The Real Problem With Free Trade Agreements

By Lowell DeFrance

I. Introduction.

In recent years much debate over free trade agreements has filled the media. Much of the concern is over jobs, environmental standards and labor standards. But only a few academics are concerned about the larger difficulties created by these agreements. The true difficulties these agreements create is that these agreements may make future trade negotiations more difficult.[1] To fully understand this possibility the background of the purposes of trade and the creation of trade agreements must be explained.

People trade for economic benefit constantly. It would be difficult for any person to make it through a day with being involved in some trade transaction. The reasons to trade between nations are similar to the reasons that we trade within a nation. The basic reason to trade is an exchange in scarce resources. The more complex reason is that of specialization. Simply illustrated, why one person is a doctor and the other a plumber. The same is true with nations. One type of production just happens to be settled in a certain region or nation.

While one region or nation is able to produce certain goods or services better, or if not even better marginal better then other goods or services that region produces for reason of specialization or scarcity of resources that in sum describes the concept of comparative advantage. This concept is what make international trade so valuable economically to nations that engage in trade, and why it brings up the living standards of the people in those nations. Exports not only allow countries improve their balance of

payments but they improve resource allocation through comparative advantage.[2] The crucial part of this then is lower trade barriers. Lower trade barriers are mostly a result of negotiated trade agreements.

Despite the benefits that nations receive from greater liberalization of trade, trade agreements are difficult to negotiate. At the end of the Second World War the allies convened at Bretton Woods to create set of international organizations for rebuilding and maintaining an international economic structure so that the economic conditions that lead to war could be avoided. They envisioned a set of three pillars to that international structure. The International Bank for Reconstruction and Development (IBRD, later the World Bank), the International Monetary Fund (IMF), but they were not able to come to a full agreement on the third 'pillar,' what was intended to be, the International Trade Organization (ITO). The ITO would have to wait forty years, when under the Uruguay round of negotiations of the General Agreement on Tariffs and Trade (GATT) the vision of the ITO was finally realized in the World Trade Organization (WTO).

The time length it took to arrive at the WTO exemplifies the difficulty of concluding large-scale trade agreements. The major impediment is the sheer complexity involved in these agreements. The 153 countries of the WTO have to all sign on to the agreement covering the lowering of tariffs and barriers to tens of thousands of commodities.[3] Other trade related barriers, such as food and safety regulations, intellectual property, agriculture subsidies need to be negotiated as well.

Even with mutual economic reward, the numbers of issues that need to be negotiated keep diplomats from arriving at any agreement.[4] Thousands of industries pressure their respective trade negotiators creating a multiplicity of conflicts even with in

one nations delegation. In addition the growth of world trade under current barriers is creating resentment in some quarters of the populous. There is a growing perception by the public that international trade is not beneficial to the economy when in fact it has been a major driver. This reticence in the public over trade and the complexity of the negotiations make large-scale, multilateral trade agreement more difficult and lengthy to negotiate. The current Doha round of WTO negotiations has lasted since November 2001 or six and one half years with no end in sight.[5]

Given the length of time in negotiating a multilateral treaty it is no wonder that more bilateral agreements treaties have been negotiated in its place. Fewer parties mean fewer domestic industries will be effects and the trade agreements can be negotiated faster and the benefits can be realized sooner.[6] They can also negotiate more issues that would have been precluded by other parties of a multilateral negotiation like environmental and labor standards.[7] The scope and style of the regional and bilateral treaties has been growing might the quick fix approach come at a cost.

II. Preferential trade agreements.

There are many different types of preferential trade agreements which all have the founding on different legal basis. Sometimes these are called free trade agreements, regional trade agreements and customs unions. In addition there are also bilateral and purely unilateral agreements added in the mix of preferential trade agreements.

The unilateral trade agreement is where one nation, usually a developed country gives trade preferences to other nations without any corresponding concessions. These trade agreements are made under the framework of Article XXXVI of the General Agreement on Tariffs and Trade (GATT) where developed contracting parties may

reduce or eliminate trade barriers to lesser-developed countries (LDC)s without any reciprocity.[8]

This exception allowing lower tariffs based on the origin of the goods from a lesser develop countries was made later, to help in concert with the international lending institutions to aid in greater growth, and better living standards for people living in poorer nations.[9] Although the needs of developing countries were recognized in the Havana Charter of 1947, the United States refused to ratify it consequently trade preferences for lesser-developed countries were not part of the GATT treaty until 1965.[10] However these trade preference were voluntary on behalf of the developed nations.[11] They were usually give on goods that do not conflict with domestic industries and they did little to help increase trade with lesser develop nations.

Regional Trade Agreements (RTAs) are negotiated between nations within certain geographical region. They can fall under two sub categories of agreements, free trade agreements or customs unions. The regional trade agreement has its legal basis in the original GATT treaty under article XXIV "Frontier Traffic-Customs Unions and Free trade areas."[12] RTAs are evidenced in the North American Free Trade Agreement (NAFTA), Common Market of South America (MERCOSUR), and the Association of South Eastern Asian Nations (ASEAN).[13] The European Union (EU) is an example of customs union. The original intent of this article was to allow for what would later become the European Union and also to allow closer nations and small 'metropolitan' nations, for example San Marino, to have their own preferential trade arrangements.

RTAs were original envisioned only to include nations in close proximity with another, adjacent countries to promote frontier traffic.[14] Research by Kerry A Chase

indicates that that Article XXIV might have been a cold war tactic. The drafters intended it to allow for a free trade agreement with the United States and Canada.[15] Despite questions of its purpose and origin, article XXIV did have some restrictions.

The restrictions originally made on negotiating RTA's were, that they could not raise any barriers to third parties, free trade agreements can not lead to higher duties while customs unions must harmonize the regulations, and that for free trade agreements had to eliminate substantially all barriers of trade within a reasonable period of time.[16]

However, supervision this article has been non-existent over the past decade allowing contracting parties to negotiate free trade arrangements between nations that did not comply with the restriction that substantially all barriers be eliminated eventually. Furthermore what envisioned as RTA with in a certain geographical region, have expanded to Free Trade Agreements (FTA) where the nations do not need to have any geographical link. Free Trade agreements can be negotiated by any two nations or group of nations that negotiate them regardless of where their territorial boundaries are.

All of these agreement Unilateral Trade Agreements, RTA's, FTAs, and Customs Unions are encompassed by the term Preferential Trade Agreement (PTA). They all prefer the importations of goods based on the country of origin. Certain trading partners are preferred and receive preferential treatment. There is a certain hierarchy of treatment based on where the goods are from. PTA encompasses the whole phenomena of discriminatory trade agreements.

While Unilateral Trade Agreements are mostly benign as they are based on a countries development status and they are voluntary, they do have some policy discrimination aspects. The US for example exempts countries that participate in as

export boycott most notably the members of OPEC are excluded from these benefits despite some of them are much lesser developed. In addition the EU grants preferential status based status as former territories and colonies excluding other nation equally deserving.[17]

RTAs are a little more treacherous because they can lead to the trading blocs that lead up to World War II. Trade within a certain region may to localized fortresses of trade. While FTAs create the feared 'spaghetti bowl' of rules of origin.[18] Although some believe these FTAs do not cause any reason for alarm this has not always been the case. Nor do I think an accurate assessment of the reality in trade negotiations.

III. The Concept of the Most Favored Nation.

The concept of discriminatory trade practices was discouraged under the original treaty GATT of 1947. The evidence of this is in the now outdated Most Favored Nation clause. The clause forbids discriminatory practices, or practices the give preferences to one state over another, by any member nation against any other member nation.[19] The underlying concept is that every trading member should be treated the same and fairly by other members.

The phrase, most favored nation, grew out early trade negotiations in Europe from the twelfth century and through the fifteenth and seventeenth centuries when competing trading blocs begin giving concessions to each other.[20] In the beginning the concessions granted to the most favored nations were for specific countries, designated preferred trading states, but eventually it grew into the concessions given generally to every nation seeking trade.[21] It is an example of the language of diplomacy using a superlative to

designate the common. But it may have stemmed from the desire to make every nation feel like it had been given the best.

This provision appears to be the bedrock of the GATT agreement. Appearing predominately in the very first article. It declares from the onset that all nations shall receive the same treatment and this principle is the foundation of the agreement.[22] The principle is considered the cornerstone of the GATT agreement.[23] The preliminary drafts for the ITO which was later was left as the GATT states it's purpose was:

> "To create conditions of economic and social progress essential to world peace … for the reduction of tariffs and other trade barriers and the elimination of all forms of discriminatory treatment in international commerce thus avoiding excessive fluctuations in world trade."[24]

It is likely that the reason behind this concept of equal treatment stem from the pre-war experiences. The negotiators were quick to distance themselves from the inter war period that was dominated with trading blocs.[25] Competition over the African Colonies was also thought to be a key factor leading into World War I.[26] The recent historical backdrop behind the most favored nation, lends a aged wisdom behind the concept. It first lays a foundation of fairness, which it the optimal goal, for trade agreements to reach their economic and social apex.

It is, however, becoming more obsolete. The United States extends MFN status to virtually all but two nations on earth, North Korea and Cuba. On the other hand it extends better than MFN or preferential trading status to well over half of the other members of the WTO. The United States is not alone. Most industrial nations currently offer

preferential treatment to at least half of their trading partners. Most Favor Nation status is really becoming symbolic of the worst favored nation status.

III The Growth of Free Trade Agreements

From the initiation of the GATT agreement until 1990 there were only 50 regional trade agreements notified under the RTA provisions.[27] In 2007 there were 200.[28] It is expect to be close to 400 agreements by 2010.[29] A World Bank study estimates that between 15% and 40% of world trade takes place under trade preferences.[30]

The Doha Round of trade began in 2001. Since then the United States has signed a free trade agreements with Bahrain, Australia, Morocco, Chile, Singapore and Jordan.[31] Negotiations are close to conclude an agreement with South Korea Columbia as well as the Caribbean Free Trade Agreement (CAFTA.) Recently the Doha round crashed and fail again un able to reach any new agreements on trade.

The U.S. is not alone in negotiating bilateral and regional PTA's. Excluding the European Customs Union, the European Community has negotiated an additional 21 bilateral trade agreements, beating the United States paltry seven, if excluding NAFTA.[32] The European Community is by far the world's leader in dispensing with the Most Favored Nation principle in favor of set of many trade agreements. One can wonder if these agreements will help to maintain the contentious and large subsidies to European agriculture.

This is somewhat more complicated by the European Free Trade Association (EFTA), a group of four European Countries, Iceland, Norway, Switzerland and

Liechtenstein, have negotiated 13 more bilateral agreements. They also have an agreement with European Community.

In addition to the large players there are a few juggernauts in the bilateral trade agreements. A few opportunist nations taking advantage of relaxed review of trade agreements are becoming neo-Venetians of trade. Chile and Turkey for example have made eleven free trade agreements.[33] Mexico has penned ten while Singapore has made nine agreements.[34] These small number of trade agreement pioneers are expected to continue the break neck pace of new bilateral agreements.

These nations are reaching out and negotiating numerous bilateral agreements. Trade with these nations is likely to increase. While there is a majority of other nations and smaller countries, that have negotiated virtually none. The Continent of Africa seems to be totally left out of bilateral agreements, with the exception of Morocco, Egypt and South Africa.[35] These nations are the beneficiaries of many unilateral agreements but little has been done to create bilateral trading agreements. They have created two regional trading areas, Economic Community of West African States (ECOWAS), a small group of fifteen West African countries, and the Common Markets of East and South Africa (COMESA).[36]

In addition to the smattering of bilateral agreements there are also a number regional trade agreements creating trading blocs. These regional trading blocs are dividing the globe. NAFTA encompasses North America. COMESA and ECOWAS are on the two ends of Africa. The Economic Cooperation Organization (ECO) is a grouping of ten middle-eastern countries.[37] There is the Central European Free Trade Agreement (CEFTA), which now has nine members, the four former nations Yugoslavia, Albania,

Macedonia, Romania, Bulgaria and Moldava.[38] In South America the Andean Community Agreement (CAN) covers many countries in the north of South America while MERCOSUR covers southern South American nations of Uruguay, Paraguay, Brazil, Chile and Argentina.[39] In Asia there is the Association of South Eastern Asian Nations (ASEAN) with many members and one of the largest trading blocs.[40] In the Caribbean there is the Caribbean Community (CARICOM), as well as Central American Common Market (CACM).[41]

With the few bilateral trade pioneers, it is possible to envision certain nations growing faster with growing trade and becoming more prosperous than their neighbors. The certain countries, that make the effort, stand to benefit as they negotiate more bilateral trade agreements. Other nations not making the effort and waiting for a multilateral agreement might have their prosperity deferred.

Likewise if we draw a map start shading in the regional trading blocs we start to see the regional trading bloc developing and dividing the world up like a Risk game. The world becomes divided regional trading blocs of competing economic regions. Both of these new developments of trade are quickly increasing the complexity of the trading system at the same time helping fed the already growth amount of global trade.

IV Additional Costs of Free Trade Agreements in Origin Compliance

This growing complexity of increasing trade agreements is increasing the importance of rules of origin. When a trade agreement is reached as discussed it is necessarily a preferential trade agreement. It confirms a preference of goods from the nations that are a part of that trade agreement over goods that are from a nation not part

of the trade agreement. The very essence of a preferential trade agreement demands that the goods imported are from the designated beneficiary of that agreement.

In theory it appears very elementary that the goods imported by benefit of a preferential trade agreement merely means the goods are from one of the originating parties. In practice it is not such a simple process. Today's manufacturing environment has very complex systems of processing goods. The goods of today have many more parts and they are sourced from many more suppliers from many nations.

The role of specialization as mentioned above as one of the benefits on international as found itself in the global supply chain. Companies are increasingly making few more specialized products. Companies are specializing in the mere processing of material for later use down the supply chain. The crossing of borders in procuring these materials and processes is considered less and less.

Assemblies and sub assemblies of products are being imported and exported where the components and processes are being done in a multitude of counties. The average car has thousands of parts. To supply all these parts for example General Motors has 3,200 global suppliers and spends $86 Billion on parts.[42] These parts are outsourced from many countries.[43] In additional there is increasing demand by manufactures for fewer parts by switch to component suppliers and requiring suppliers to assemble the parts into components before the final assembly.[44] Before a car is ready for export or even domestic sale the parts have likely crossed thousands of international borders.

Before the proliferation of free trade agreements there was one basic rule of origin. That rule was the last place of substantial transformation.[45] This rule was interpreted by the courts of the country the goods were imported into and it had its own

kinks in *Superior Wire*, the metal which was cut to shape molded and tempered did not qualify to be of different origin.[46] In a similar case metal that had been coated with a galvanized spray did qualify.[47]

It is not so easy to predict whether a court will rule that a substantial transformation has occurred. Sometimes processes where no change in tariff number occurs, is enough to establish a substantial transformation. Other times even though the tariff classification is entirely different no substantial transformation is found.

The court in the U.S. has ruled that value changes that can be used as evidence of a transformation.[48] The rule substantial transformation has been said to be when one product becomes a new and unique product having "a distinct name character or use."[49]

But that leaves plenty of gray area as products evolve through out the manufacturing process to several different and not so different products. A toothbrush body sans the bristles might be essentially a toothbrush. In fact some cultures use wooden sandalwood sticks for toothbrushes.[50] On the other hand it could be a stick and only with the bristles does it become a toothbrush.

In preferential trade agreements there is no uncertainty, however, the rules of origin have frequently been negotiated. Rarely these rules are simpler than the already difficult substantial transformation rule, but they are more objective. They tend to codify the dual change between different products and changes in value.

The NAFTA agreement for example sets forth rules of orgin that start with and elaborate tariff-shifting scheme.[51] Utilizing the Harmonized Tariff Systems that assignees a twelve-digit number to every possible product.[52] The agreement decides a transformation occurs when the twelve-digit number is different enough based on a large

schedules of possible number changes.[53] The number must transform from one grouping of number to another. Sometime the number change is enough but other times the change in number will not always qualify as a substantial transformation.

NAFTA is one of the most elaborate set of rules but the United States also has tariff shifting rule in its agreements with Singapore, Bahrain, Chile, Morocco and Australia.[54] Each agreement has similar but different sets of tariff shifting rules to allow products to qualify. Most of the European agreements also have tariff shifting included in their trade agreements as well.[55]

Every bilateral trade agreement has different method of calculating origin they are not negotiated together but he result of two parties coming to a unique agreement. Outside of the agreements mentioned above, the other two US agreements have rules of origin based on only the value change from the time the products are imported to the time they are exported.[56] This second test of substantial transformation if it is not a wholly new or different product was the change in value high enough.

The United States-Jordan and Israeli free trade agreements are based solely on the changes in value.[57] The US-Israeli free trade agreement is the simplest. It was negotiated in 1985 well before NAFTA and the European Community entered into force. Consequently, it is also the most generous free trade agreement in terms of rules of origin requiring that only 35% of the direct cost of the good be from Israeli, Gaza, or the West Bank.[58]

The free trade agreements mentioned using the tariff shift-rule, also have an allowance for a value change rule. The NAFTA agreement contains two possible value change methods. The transaction cost method and the net cost method. The Net cost is

adding of the basic cost of all parts and labor of a good and that cost is over 50% then the goods qualify under the agreement.[59] The transaction cost basically takes the sales price of the good and subtracts the non-originate material and if the resultant value is over 60% of the original sales price then it will qualify.[60]

The transaction value allows goods where there might be a high amount of Intellectual property, marketing or branding involved with a product. For example an iPod made in China selling for a multiple of the cost of production would qualify. Other agreements have other way of calculating a value change.

The United States-Chile agreement uses in addition to the tariff shift method allowance for certain tariff numbers, a built up or build down cost method as well.[61] Under these cost methods it is a little more lenient by percentages of product but it does not make the same allowances. Under the build up method the free on board (FOB) value of the non-originating goods cannot be more that 45% while under the build down method the originating goods as percentage of the FOB value should be over 35%.

These different calculations of origin content seem to be repeated in several agreements in varying percentages and methods of calculation. The Japan-Chile free trade agreement also uses the build up or build down method but the percentages are varied depending on the referenced tariff shift that occurs.[62] While the European Union-Norway Free trade agreement requires a straight 50% value excluding simple operations for example packing or diluting in water.[63]

In addition to the value change and tariff change in rules of origin there are usually some more rules like a *de minimis* rule, a set of excluded operations, fungible rules and the most interesting the direct shipment rule or transshipment rule.[64] For and

good qualifying for preferential treatment is must be shipped direct from the country claiming the preferential treatment.

The no-transshipment rule does not mean the goods need to be on direct flights or on direct vessels heading to the final destination. It means the goods cannot enter into the commerce of another country before it enters the final destination claiming preferential treatment. For example NAFTA states no operation other than unloading or reloading.[65]

This means a product from Singapore cannot be shipped to Mexico to be painted before coming to the US and qualify for preferential treatment.[66] Even though the product would qualify for preferential treatment under either the United States-Singapore Free Trade Agreement or NAFTA it could not claim preferential treatment because it was not directly shipped.

A similar outcome would occur if the high tech, iPod, for example was shipped directly from China into Mexico or Canada. Here although a majority of the costs in manufacturing the goods were spent in the United States for development and marketing, and a small amount of the cost in manufacturing the good was spent in China the good would not qualify for preferential treatment unless it was shipped directly from the United States.

The product would have to be shipped to the United States first and then shipped to Mexico or Canada. The same situation would occur if a Canadian or Mexican firm designed such a product. There would have to be extra shipping around costs to qualify for preferential treatment. Not a great way to cut down on carbon emissions.

Although there would not be too much occurrence of this problem the duty rates for technological products are usually fairly low, the commodities with higher rates for

some reason are on the low tech of the production scale. This further demonstrates additionally why all these various agreements start to cumulatively add up to much inefficiency.

With the number free trade agreements growing and the increase confusion over rules of origin there has been some attempt to standardize the rules of origin in preferential trade agreements.[67] Although some believe that these separate rules of origin can be an important policy tool.[68] Others realize simplified rules will facilitate trade.[69] The complexity of the rules was illustrated by Professor Jagdish Bhagwati, of Columbia University, when he coined the phrase the, 'spaghetti bowl' of confusing and twisted rules of origin.[70]

The ever growing and expanding rules of origin are one example that brings into question whether the proliferation of free trade agreements is in the end helpful to world trade. Some believe the complexity of the rules could be ameliorated by standardizing them through a multilateral agreement. Even if an agreement to standardize the rules could be reached, nation would still have difficulty on enforcing them retroactively on previously negotiated agreements. There are other aspects of these agreement as well that also bring into question the eventually effectiveness of these agreements.

V. Dispute Settlement.

Another conflict that is created with PTA's is that frequently they create their own dispute settlement bodies.[71] The WTO would hardly be able to entertain dispute based on a PTA. Dispute settlement bodies can only adjudicate dispute dealing with the respective

agreements they were created to adjudicate.[72] However, what could happen when the agreements over lap becomes more an interesting dilemma.

The overlaps in regional bilateral agreements and the WTO agreements make for a large number of possible conflicts. There is a possibility overlaps between substantive and procedural trade law.[73] For example the WTO permits safeguards for health and safety while many regional agreements might prohibit the safeguards.[74]

This would bring either settlement body to question which body of law would prevail, the law of the forum or prevailing international public law principles. But if public international law principles were to apply, then a dispute settlement body might be adjudicating law from agreement it was not created to interpret.

In addition there could be overlaps not only with WTO and PTAs, but between PTA's.[75] Finally there may be overlaps were one agreement may breach another.[76] Most of the time the overlap in trade agreement will be binding on both parties but sometimes it will being only one of the parties.[77] For example the in EC-Banana case the European Community gave preferential treatment to bananas from countries based on their commitment to another preferential agreement, the Lomé Convention.[78] The United States challenge the preferential treatment using the WTO Dispute Settlement Body and it was not a party to the Lomé convention.[79]

It is likely some dispute savvy countries will make the decision where the start their trade dispute based on which forum will provide the most beneficial treatment. [80] This is complicated because most PTA's do not have a forum exclusion clause.[81] The concept of *res judicata* is unlike to apply as Joost Pauwelyn who points out that *res judicata* cover the same legal claim and when made under different treaties the legal

claim would be different.[82] So it might be possible to have two conflicting cases over virtually the same issue with two conflicting claims.

Many insightful scholars aware of these issues have proposed some ideas to avoid these potential conflicts in law and allow integration of the PTA's into the multilateral system. Sunjoo Cho suggests the RTA tribunals should be allowed to request "advisory opinions" on issues effecting the WTO agreement from the WTO Appellate Body.[83] He also believes that if PTA tribunals follow the basic legal cannon like the Charming Betsy cannon that PTAs can largely be consistent with TWO rules.[84] His primary example is that of NAFTA tribunal adopting the ban on zeroing when calculating dumping margins.[85]

Dumping duties are an international trade remedy when a product is being sold into the importing country at less than cost or below fair market value in the country of origin. The closest similarity would be to predatory pricing remedy under antitrust law. When calculating whether the good is below cost they add up all the cost however, if one of the costs happens to be too low they will 'zero' that cost out.

The US court has found that zeroing to be an acceptable interpretation of the congressional statue.[86] However, the WTO has found it to be an unacceptable interpretation of the antidumping treaty article VI to the GATT. The NAFTA court found it also to unacceptable and invoked the Charming Betsy Cannon for legal justification. The Charming Betsy was a vessel caught up in an international dispute it was ruled that were US law could agree with international law it should. However, US courts still have declined to extend that doctrine to the zeroing dispute.

Joost Pauwelyn also developed eight basic rules from International Public Law that could apply to conflicting trade jurisdictional regimes: 1) all treaties are of equal value, 2) treaties only affect the parties that agreed to them, 3) There is a presumption against conflict, 4) if the treaty speaks to what treaty shall prevail to use that assumption, 5) treaties are valid unless otherwise, 6) a later treaty prevail over a earlier one, 7) a specific treaty provision prevail over a more general one, and 8) even though dispute panels can only rule over their respective treaties they should not ignore other treaties.[87]

These ideas are good to avoid conflict but they will only do that if all the members of the dispute settlement bodies and PTA tribunals all follow them. It is hard to say if all the players will follow or adopt these rules.

VI Why are PTAs so Popular?

With all their potential problems PTAs are currently offing the only way to come to agreements on a variety of trade related areas. Trade agreements just are not about the tariffs on goods anymore. They are consistently becoming agreements that sync up law on a variety of issues.

Such issues as intellectual property or Trade-Related Intellectual Property Rights (TRIPS), are becoming an integral part many PTA's. Also agreements on foreign investment and trade in services are also a large part of many PTA's. Other major issues such as labor and environmental standards are being integrated into PTAs. These limited area agreements could be the building blocks to develop standards for larger trade agreements on these difficult issues.[88]

These issues would never be able to find their way into a multilateral agreement yet, especially when nations still have many divergent views on issues such as protection over pharmaceuticals and human rights. It is easy to see why like-minded nations are coming to agreements in areas where the larger body of nations cannot.

VII Can Regionalism be Multilateralized?

Regional agreements growing and they are here to stay.[89] Measures can be taken to make them more harmonious with the multilateral trading system. Harmonizing the rules of origin might be a big step in that direction and retroactively getting nations to adopt the harmonized rules into the previously negotiated trade agreements.[90]

Developing a system for "best practices" in regional agreement is another approach that is being offered. [91] This would help to insure that the overlapping does not cause conflict and no undue discrimination of products.

Another proposal is to harmonize and institutionalize PTAs within the WTO.[92] This proposal would create certain provisions by which PTAs could be negotiated and permit PTAs only if they complied with WTO provisions regarding PTAs.[93] Basically this would appear to strengthen and augment Article XXIV of GATT. The supremacy of WTO rules over PTAs would also have to be added to the WTO framework.[94]

Another integrating feature is to make the implementation of TRIPS agreements to be non-discriminatory. Here the IP feature of a PTA is automatically multilateralized.[95] Strengthening in IP protection would apply to all other WTO members not just the members of a particular PTA. However, this would only be negotiated were one of the

parties to the PTA had a large amount of IP and high amount of IP protection already and would simply make the parties any PTA adopt similar standards.

This might have unintended consequences as nation who make a deal would protect IP while nations who refrain would still be allowing IP infringements. It could cause those who did not make the deal to be less inclined with the exchange.

There is also a problem of resource diversion, which cannot be solved by institutionalizing PTAs our trying to harmonize them.[96] Trade diversion and trade creation are side-by-side principles when trading blocs are developed.[97] Trade creation occurs when lower cost imports displace domestic production. Trade diversion occurs when trade within a regional bloc displace trace from other countries outside of the trading agreement.[98] Trading blocs or PTAs engage in both trade diversion and trade creation. [99]

Not to mention trade distortions that will occur as certain locations will be more beneficially to locate factories and source products. Investment in certain regions will be more profitable and investments in other regions will be diminished. This causes capital resource diversion.

When resources are diverted based on PTA there creates a new vested interest in maintaining the preferences. PTAs act as disincentives to multilateral agreements.[100] There has been some talk that trade negotiators are suspending their WTO negotiations for regional trade negotiations.[101] Domestic companies and lobbies with investments develop a need to maintain a benefit vis-a-vi another country will pressure trade negotiators to prolong delay or cancel any multilateral agreement. There is no lack of short sightedness among business investors.

VIII. Conclusion

Regional trade agreements may be here to stay and it may be possible yet to integrate the regional back into a multilateral framework. But the more fragmented trading systems become the more difficult it will be to squeeze them back into the Pandora's Box. There is some wisdom present in the Most Favored Nation principle, a wisdom that is now ignored, by the race to negotiate more PTAs. It is important to reign in the PTAs and double efforts at reaching a multilateral agreement over these issues, before the fragmentation and distortion of resources becomes too great and nations move away from their commitment to global trade. A fragmented trading system would create a less prosperous and more dangerous world.

---

[1] Lamy, Pascal "Multilateral and Bilateral trade agreements: Friends or Foes." 2006 Gabrial Silver Memorial Lecture Columbia University 31 Octobet 2006.

[2] United Nations, Committee for Development Planning. "Regional Trading Blocs: A Threat to the Multilateral Trading System?" 1990.

[3]http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm. . (last visited July 19th 2008)

[4] World Trade Organization. "Day 9: Talks collapse despite progress on a list of issues." http://www.wto.org/English/news_w/news_e.htm. . (last visited July 19th 2008)

[5] The objective are to come to an agreement over twenty subjects of trade, currently they only have draft proposals for four of those subjects. See: http://www.wto.org/english/thewto_e/minist_e/-min01_e/mindecl_e.htm. (last visited July 28th 2008)

[6] See note 1.

[7] Id.

[8] GATT Article XXXVI (8).

[9] Id. at Article XXXVI (6).

[10] GATT. at *BISD § 13S/2-10.*

[11] Id .at Article XXXVI.

[12] Id. at Article XXIV.

[13] World Trade Organization. Regional Trade Agreements in f Force as of July 28th 2008. http://www.wto.org/english/tratop_e/region_e/region_e.htm. (last visited July 28th 2008).

[14] GATT, Article XXIV, Para 1.

[15] Kerry A. Chase, Multilateralism Compromised: The Mysterious Origins of GATT Article XXIV 5 World Trade Review 1. (March 2006).

[16] GATT Article XXIV, Para 8 (b).

[17] European Union Law. Overseas Association Decision. 2001/822/EC.

[18] See note 1 *supra* at 7.

[19] GATT Article I.

[20] Gretchen Harders-Chen, China MFN: A reformation of Tradition or a Regulatory Reform?, 5 Minn.J, Global Trade, 381,413.

[21] Id.

[22] GATT artl I. 1947

[23] Id. at 382.

[24] World Trade Organization, Summary Record of the Fifth Meeting, Subcommittee on Administration Held at Lake Success on 31 January 1947, (Feb 1st 1947) E/P/T/C.6/21 at page 3

[25] Cho, Sunjoon "Defragmenting World Trade." (Fall 2006). 27 NW J INTL & bus. 39.47

[26] Id.

[27] http://www.wto.org/english/tratop_e/region_e/regfac_e.htm. (last visited July 28th 2008)

[28] Id.

[29] Lamy, supra note 1.

[30] Id.

[31] Regional Trade Agreements Entered Notified to the GATT/WTO and in Force as of May 20th 2008.

[32] Id.

[33] Harders-Chen, note 20 supra.

[34] Id.

[35] Id.

[36] ECOWAS, http://www.ecowas.int/ (last visited July 28th 2008)

[37] ECO, http://www.ecosecretariat.org/ (last visited July 28th 2008)

[38] CEFTA, http://www.stabilitypact.org/ (last visited July 20th 2008)

[39] http://www.sice.oas.org/trade/JUNAC/Decisiones/dec563e.asp, (last visited July 25th 2008). http://www.sice.oas.org/trade/mrcsr/mrcsrtoc.asp (last visited July 25th 2008)

[40] ASEAN, http://www.aseansec.org/12025.htm (last visited July 25th 2008)

[41] CARICOM, http://www.caricom.org/, http://www.sice.oas.org/Trade/Junac/Carta_Ag/index.asp (last visited July 25th 2008)

[42] Tom Ward Strategic Sourcing Wards Auto World July 1 2007.

[43] Id.

[44] Connecting to Applications, Financial Express, December 25, 2005.

[45] *Superior Wire v. United States*, 867 F.2d 1409,1414. (CIT 1989)

[46] *Superior Wire Dvi. of Superior Products Co., a Michigan Co. v. United State*s, 669 F.Supp. 472. (CIT 1987).

[47] *Ferrostaal Metals Products v. United States*, 664 F. Supp. 535. (CIT 1987).

[48] Id.

[49] *Anheuser-Busch Brewing Ass'n* v. *United States*, 207 U.S. 556, 562 (1908).

[50] *Midwood Indus.* v. *United States*, 313 F. Supp. 951 (1970).

[51] Harmonized Tariff Schedule of the United States (2008) General Note 12.

[52] Id.

[53] Id

[54] In at GN 25-28.

[55] Chile-European Community Association Agreement, Annex III, Entry into force. February 1 2003.

[56] Harmonized Tariff Schedule of the United States (2008) General Note 8 and General Note 18.

[57] Id.

[58] Id.

[59] Id. at General Note 12.

[60] Id.

[61] Id. at General Note 26.

[62] Agreement between Japan and the Republic of Chile for a Strategic Economic Partnership (March 2007). Annex 1. http://www.mofa.go.jp/policy/economy/fta/chile.html (last visited July 12th 2008)

[63] Agreement between the European Economic Community and the Kingdom of Norway. Protocol No. 3.

[64] Harmonized Tariff schedule of the United States (2008) Supplement 1 General Notes,12 (l).

[65] Id.

[66] Id at General Note 25 (b) (ii).

[67] Bernard Hoekman, The Multilateral Trade Regime: Which Way Forward, World Trade Review 7: 2 455,455.

[68] Mohe Hirsch, Rules of origin as trade or foreign policy instruments? The European Union Policy on Products Manufactured in the Settlements in the West Bank and the Gaza Strip. 26 Fordham Int'l L.J. 572,591. (March 2003).

[69] Lamy, supra note 1, at 14.

[70] Id. at 7.

[71] Cho, supra note 25 at 86.

[72] Joost Pauwelyn. Legal Avenues to Multilateralizing Regionalism: Beyond Article XXIV". Paper presented at the Conference on Multilateralising Regionalism Sponsored by the WTO-HEI 10-12 (Sep. 2007).

[73] Id at 5.

[74] Id.

[75] Id. at 6.

[76] Id.

[77] Id at 7.

[78] Id.

[79] Id.

[80] Id citing , Peter Drahos. Weaving Webs of influence: The United States, Free Trade Agreements and Dispute Resolution. 41 Journal of World Trade 191, at 199.

[81] Id. at 21

[82] Id.

[83] Cho, supra note 25 at 87.

[84] Id.

[85] Id.

[86] Cho, note 25 supra at 87

[87] Pauwelyn , supra note 72, at 14

[88] Lamy, supra note 1.

[89] Id.

[90] Id.

[91] Id.

[92] Colin Picker. Regional Trade Agreements v. the WTO: A Proposal for Reform of Article XXIV to Counter this institutional Threat. 26 U. Pa. J. Int'l L. 267,305.

[93] Id at 306.

[94] Id.

[95] Pauwelyn , supra note 36, at 18.

[96] Lamy, supra note 1, at 8.

[97] United Nations, supra note 2, at 23.

[98] Id.

[99] Id.

[100] Lamy, supra note 1, at 10.

[101] Id.