanied by the political statements of the policymakers on the non-economic and diplomacy centric public statements of the two parties, may connote that the BBPTA is all about symbolism. However, from the viewpoint of those who attach their hope to the multilateral trade liberalisation, the very limited scope of the BBPTA may not necessarily be unwelcome. Clearly, the very limited scope of the BBPTA would mean that it falls far short of a full-fledged FTA as GATT Article XXIV would require. That being said, its simple rules or origin and coverage of some tradable products which are protected by the relatively high MFN tariff may mean that it complies with the spirit of GATT Article XXIV, in that PTAs should reduce barriers to trade between the parties (albeit in case of the BBPTA, it clearly does not do so for substantially all trade). Article XXIV also demands that in liberalizing trade for PTA parties, it should not raise barriers for entry of third-party products to the market of PTA partners. And the BBPTA, to some extent, ensures that. But, of course, for some products, the possibility of trade diversion is a real one.

Overall, the shallow liberalisation pursued by the BBPTA may indeed be an economic welfare enhancing treaty rather than those of deep economic integration pursued by PTAs that reduce barriers for intra-PTA trade but raise barriers for third parties. This is somewhat paradoxical, that though the BBPTA does not substantially liberalize the internal trade between the two state parties, it perhaps does not pose any real strain for the WTO's multilateral trade

⁸¹ Panel Report, *Dispute Settlement Reports 2019*, ¶ 7.1117, WTO Docs. WT/DS472/R WT/DS497/R (adopted as modified by the Appellate Body Report on Jan. 11, 2019),

⁸² Islam, *supra* note 26, at 77-79.

⁸³ *Id.*

⁸⁴ WTO Appellate Body Report, *supra* note 80, at ¶ 5.363.

liberalisation route. From the standpoint of greater sub-regional economic integration in South Asia, the BBPTA would seem to be yet another stumbling block and evidence that member states do not perceive any significant breakthrough within the SAARC trade integration framework anytime soon.