PREFERENTIAL TRADE AGREEMENTS AND THE WTO: IMPETUS OR IMPEDIMENT?

Committee on International Trade

Principal Drafters:
Helena Sullivan, Chair
Stuart Shroff
Mark Du
Albert Bloomsbury

MAY 2010

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
42 WEST 44TH STREET, NEW YORK, NY 10036

I. Introduction

The Doha Development Round ("DDR") at the World Trade Organization (WTO) has faced several significant obstacles and, to date, has been viewed as somewhat of a failure. DDR commenced in November 2001 and is still ongoing. In contrast, during the same period when DDR lost its political momentum among global leaders' agenda, a substantial number of new bilateral preferential trade agreements (PTAs[1]) were entered into across the world. Thus, DDR's failure to make progress may not be attributable to unwillingness on the part of WTO members to liberalize trade. The multilateral DDR and bilateral PTAs both pose the same concerns and create the same fears for those who protest against the trade liberalization. This apparent contradiction then gives rise to a natural question: what are the real causes which are responsible for the lack of progress in the Doha Round, if the generally perceived aversion to trade liberalization is not the real reason? This paper attempts to find an answer by considering the possibility that it is precisely the proliferation of PTAs that has diverted the interest of the leaders of world's major trading partners away from a multilateral solution under DDR. We will examine the examples of the United States and the European Union ("EU") by scrutinizing PTAs which the U.S. and EU entered into for the purpose of trade liberalization on a bilateral basis. Through this exercise, we attempt to determine if there was any actual benefit derived from those FTAs or PTAs that could not have been otherwise achieved via the larger-scale multilateral WTO negotiations like DDR.

Historically, PTAs were an offshoot of the concept of trade preferences, under which a country offered the trade benefit of market access to a specific country that was not allowed to other nations. Such trade preferences became the policy of choice during the Great Depression in the 1930s, devastating global trade and possibly helping to cause World War II. During that period, Great Britain tried to hold on to imperial preferences for its colonies and dominions, although the U.S. supported most-favored-nation status ("MFN") as its trade policy—MFN automatically extended the lowest tariff to any other members of a proposed trade group. During this period, nations engaged in tit-for-tat trade protectionism, and bilateral trade agreements were intended to offset the diminishing trade wrought by such protectionist policies.

The experience of the 1930s and the World War II led the architects of the post-War global order to develop a new global economic system, the Bretton Woods system, based on the principle of an open economy designed to prevent a repeat of the failed policy of preferential trade agreements. Under the Bretton Woods proposal, it was contemplated that three global economic institutions, the International Trade Organization (ITO), the International Monetary Fund ("IMF") and the World Bank, would have been set up under the auspices of the United Nations; and the ITO would acquire a sweeping power to safeguard worldwide commerce and beyond. Its powers would have included the powers to regulate employment, commodity agreements, restrictive business practices, international investment, and services in conjunction with trade.[2] The ITO Charter was signed by the U.S. and many other nations; however the U.S. Congress objected to various provisions of the ITO, and the Truman Administration gave up the

[1] Sometimes known as regional trade agreements (RTAs) or free trade agreements (FTAs).
[2] *Understanding the WTO: Basics, The GATT years: from Havana to Marrakesh*, http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm (last visited April 27, 2010).

effort to obtain Congressional approval, thereby causing the ITO plan to fall apart.[3] Instead, the General Agreement on Trade and Tariffs ("GATT")[4] emerged as an international framework designed to align and coordinate the trade policies of each nation for a more liberal international trading regime. The GATT framework required its members to abide by a complex set of rules and provisions designed to prevent the use of trade barriers. Through this arrangement, GATT enshrined the principles of nondiscrimination in trade and created a forum through which the participating nations were able to cooperatively reduce trade barriers. However, the GATT Agreement also included a provision that modified its basic principle of multilateralism. Under Article XXIV,[5] GATT permitted bilateral and regional free trade agreements and customs unions among its members on the condition that these arrangements not increase the level of trade protection against other members.

In the 1970s, there was a new development that further removed GATT from its original principle of promoting multilateral trade liberalization and discouraging bilateral preferential deals. During this period, developing countries sought, and were granted, what became known as special differential treatment. Under the special differential treatment, the developing countries would be exempt from the obligations and rules of the GATT while remaining free to enjoy its benefits. This further undermined the efficacy of the GATT. In 1979, as part of the Tokyo Round of the GATT, an enabling clause was adopted that permitted trading preferences targeted at developing countries and least developed countries. This provision explicitly allowed preferential treatments that would otherwise have been prohibited under the principle of MFN treatment under Article I of the GATT. Furthermore, under this clause, developed nations were allowed to give preferential treatment to poorer nations, particularly to the least developed.[6]

---

[3] *Id.*

[4] General Agreement on Tariffs and Trade**,** Oct. 30, 1947, 61 Stat. A3, 55 U.N.T.S. 187, (hereinafter "GATT").

[5] Article XXIV at (5) provides that: "Accordingly, the provisions of this Agreement shall not prevent, as between the territories of contracting parties, the formation of a customs union or of a free-trade area or the adoption of an interim agreement necessary for the formation of a customs union or of a free-trade area; *Provided* that:
(*a*) with respect to a customs union, or an interim agreement leading to a formation of a customs union, the duties and other regulations of commerce imposed at the institution of any such union or interim agreement in respect of trade with contracting parties not parties to such union or agreement shall not on the whole be higher or more restrictive than the general incidence of the duties and regulations of commerce applicable in the constituent territories prior to the formation of such union or the adoption of such interim agreement, as the case may be;
(*b*) with respect to a free-trade area, or an interim agreement leading to the formation of a free-trade area, the duties and other regulations of commerce maintained in each of the constituent territories and applicable at the formation of such free-trade area or the adoption of such interim agreement to the trade of contracting parties not included in such area or not parties to such agreement shall not be higher or more restrictive than the corresponding duties and other regulations of commerce existing in the same constituent territories prior to the formation of the free-trade area, or interim agreement as the case may be; and
(*c*) 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 within a reasonable length of time."

[6] Under the Enabling Clause, "Notwithstanding the provisions of Article I of the General Agreement, contracting parties may accord differential and more favourable treatment to developing countries, without according such treatment to other contracting parties". More specifically, the clause allows for: "preferential tariff treatment accorded by developed contracting parties to products originating in developing countries in accordance with the Generalized System of Preferences"; "differential and more favourable treatment... concerning non-tariff measures"; "regional or global arrangements... amongst less-developed contracting parties for the mutual reduction or elimination of tariffs... [and] non-tariff measures, on products imported from one another"; and "special treatment of the least developed among the developing countries in the context of any general or specific measures in favour of developing countries". Under the Enabling Clause, "developed countries do not expect reciprocity for commitments

Also under this clause, developing nations were specifically permitted to enter into an agreement which may not be reciprocal, or which covered only a very limited range of products, notwithstanding the general principles of the GATT that would have prohibited such arrangements. Freed from restraints, regional PTAs soon emerged; however those arrangements were ineffective and confusing in practice. Although those developing nations sought to take advantage of the expected economies of scale under the regional market under the PTA, in reality, bureaucratic and political obstacles often cancelled out any anticipated benefits.

An ultimate cause of the proliferation of PTAs was that the U.S. started to shift away from its tradition of being a champion of the multilateral trading system in favor of bilateral trade deals. This was in response to the trend of accelerated European economic integration in the 1970s. In the 1980s, the Reagan Administration sought to open particular markets in an effort to stem inflation and to countervail the protectionist bills passed by Congress. The American embrace of bilateralism in trade deals started in the 1980s partly in response to the inability to start new multilateral talks under the GATT at that time. But this policy continued even after the Uruguay Round was successfully concluded and a new WTO was created in the 1990s. As a result of the conclusion of Uruguay Round, the WTO replaced the GATT as an international organization, but the General Agreement still exists as the WTO's umbrella treaty for trade in goods, updated as a result of the Uruguay Round negotiations.[7] Therefore, the new WTO continued the mission that the GATT had promoted in global trade, and especially the role to safeguard the free trade under the multilateral principles. Under WTO, there were efforts to curb the uncontrolled increase of bilateral trade deals that would undermine the multilateral free trade principles, and one of the results of these efforts was the creation of the "Transparency Mechanism" in 2006. This Mechanism aims to further "openness and understanding" about the operation of PTAs by building a database of information concerning these PTAs and thereby facilitating comparison and analysis.[8] Over 350 such PTAs have been reported to the WTO at the date of this writing.

In his book *Termites in the Trading System*,[9] Professor Jagdish Bhagwati, who characterizes the proliferation of PTA's an undesirable "spaghetti bowl," outlines five factors that motivate developing nations to enter into PTAs amongst themselves: (1) fear of competition with developed nations; (2) improvement of bargaining position *vis-à-vis* developed nations; (3) media coverage of multilateral negotiations focusing almost exclusively on Europe and the U.S., thus leaving out the developing nations; (4) PTAs are in vogue; and, (5) the belief that PTAs would be a backup plan in case multilateral negotiations fall through. He also suggests multiple negative consequences of the indiscriminate use of PTAs, including undesirable trade diversion, confusion caused by differing rules of origin, a hegemonic approach by larger nations to the use

---

made by them in trade negotiations", and "shall exercise the utmost restraint in seeking any concessions or contributions for commitments made by them to reduce or remove tariffs and other barriers to the trade of [least-developed countries], and the least-developed countries shall not be expected to make concessions or contributions that are inconsistent with the recognition of their particular situation and problems." *See* GATT, Basic Instruments and Selected Documents (BISD), 26th Supp. 203–5 (1980).

[7] *Understanding the WTO: Basics The Uruguay Round,* http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm (last visited April 21, 2010).

[8] Chi Carmody, *The Changing Tide of Trade: The Social, Political and Environmental Implications of Regional Trade Agreements*, 28 ST. LOUIS U. PUB. L. REV. 273 (2008).

[9] Jagdish Bhagwati, *Termites in the Trading System* (Oxford Univ. Press 2008).

of PTAs as a part of their national policy to impose their own will on smaller ones, and the desire of nations to keep MFN rates higher so that they can use tariff reductions as bargaining chips when negotiating PTAs. This paper will examine the practice of the use of PTAs within the US and EU trade policies to evaluate this claim.

II. Preferential Trade Agreements entered into by the United States

At present, there are 17 PTAs or free trade agreements (FTAs) in effect between the U.S. and its trading partners: Australia, Bahrain, Canada, Chile, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Israel, Jordan, Mexico, Morocco, Nicaragua, Oman, Peru and Singapore. The U.S. also has a Generalized System of Preferences (GSP) program designed to promote economic growth in the developing world by providing preferential duty-free entry for about 4,800 products from 131 designated beneficiary countries and territories. GSP was instituted on January 1, 1976, by the Trade Act of 1974, and is authorized through December 31, 2010. While the shift towards the use of bilateral trade agreements has often been justified as an alternative approach that complements the multilateral trade liberalization under WTO negotiation rounds, the actual contents of those trade agreements reveal that political considerations play a rather significant role in such bilateral trade agreements.

Historically, most of PTAs worldwide were based on geographic proximity and practicalities. For example, the memberships of NAFTA, ASEAN and MERCOSUR are based on regional groupings. However, apart from NAFTA, the free trade agreements entered into by the U.S. are with nations primarily in Latin America and the Middle East. Thus, U.S. PTAs no longer follow any discernible regional or geographic patterns[10]. Free trade agreements with Panama, Colombia, and South Korea were signed in 2006 and 2007, but ratification seems unlikely in the near future. Some have argued that no one else will negotiate new trade agreements with the U.S. until we approve these three pending agreements.[11]

One of the most common criticisms against PTAs is that without the auspices of the WTO as a multilateral forum, PTAs are often unequal agreements between parties with highly unequal bargaining powers.[12] This has especially been the case for many of those PTAs signed by the U.S. In those U.S. PTAs, there are many provisions that reflect non-trade related political agendas of U.S. policy makers. For instance, when the U.S. entered into its first free trade agreement with Israel in 1985, many commentators considered the agreement to be more of a strategic agreement than a trade agreement.[13] This agreement included numerous provisions that reflected special considerations unrelated to trade issues. This trend was carried forward into the

[10]In the late 1990's and early 2000's, negotiations on a regional agreement called the Free Trade Area of the Americas which would have included all of the Americas except for Cuba foundered on issues of intellectual property, trade in services and agricultural subsidies. *See SICE: Free Trade Area of the Americas (FTAA), available at* http://www.sice.org/tpd/ftaa/ftaa_e.asp.

[11] James Bacchus, *Trading Up*, Forbes.com, March 4, 2010, *available at* http://www.forbes.com/2010/03/03/trade-deficit-economy-obama-opinions-contributors-james-bacchus.html.

[12] Sydney Cone III, *The Promotion of Free-Trade Areas Viewed in Terms of Most-Favored-Nation Treatment and Imperial Preference*, 26 MICH. J. INT'L. L. 563, 576 (2005).

[13] *See e.g. Howard Rosen, Free Trade Agreements as Foreign Policy Tools: The U.S.-Israel and US-Jordan FTAS*, www.iie.com/publications/chapters_preview/375/03iie3616.pdf.

subsequent agreements between the U.S. and other nations. These special considerations have included the environment, labor, national security, and intellectual property protections.

In addition, these agreements often include provisions specifically tailored for the special interests of a certain protected sector of the dominant nation, which is invariably the U.S. Throughout negotiations, the U.S. has used the right of access to the U.S. market as considerable leverage and consequently forcing the weaker negotiating partner to accept the conditions that the U.S. wanted in those PTAs. Also, a foreign state that plays along with U.S. foreign policies may find more support in the U.S. for a free trade deal between the U.S. and that country. The not yet ratified U.S.-Colombia Free Trade Agreement (officially known as the United States-Colombia Trade Promotion Agreement) may be such an example, the Bush Administration having said that it viewed the Agreement as a national security issue and as strengthening a key democratic ally in Latin America[14]. As a result, a typical U.S. bilateral trade agreement with a much smaller economy is asymmetrical. Thus, free trade agreements in the U.S. have been influenced by domestic political considerations, by foreign policy[15], and by industry lobbying and special interests[16]. Under these circumstances, one could argue that U.S. free trade agreements have been primarily a tool to advance U.S. foreign policies, not trade.

U.S. bilateral free trade agreements closely follow the U.S. domestic policy guidelines and regulatory standards concerning trade in goods and services, intellectual property rights, labor protections, environmental standards, and human rights and other U.S. foreign policy guidelines on international cooperation and security issues. A potential trading partner's level of access to the U.S. marketplace is commensurate with the strategic importance of this nation within the overall framework of U.S. foreign policy.

In the following analysis of various U.S. PTAs, we will discuss selected PTAs, or free trade agreements, including the Dominican Republic- Central America-United States Free Trade Agreement (DR-CAFTA), and those with Chile, Israel, Jordan and Singapore. The PTA with Chile is an example of a free trade agreement which is generally consistent with WTO principles, as it solely deals with trade matters with only relatively minor exceptions. In contrast, DR-CAFTA is arguably quite different in nature and more focused on issues tangential to trade.

United States-Chile Free Trade Agreement

The U.S.-Chile Free Trade Agreement entered into force on January 1, 2004.[17] It immediately eliminated 87 percent of bilateral trade tariffs. In addition, it established a schedule to achieve duty-free trade status for all products within 12 years. However, the U.S. made a specific exception by exempting certain goods such as wheat, flour and sugar from the schedule.

---

[14] M. Angeles Villareal, Cong. Research Serv., *The U.S.-Colombia Free Trade Agreement: Economic and Political Implications* 25 (2008), *available at* http://www.policyarchive.org/handle/10207/bitstreams/20026.pdf.

[15] *Supra* Notes 12 and 13.

[16] *See e.g, White House Will Not Announce Panama FTA Plans At Americas Summit*, Inside U.S. Trade, April 17, 2009, Lexis Nexus Library, Inside U.S. Trade file*; see also* Kerry A. Chase, *Industry Lobbying and the Rules of Origin in Free Trade Agreements*, draft of paper delivered at the International Studies Association 48th Annual Convention, Chicago, Illinois, Feb. 28-March 3, 2007, http://people.brandeis.edu/~chase/research/isa07.

[17] United States-Chile Free Trade Agreement**,** Jun. 6, 2003, 42 I.L.M**.** 1026, *available at* http://www.ustr.gov/trade-agreements/free-trade-agreements/chile-fta/final-text.

Although the U.S.-Chile Free Trade Agreement has been hailed by many as a model free trade agreement, there are still some non-trade related provisions including safeguards on intellectual property rights. Chapter 17 of the FTA requires both parties to accede to international intellectual property right agreements (TRIPS) and to take measures to prevent unauthorized third parties' obtaining domestic market approval for a patented product. Chapter 17 has been occasionally ignored by the Chilean government with relation to pharmaceutical products. Another point of contention for many economists is the provisions regarding capital controls. These provisions were inserted as a direct result of the insistence of the U.S. Treasury which sought to protect the interests of the U.S. financial services sector.

Unlike more recent U.S. PTAs, the U.S.-Chile Free Trade Agreement does not specifically focus on the effectiveness of the enforcement of domestic labor conditions and standards in the respective states. The enforcement mechanism under the agreement accepts the enforcement of the domestic labor laws of each nation according to each nation's normal governmental process. Consequently this agreement does not effectively export U.S. labor standards into its trade partner, Chile. The U.S.-Chile Free Trade Agreement is weak in the enforcement of environmental standards. Although provisions on environmental standards can be found in the main text, the effectiveness of such provisions necessarily depends on the dispute resolution mechanisms designated for issues that may arise. Therefore, similar to those provisions on labor issues, the U.S.-Chile free trade agreement largely leaves the environmental protection to the respective domestic laws. Article 19.8 requires each Party to ensure that judicial, quasi-judicial, or administrative proceedings are available under its law to sanction or remedy violations of its environmental laws. The exception to this was the creation of an environmental advisory and consultation committee.

DR-CAFTA

On August 5, 2004, the U.S. signed the Dominican Republic-Central America-United States Free Trade Agreement ("DR-CAFTA")[18] agreement with Honduras, Nicaragua, El Salvador, Costa Rica, Guatemala, and the Dominican Republic. This Agreement represents the first time the U.S. entered into a free trade agreement with a bloc of small developing nations. The U.S. Congress approved the DR-CAFTA in July 2005 and President Bush signed the implementing legislation on August 2, 2005. The U.S. implemented the DR-CAFTA on a rolling basis as other signatory nations made progress in completing their commitments under the Agreement. The Agreement became effective between the US and El Salvador on March 1, 2006, followed by Honduras and Nicaragua on April 1, 2006, Guatemala on July 1, 2006, and the Dominican Republic on March 1, 2007. The Agreement became effective between the U.S. and Costa Rica on January 1, 2009; it is now fully in force.

Unlike the free trade agreement entered into between the U.S. and Chile, DR-CAFTA requires signatory nations to effectively enforce their own domestic labor laws, and to strive to ensure that there is no lack of effective enforcement of domestic labor law standards in order to

[18] Dominican Republic-Central America-United States Free Trade Agreement, May 28, 2004, 43 I.L.M. 514, *available at* http://www.ustr.gov/trade-agreements/free-trade-agreements/DR-CAFTA-dominican-republic-central-america-fta/final-text.

increase exports by means of allowing substandard labor conditions. DR-CAFTA is noticeably more stringent than the U.S.-Chile agreement, requiring signatories to uphold and comply with labor standards under the Agreement. While the labor standards are based upon domestic labor laws, governments can be fined up to $15 million for failure to effectively enforce their own labor laws under the agreement.[19] Parties are to strive to ensure that they do not derogate from their own labor laws in order to increase trade (Article 16.2). DR-CAFTA provides for the establishment of a Labor Affairs Council and a Labor Cooperation and Capacity Building Mechanism.[20] Under DR-CAFTA, the parties work with the ILO to improve the judicial system of the US counterparts in DR-CAFTA, so they can effectively enforce their own labor laws.[21] The U.S. Agency for International Development also works with the labor ministries of the U.S. counterparts in DR-CAFTA to improve their ability to conduct inspections for prosecuting violations and resolving disputes.[22] Furthermore, working conditions for women and children in those nations are specifically scrutinized by the U.S. Department of Labor to ensure effective compliance with the respective labor laws; $27 million has been earmarked for this oversight function.[23] This approach differs from the approach in, for example, the U.S.-Peru Trade Promotion Agreement ("TPA"),[24] which requires the signatories to adopt, maintain and enforce the International Labor Organization ("ILO") core labor standards and provides for state-to-state binding disputes for enforcement.[25]

DR-CAFTA also requires 'effective enforcement' of domestic environmental laws,[26] and the creation of an Environmental Affairs Council.[27] Environmental violations are also subject to a monetary assessment capped at $15 million.[28] Contrastingly, under the Peru TPA, parties must meet obligations under seven specific multilateral environmental agreements, and a state is also subject to suspension of trade benefits for violating its environmental obligations. DR-CAFTA signatories are required to adopt intellectual property ("IP") protection laws modeled after those in the U.S. While the U.S.-Chile FTA includes some intellectual property protection, the requirement to protect IP rights is more stringent under DR-CAFTA. The advisory committees for DR-CAFTA reported difficulties in enforcing IP rights under the US-Chile FTA model, and accordingly the regulatory framework under DR-CAFTA is stepped up. The nations of DR-CAFTA must limit their government's ability to revoke patents to a small number of specific grounds as permitted under the agreement. DR-CAFTA further requires signatory nations to

[19] Art. 20.17; this is indexed for inflation as per Annex 20.17.
[20] Arts. 16.4 and 16.5.
[21] K. LORRY STORRS, ET AL., CONG. RESEARCH SERV., CENTRAL AMERICA AND THE DOMINICAN REPUBLIC IN THE CONTEXT OF THE FREE TRADE AGREEMENT (DR-CAFTA) WITH THE UNITED STATES 9 (2005), *available at* http://www.nationalaglawcenter.org/assets/crs/RL32322.pdf.
[22] U.S. ADMIN. FOR INT'L DEV., USAID STRENGTHENING LABOR JUSTICE CAFTA-DR PROGRAM TASK ORDER NO. -I-03-04-00175-00 (2009), *available at* http://pdf.usaid.gov/pdf_docs/PDACN672.pdf.
[23] U.S. TRADE REP., CAFTA-DR-LABOR CAPACITY BUILDING 4 (2007), *available at* http://ustraderep.gov/assets/Trade_Agreements/Regional/CAFTA/Briefing_Book/asset_upload_file739_13204.pdf.
[24] U.S.-Peru Trade Promotion Agreement, Apr. 12, 2006, *available at* http://www.ustr.gov/trade-agreements/free-trade-agreements/peru-tpa/final-text (last visited April 27, 2010).
[25] *See* Huma Muhaddisoglu and Mark Kantor, *Background on US and EU Approaches to Labor and Environment Chapters in Free Trade Agreements* (2008), *available at* http://www.oecd.org/dataoecd/45/5/40311013.pdf.
[26] Art. 17.2.
[27] Art. 17.5.
[28] Art. 20.17.

establish statutory damages, which can be imposed in addition or as an alternative to actual damages when a party is found liable for violating IP rights. Law enforcement agencies also must be vested with authority to seize pirated and counterfeited goods, the equipment used to make them, and documentary evidence pertaining to such illicit transactions. Lastly, like the U.S.-Chile Free Trade Agreement, all DR-CAFTA signatory nations must accede to international treaties on intellectual property rights such as the Patent Cooperation Treaty, the WIPO Copyright Treaty, and the Brussels Convention Relating to the Distribution of Program-Carrying Satellite Signals, which have been ratified by the U.S.

DR-CAFTA represents an 'updated' model of the U.S.-Chile free trade agreement, and includes more detailed procedures pertaining to labor and intellectual property issues. While the stated goal of those agreements is to facilitate trade and to reduce barriers to entry, these additional provisions are intended to export U.S. domestic regulatory laws and render the overall agreement less trade-oriented.

United States-Israel Free Trade Agreement

The U.S. first entered into its first free trade agreement in 1985, with Israel.[29] While the two nations have long held close ties, it was the European Economic Community ("EEC")-Israel free trade agreement, signed in 1975, which triggered a sudden U.S. interest in signing its own bilateral free trade agreement with Israel since the U.S.-Israel Agreement effectively supplanted some of the United States' agricultural exports to Israel. The U.S.-Israel FTA was comprehensive on the surface as it sought to eliminate all trade barriers on all products by 1995. This ambitious goal, however, never materialized, especially in the sensitive area of agricultural products. Contrary to general expectations, in the five years after entering into this Agreement, U.S. agricultural exports to Israel dropped by nine percent, whereas the EEC's exports grew by 13 percent.[30] This PTA does not contain any provisions relating to labor standards, environment, or intellectual property protection, but it does contain a 'declaration' that the parties will endeavor to provide national treatment for trade in services.

In an effort to increase U.S. access to Israel's agriculture markets, and to harmonize their earlier agreement to the rules of the Uruguay Round of the GATT, the two nations entered into a new agreement, the Agreement on Trade in Agricultural Products ("ATAP") in 1996. The objective of this Agreement was to immediately complete the reductions in all trade barriers agreed to in the original 1985 Agreement. The ATAP categorized U.S. agricultural products into three categories: (i) those without duties or other barriers; (ii) exports with tariff-rate quotas; and, (iii) those with preferential treatment.[31] However, the ATAP did not actually achieve these objectives. The only areas which saw the complete elimination of all barriers were certain fruit and grain products.[32] An agreement extending ATAP was signed in 2004; and was subsequently extended until the end of 2009.[33]

---

[29] U.S.-Israel Free Trade Agreement, April 22, 1985, 24 I.L.M. 657.
[30] U.S. DEP'T OF AGRIC., AGRICULTURAL ECONOMICS REPORT, App. 5, 97 (1998), *available at* http://www.ers.usda.gov/publications/aer771/aer771m.pdf.
[31] *Id.*
[32] *Id.*
[33] Letter from Ehud Olmert, Vice Prime Minister of Israel for Industry, Trade, Labor and Communications, to Robert Zoellick, United States Trade Representative (July 27, 2004), *available at*

In addition to Israel's tariff rate quotas, another serious concern is the lack of transparency in Israeli standards for licensing, health and safety guidelines, and overall bureaucratic challenges. Because of the chronic and lengthy delays imposed by Israeli trade officials on the export license allocations , exporters have found it difficult to accurately plan and manage their operations[34]. One specific area of concern is beef. Though Israel domestically produces non-kosher beef, Israel banned the import of non-kosher beef; this act alone violates GATT principles.[35]

While disagreements on trade are common, one positive aspect about the US-Israel relationship is that the two nations have continued a dialogue on these matters and continue to address them.[36] In contrast, global multilateral trade negotiations of DDR are still currently on hold.[37]

United States-Jordan Free Trade Agreement

The U.S. and the Kingdom of Jordan established a free trade agreement which went into effect on December 17, 2001.[38] Like the U.S.-Israel FTA, the U.S. again followed in the footsteps of the EU which established its agreement with Jordan in 1997 through the Jordanian-European Association Agreement, the precursor to Jordan's subsequent agreement with the EU through the Euro-Mediterranean Agreement.[39] The effort, though, of the U.S. to enter into a bilateral agreement with Jordan was partially rooted in the amended US-Israel FTA in 1996.[40] This amendment meant that qualifying industrial zones ("QIZs") in the West Bank and Gaza, Jordan and Egypt, were able to essentially "piggyback" on to the US-Israel FTA and gain greater access to the US markets.

Jordan coordinated its inspection systems and standards with the EU and the U.S. in efforts to reduce transaction costs. All tariffs are to be phased out by 2010.[41] Significantly, the U.S.-Jordan FTA included labor and environmental standards which certain members of

---

http://www.ustr.gov/sites/default/files/2004-US-Israel-Agricultural-Agreement.pdf (last visited January 28, 2010); Letter from Robert Zoellick, United States Trade Representative, to Ehud Olmert, Vice Prime Minister of Israel for Industry, Trade, Labor and Communications (July 27, 2004), *available at* http://www.ustr.gov/sites/default/files/2004-US-Israel-Agricultural-Agreement.pdf.

[34] U.S. TRADE REP., 2009 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS 259–260 (2009), *available at* http://www.ustr.gov/sites/default/files/uploads/reports/2009/NTE/asset_upload_file405_15451.pdf.

[35] GATT, art. III.

[36] *USTR and Israel Hold FTA Joint Committee Meeting*, Targeted News Service (Dec. 16, 2009), *available at* Lexis Nexis Library, Targeted News Service File.

[37] *See* James E. Bacchus, Op-Ed., *Breaking the Deadlock at Doha*, WALL ST. J. , Dec. 17, 2009.

[38] Agreement between the United States of America and the Hashemite Kingdom of Jordan on the Establishment of a Free Trade Area, Oct. 24, 2000, 44 I.L.M. 63, *available at* http://www.ustr.gov/trade-agreements/free-trade-agreements/jordan-fta/final-text .

[39] Atlas Investment Group, *Jordan-US FTA: Free Trade Agreement Inception*, http://www.jordanusfta.com/free_trade_agreement_fourth_inception_en.asp (last visited February 1, 2010).

[40] MARY J. BOLLE, CONG. RESEARCH SERV., U.S.- JORDAN FREE TRADE AGREEMENT (2001), *available at* http://digital.library.unt.edu/ark:/67531/metacrs2011/m1/1/high_res_d/.

[41] U.S. TRADE REP., 2009 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS 287–89 (2009), *available at* http://hongkong.usconsulate.gov/uploads/images/pOYsHwEbh_XXL4JvkGO3Fg/uscn_t_sprpt_2009nte_full.pdf.

Congress would try to use as a "template" in future trade negotiations.[42] These environmental and labor standards are incorporated in the agreement as opposed to being "side agreements," as was the case for NAFTA.[43] They require effective enforcement of domestic environmental laws (Article 5) and labor laws (Article 6). The parties are to strive to ensure its laws provide for high levels of environmental protection and internationally recognized labor rights. The U.S.-Jordan agreement also dealt with trade in services (Article 3) and intellectual property protection (Article 4), requiring that Jordan ratify the WIPO Internet Treaties.[44] Since there is not a significant amount of trade between the U.S. and Jordan, this FTA was concluded largely for symbolic as opposed to economic purposes.

United States-Singapore Free Trade Agreement

The US-Singapore Free Trade Agreement, its first in Asia, went into effect on January 1, 2004.[45] U.S. policymakers wanted to use this agreement as a springboard for the expansion of its bilateral FTA network in Asia.[46] Upon entry in force, all U.S. export goods entering into Singapore would be duty-free and all goods exported from Singapore to the U.S. would be granted tariff-free status over a ten-year phase-in period. Though a relatively small nation, Singapore is a significant trade partner of the U.S., as evidenced by its high levels of trade in both goods and services.[47] In the trade of goods, as an important concession in the agreement, Singapore gains a generous access to the U.S. textile market. The Agreement specifically prescribes that that "apparel goods" which are not sourced from Singapore, but are assembled in Singapore, are granted preferential treatment in comparison to other countries.[48] This PTA also deals with trade in Services (Article 8), intellectual property protection (Article 16), and financial services (Article 10). In the financial services area, the U.S. benefited greatly from Singapore's relaxation of its entry restrictions. These relaxed restrictions permit U.S. banks to setup branches in Singapore, though under stricter terms than those in the U.S.[49] Article 18 states that the parties "shall not fail to effectively enforce" their own environmental laws, while Article 17 requires the same with regards to labor laws. Article 17.5 and Annex 17A also create a Labor Co-operation Mechanism. Some commentators believe that these labor and environment provisions are too weak to constitute a deterrent.[50] The United States and Singapore have

[42] *Before the Senate Finance Comm.*, 107th Cong (2001) (statement of Jagdish Bhagwati, Professor, Columbia University).
[43] *Id*.
[44] *Supra* note 38, art. 4(1)(c), (d).
[45] United States - Singapore Free Trade Agreement, May 6, 2003, 42 I.L.M. 1026 (2003), *available at* http://www.ustr.gov/trade-agreements/free-trade-agreements/singapore-fta/final-text.
[46] Jason Gutierrez, *Bilateral Agreements: Bush Push for Free Trade Initiative Expected at APEC Forum in Bangkok*, *Int'l Trade Daily*, BNA, Aug. 7, 2003.
[47] Press Release, Office of the United States Trade Representative, United States Holds Fifth Annual Free Trade Agreement Review, Dec. 7, 2009, *available at* http://www.ustr.gov/about-us/press-office/press-releases/2009/december/united-states-and-singapore-hold-fifth-annual-fre.
[48] *Supra* Note 12.
[49] Sherrillyn Lim, *The U.S.-Singapore Free Trade Agreement: Fostering Confidence and Commitment in Asia*, 34 CAL. W. INT'L L. J. 301, 315–18 (2004).
[50] *Supra* note 12.

conducted an annual review of their trading situations and both appear pleased with their arrangement.[51]

III. Preferential Trade Agreements Entered into by the European Union

As noted above, earlier in the 20th Century, countries which are now members of the EU took a "colonial" approach to trade preferences, negotiating preferential trading arrangements with their former colonies and overseas territories. Today, the EU is the world's biggest economic entity, accounting for 20% of global imports and exports.[52] Not surprisingly, the EU has so many bilateral and regional trade agreements with nations all over the world that it applies MFN to only a handful of countries (Australia, New Zealand, the United States, Japan, Canada, South Korea, Singapore, Taiwan, Hong Kong, and Vatican City).[53] With one of these countries, South Korea, the EU signed a PTA in 2009 that not yet in force. In addition, the EU is in the process of negotiating a PTA with two other nations currently receiving MFN treatment, Canada and Singapore[54]. China does not have a PTA with the EU; it qualifies for the EU's Generalised System of Preferences ("GSP")[55] on some products, but receives MFN treatment on others.

The legal basis for trade policy for the EU and its 27 member states is contained in Articles 3, 5, 21 and 25 of The Treaty on European Union ("TEU"), and Articles 206, 207, 216 and 218 of the Treaty on the Functioning of the European Union ("TFEU") after Lisbon Treaty took effect on December 1, 2009.[56] Under the Lisbon Treaty, the EU acquired legal personality, thereby making the EU a judicial person that can negotiate a treaty with external nations in its own name.[57] The treaties and other agreements of the EU with external parties are binding on its

---

[51] Press Release, United States Trade Representative, United States and Singapore Hold Fifth Annual Free Trade Agreement Review, Dec. 7, 2009, http://www.ustr.gov/about-us/press-office/press-releases/2009/december/united-states-and-singapore-hold-fifth-annual-fre (last visited May 28, 2010).

[52] Marina Kesner-Skreb, *The European Customs Union*, FIN. THEORY AND PRAC. 99 (2010).

[53] *See* list of countries which have no applicable preferential arrangement on European Commission website.http://ec.europa.eu/taxation_customs/customs/customs_duties/rules_origin/article_403_en.htm (last visited April 27, 2010). North Korea is the only nation to which the EU applies less-than MFN status.

[54] *See* European Commission, *EU Trade-Overview of FTA and Other Trade Negotiations* (May 2010), *available at* http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_118238.pdf.

[55] The EU's Generalised System of Preferences is a trade arrangement similar to the U.S. GSP program through which the EU unilaterally provides preferential access to the EU market to 176 developing countries and territories, in the form of reduced tariffs for their goods when entering the EU market. There is no expectation or requirement that this access be reciprocated. There are the standard GSP, which provides preferences to 176 Developing Countries and Territories on over 6300 tariff lines, the special incentive arrangement for sustainable development and good governance, known as GSP+, which offers additional tariff reductions to support vulnerable developing countries in their ratification and implementation of international conventions in these areas, and the Everything But Arms (EBA) arrangement, which provides Duty-Free, Quota-Free access for all products for the 50 Least Developed Countries (LDCs). The EU adopted a regulation on 22 July 2008 applying a new GSP scheme for the period from January 1, 2009 to December 31, 2011.

[56] The Treaty on European Union (TEU) and The Treaty on the Functioning of the European Union (TFEU) are the two key treaties of the EU after Lisbon Treaty (2007/C 306/01). These two treaties are in aggregate referred to as "EU Treaties." Lisbon Treaty substantially amended the previous TEU, and also substantially modified the former "The Treaty Establishing the European Community," which was renamed to "The Treaty on the Functioning of the European Union."

[57] Under Article 216(1) of TFEU, the Union (i.e. EU) may conclude an agreement with one or more third countries or international organizations where the EU Treaties so provide or where the conclusion of an agreement is

27 member states.[58] Prior to the Lisbon Treaty, Article 133 of the European Community Treaty was the basis of authority to negotiate external trade agreements. The European Commission was responsible for negotiating on behalf of its Member States, in consultation with a special committee, dubbed the "133 Committee", which is composed of representatives from both the Member States and the Commission. Formal decisions on issues, such as launching and concluding negotiations on trade agreements, were confirmed by the Council of the European Union.

The EU has trade arrangements with several different types of countries or regional groupings, and those diverse agreements are meant to accomplish very different goals. The main tool used by the EU is the European Union Association Agreement, which is a treaty between the EU and a non-EU country that creates a framework for co-operation between them; however, the arrangements created can be drastically different. The first type of arrangement is geared toward candidates or potential candidates for EU membership, the second towards countries that are geographically close or have historic/cultural ties with the EU, and the third with countries that are viewed as strategic to EU commercial interests. The EU takes a position that its preferential trade agreements are part of a wider policy of promoting multilateralism. Thus, many of its negotiations are with existing regional groupings, and some negotiations are made to encourage the creation of a new regional grouping. Those regional groupings include MERCOSUR, the Gulf Coast States and the Euro-Mediterranean Free-trade Area. The EU also has Economic Partnerships Agreements with the African, Caribbean, and Pacific ("ACP")[59] countries. Liberalization is often asymmetrical, with the EU liberalizing faster than its trading partners and over different transition periods.

The EU's bilateral trade agreements deal with more than just liberalizing trade in agricultural and non-agricultural goods and services. These preferential arrangements cover a variety of areas such as the harmonization of technical requirements and standards, protection of intellectual property rights, liberalization of investment and capital flows, cooperation on competition policies, government procurement, trade defense instruments, and dispute settlement. Under EU policy, all of these trade negotiations should take into account environmental and social considerations through sustainability impact assessments. Moreover,

---

necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the EU Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope. Under Article 216(2), such external agreements concluded by the Union are binding upon the institutions of the Union and on its Member States. Under Article 207(3) of TFEU, where agreements with one or more third countries or international organizations need to be negotiated and concluded, Article 218 of TFEU shall apply, subject to the special provisions of Article 207(3) as follows: the Commission shall make recommendations to the Council, which shall authorize it to open the necessary negotiations; the Council and the Commission shall be responsible for ensuring that the agreements negotiated are compatible with internal Union policies and rules; and the Commission shall conduct these negotiations in consultation with a special committee appointed by the Council to assist the Commission in this task and within the framework of such directives as the Council may issue to it. Under Article 218(5) and (6) of TFEU, the Council adopts a decision to authorize the negotiator to sign the external agreement and to conclude a negotiation, and the Council's adoption of decision is subject to consent of European Parliament where the subject matter concerns the field that is subject to ordinary or special legislative procedure under EU Treaties.

[58] *Id*.

[59] This group consists of 79 countries. http://www.acpsec.org/en/acp_states.htm (last visited April 16, 2010).

many of the EU's preferential agreements contain provisions on political, cultural, and security cooperation.

Several years ago, the EU announced that it would pursue PTAs as part of a wider policy of promoting multilateralism and that it intended to launch new PTAs with market access as the main criterion.[60] The EU's trade initiatives had previously been focused on maintaining PTAs with former colonies and making new ones in the Euro-Mediterranean region. However, with multilateral talks in the WTO making little progress, the EU began to show a new interest in PTAs in the East.[61]

EU and the Rest of Europe

Typically, when a nation becomes an EU candidate, it signs an association agreement called a Europe Agreement, Association Agreement or Stability and Association Agreement. The main focus of such an agreement is the establishment of free trade between the EU and the candidate nation within a specified time frame and a creation of a single market. Afterwards, the EU offers direct support to the needs of each candidate nation in overcoming specific problems from among various available policy tools.[62] The accession partnerships cover a variety of areas, such as strengthening democracy, protection of minorities, economic reform, reinforcement of institutional capacity, alignment with the internal market, justice and home affairs, agriculture, environment, social affairs and regional policy. Current candidates are Turkey, Croatia, and Macedonia, with further enlargement expected to continue.

The European Free Trade Association ("EFTA") is a European trade bloc which was established on May 3, 1960 by seven European states who either were unable to, or chose not to, join the then-European Economic Community. Only Iceland, Norway, Switzerland, and Liechtenstein remain current members of the EFTA. Three of the EFTA nations are part of the European Union Internal Market through the Agreement on a European Economic Area ("EEA"), which took effect on January 1, 1994; the fourth, Switzerland, opted to conclude its own bilateral agreement with the EU.

The Cotonou Agreement and Economic Partnership Agreements

The EC's trade relations with ACP countries are governed by the ACP-EC Cotonou Agreement signed in June 2000 for a period of 20 years.[63] The Cotonou Agreement, which entered into force in 2003, is based on five interdependent pillars: (i) an enhanced political

[60] WTO Trade Policy Review Body, *Trade Policy Review: Report by the Secretariat European Communities*, WT/TPRS/S/177 (Jan. 22, 2007).
[61] *Little Hope on Trade; Europe and Asia Make Little Progress on New Trade Arrangements*, ECONOMIST, Oct. 24, 2008, *available at* http://www.economist.com/agenda/displaystory.cfm?story_id=12493812.
[62] European Union's web site on Enlargement, "How does it work?" http://ec.europa.eu/enlargement/how-does-it-work/index_en.htm (last visited April 21, 2010).
[63] The trading relationship between the EU countries and the ACP countries predates both the Cotonou Agreement and the earlier Lome Conventions which beginning in 1975 gave the ACP countries tariff preferences in the European market. *See*, U.S. DEP'T OF AGRIC., FOREIGN AGRIC. SERV., GAIN REPORT E48005 TRADE POLICY MONITORING, OVERVIEW OF EU BILATERAL AND REGIONAL AGREEMENTS (2008), *available at* http://www.fas.usda.gov/gainfiles/200801/146293474.pdf.

dimension; (ii) increased participation; (iii) a more strategic approach to cooperation focusing on poverty reduction; (iv) new economic and trade partnerships; and (v) improved financial cooperation. Under the Agreement, ACP countries (except for South Africa), benefit from non-reciprocal trade preferences during an interim period (2001–07), i.e. duty-free treatment on industrial, certain agricultural, and fishery products, subject to a safeguard clause. For certain products (bananas, beef, veal, and sugar), the EU provides special market access under commodity protocols." Moreover, preferential rules of origin contain product-specific requirements that allow for accumulation between the ACP nations, the EC, and "overseas countries and territories". While there is no specific labor chapter, the parties generally affirm their commitment to ILO standards and agree labor standards should not be used for protectionist purposes (Article 50). Likewise, there are no specific environmental commitments, although the parties pledge cooperation on environmental protection and sustainable development, and agree that sanitary and phytosanitary measures may be used to protect human, animal or plant life or health, but not as a disguised restrictions on trade.[64] The Agreement provides for a revision clause (Article 95) and for its adaptation every five years, with the exception of the economic and trade provisions for which there is a special review procedure. Negotiations for its first revision took place between May 2004 and February 2005. The amendments covered the political dimension, development strategies, investment facility, and implementation, as well as management procedures, and were followed by a ratification process. The second revision of Cotonou Agreement was signed on March 19, 2010.[65]

Under the Cotonou Agreement, the EC is negotiating reciprocal Economic Partnership Agreements ("EPAs") with the ACP countries individually. EPAs are supposed to be based on four main pillars and will (i) entail rights and obligations for both sides; (ii) be based on existing regional integration initiatives; (iii) be designed to take account of the economic, social and environmental constraints of ACP nations; and, (iv) facilitate the gradual integration of ACP nations into the world economy. Specifically, the agreements will define bilateral trade-related provisions, within the broader framework of WTO rules. Thus, they are supposed to provide for progressive elimination of tariffs and non-tariff measures (including technical barriers to trade), on both goods and services, and address other trade related issues. Development concerns are supposed to be reflected through flexibility vis-à-vis depth of liberalization, its asymmetry, length of transition periods, trade coverage and exceptions, and through EC support measures.

By the end of 2007, one full regional EPA had been reached between the EU and CARIFORUM (signed in October 2008).[66] With all other negotiating regions, interim agreements covering primarily trade in goods were concluded between the EU and the individual ACP counties and subgroups of nations, with a view to concluding negotiations toward full regional EPAs. Where there are signed agreements, and such agreements are in the ratification phase, the interim EPAs are normally provisionally applied. However, the negotiations for full regional EPAs have been ongoing during the same time period, as specified by the various

[64] Arts. 32, 48 and 49.
[65] Second revision of Cotonou agreement, signed on 19/03/2010, *available at* http://ec.europa.eu/development/geographical/cotonouintro_en.cfm#revision2.
[66] Caribbean Forum, the Caribbean group of 15 states which are ACP members. For an overview of the current status of all EPAs, *see* European Commission, *EU Trade-Overview of EPA* (Feb. 2010), *available at* http://trade.ec.europa.eu/doclib/docs/2009/september/tradoc_144912.pdf

interim deals. Those nations which have not entered into an agreement are expected to export to the EU under the EU's GSP regime.

Under the second revision of Cotonou Agreement (March 19, 2010), the trade chapter of the Agreement reflects the new trade relationship and the expiry of preferences at the end of 2007. It reaffirms the role of the EPA to boost economic development and integration into the world economy. The revised Agreement highlights the challenges ACP nations are facing to better integrate into the world economy, with particular attention to the effects of preference erosion. It therefore emphasizes the importance of trade adaptation strategies and aid for trade.[67] The Second Revision also provides that labor standards and environmental measures shall not be used for protectionist purposes, and recognizes that sustainable development must take climate change into account.[68]

EU-Mediterranean Agreements

In 1995, the Euro-Mediterranean Partnership was launched. The Mediterranean ("MED") partners are Albania, Algeria, Bosnia & Herzegovina, Croatia, Egypt, Israel, Jordan, Lebanon, Libya, Mauritania, Monaco, Montenegro, Morocco, the Palestinian Authority, Syria, Tunisia and Turkey. This Euro-Mediterranean Partnership, formerly known as the "Barcelona Process," was re-launched in 2008 as the Union for the Mediterranean (Euromed) at the Paris Summit for the Mediterranean in July, with the new network of relations endorsed at the Marseille Meeting of the Euro-Mediterranean Ministers of Foreign Affairs in November. The Partnership now includes all 27 member states of the European Union, along with partners across the Southern Mediterranean and the Middle East.[69]

The EU and MED sought to establish a Euro-Mediterranean free-trade area by 2010, i.e. free trade in non-agricultural products, and progressive liberalization of trade in agricultural goods and services. The free-trade area is being established through the conclusion of Euro-Mediterranean association agreements between the EU and individual Mediterranean nations. All agreements, with exception of the one with Syria, have entered into force. The EU also supports free-trade arrangements among the Mediterranean nations, as a means of regional integration (for example, the Agadir Agreement concluded between Morocco, Tunisia, Egypt, and Jordan). Presently, MED nations enjoy reciprocal duty-free access for non-agricultural goods to the EU market.

The 5th Euro-Mediterranean Trade Conference, held in March 2006, launched negotiations on the liberalization of services, investment and the right of establishment. The negotiations follow a two-track approach: negotiations on general provisions of interest to all parties will be conducted collectively. The parties first aimed to agree on a draft text by early 2007. Subsequently, negotiations on issues pertaining to the different parties, such as their schedules of specific commitments, were to be conducted on a bilateral basis. In addition,

[67] The Cotonou Agreement, *available at* http://ec.europa.eu/development/geographical/cotonouintro_en.cfm#overview.
[68] *See* arts 1, 32bis, 49 and 50.
[69] *The Euro-Mediterranean Partnership*, http://ec.europa.eu/external_relations/euromed/index_en.htm (last visited April 21, 2010).

Ministers agreed to deepen agricultural trade liberalization (negotiations on this started in 2006), and to negotiate a dispute settlement mechanism. The parties aimed to conclude the first bilateral protocols on this mechanism by the end of early 2007. However, to date, bilateral negotiations with Egypt, Tunisia, Morocco, Lebanon and Israel on trade in services and the right of establishment are still continuing, along with parallel regional consultations to ensure transparency[70]. Regarding a dispute settlement mechanism, agreement was reached with Tunisia, Jordan, Lebanon and Morocco. On agricultural issues negotiations were concluded in 2005 with Jordan, in 2008 with Egypt and Israel; with Morocco in 2009, and negotiations with Tunisia[71] are still ongoing.[72] There are negotiations with Libya over a framework FTA every 2-3 months.[73]

In the 8th Union for the Mediterranean Trade Ministerial Conference held in Brussels on December 9, 2009, Euromed Ministers generally endorsed the Euromed Trade Roadmap beyond 2010 (the "Roadmap"). Under the Roadmap, the implementation of the trade and investment facilitation mechanism should start without delay in view of a first phase being operational for business by 2010. In addition, they agreed that Euro-Mediterranean trade relations should move beyond tariffs, taking into account the outcome of the current negotiations, to remove non-tariff barriers and to include regulatory issues, so as to allow real market access and contribute to a more favorable investment climate. In this respect, Ministers expressed their commitment to the launching of bilateral negotiations on a package of non tariff and regulatory issues beyond 2010.[74]

EU-MERCOSUR

MERCOSUR is a regional trading bloc founded in 1991 which consists of Brazil, Argentina, Paraguay, and Uruguay; Venezuela was accepted as a full member in 2006, but is still in the process of integrating.[75] In 1992, the EU signed an Inter-Institutional Agreement with MERCOSUR to provide technical and institutional support. In 2000, the EU and MERCOSUR began negotiating an inter-regional association agreement. Since then, there have been numerous rounds of negotiations focusing on trade and economic issues, and a series of annual ministerial meetings, but no free trade agreement has yet resulted. Agriculture remains the most difficult sticking point in these negotiations. In February 2010, further negotiations were held in Brussels.[76]

---

[70] *Supra* note 54.
[71] *Supra* note 54; *also see* Press Release, Council of the European Union, Barcelona Process: Union for the Mediterranean Ministerial Conference: Final Declaration (Nov. 4, 2008), *available at* http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/misc/103733.pdf.
[72] *Tunisia Government Continues Trade Liberalization*, Global News Wire-Asia Africa News Wires, Jan. 12, 2010, Lexis Nexis Library, Global News Wire File.
[73] *Supra* note 54.
[74] European Trade Commission, *Conclusions for the 8th Union for the Mediterranean Trade Ministerial Conference* (2009), http://trade.ec.europa.eu/doclib/docs/2009/december/tradoc_145575.pdf (last visited April 21, 2010).
[75] As of January 2009, Venezuela's bid to enter Mercosur has been approved by the legislatures of member nations Argentina, Uruguay and Brazil, but Paraguay has yet to approve the measure. *Country watch: Mercosur/Venezuela* Business Latin America Select, January 11, 2010, Lexis Nexus Library, Business Latin America Select File.
[76] *Supra* note 54.

EU-Russia and the Eastern Bloc

The Partnership and Co-operation Agreement ("PCA")[77] provides the framework for the EU-Russia relationship. It was signed in 1994, and entered into force on December 1, 1997. The Agreement regulates political, economic and cultural relations between the EU and Russia, and serves as a legal basis for the EU's bilateral trade with Russia. The main objectives of the Agreement are trade and investment, and encouraging economic relations between the EU and Russia. The current PCA expired on December 31, 2006. However, it remains in force until a new agreement replaces it; there are ongoing negotiations to update the PCA (including trade provisions).[78] Certain Russian goods can enter the EU market under the EU's GSP regime. In June 2008, the EU and Russia launched negotiations on a new framework agreement at the Khanty-Mansiisk Summit. These negotiations are ongoing; however, it is not known how Russia will react to the EU proposal to the Eastern Partnership ("EP"), addressed to Armenia, Azerbaijan, Belarus, Georgia, Moldova, and Ukraine, for which the EU Commission proposed a deep and comprehensive free trade area to be established between the EU and the EP participants. In November 2008, an EU diplomatic source said that the EU had tied a new Russia-EU agreement to Russia's WTO membership, as a free trade agreement would not be possible without Russia's WTO accession.[79] There have been several rounds of negotiation.[80]

EU-Gulf Coast Nations

In 1989, the EU signed a Cooperation Agreement with the six Gulf Cooperation Council ("GCC") states, Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and the United Arab Emirates.[81] The GCC is Europe's sixth-largest export market. Under this Agreement, EU and GCC Foreign ministers meet once a year in a Joint Council/Ministerial Meeting, with the objective of facilitating trade relations. The Joint Council has established working groups to promote industrial cooperation, energy, environment and education. Both sides committed to enter into negotiations on a free trade agreement. Negotiations began in 1990, but stalled after GCC decided to move towards a customs union. Discussions resumed in March 2002, and are ongoing. In December 2008, the GCC's Secretary General said "[w]e are suspending the negotiations until the European side agrees to sign the [most recent] draft accord", and added that GCC had "made many concessions and responded favorably to the EU's many demands."[82] Consequently, there are no set dates for the next round, while informal consultations continue.[83]

[77] Partnership and Cooperation Agreement. a*vailable at* http://www.delrus.ec.europa.eu/en/p_243.htm.
[78] *Supra* note 54.
[79] *WTO Membership Essential For EU-Russia Talks – EU Diplomat* Russia & CIS Banking & Finance Weekly, Nov. 14, 2008, Lexis, Nexis Library, Russia and CIS Banking and Finance Weekly File.
[80] *Supra* note 54.
[81] In 2003 GCC members eliminated tariffs on trade between member nations and established common external tariffs; a common market was established in 2008 and they are hoping to establish a single currency in 2010. *See SAMA chief named head of GCC central bank*, Saudi Economic Survey, April 15, 2010, Lexis Nexis Library, Saudi Economic Survey File.
[82] *GCC suspends EU free-trade talks*, EU Business.com, Dec. 29, 2008, http://www.eubusiness.com/news-eu/1230048122.99 (last visited Jan. 27, 2009).
[83] *Supra* note 54.

EU-ASEAN Negotiations

Southeast Asia is one of the EU's most important trading partners. Since May 2007, the EU has been involved in free trade agreement negotiations with the Association of Southeast Asian Nations ("ASEAN"), a trading bloc which includes Brunei, Cambodia, Malaysia, Myanmar, Indonesia, the Philippines, Thailand, Singapore, Laos, and Vietnam. The goal of ASEAN itself is to create an economically, socially, and politically integrated bloc by 2015. With the economic slowdown taking hold, there is some urgency felt for concluding the EU-ASEAN free trade agreement talks, which cover the liberalization of goods and services. ASEAN is not a customs union, so individual agreements will have to be signed with individual ASEAN members and the EU. The EU had consistently said that it would not be negotiating separate bilateral agreements as it "is not possible to negotiate regional FTA with individual member states",[84] but that there would be some flexibility in the framework to take into account the different levels of development within ASEAN. However, negotiations stalled due to EU concerns, including violations of human rights in Myanmar. The ASEAN bloc's lack of cohesion was seen by the EU Trade Commissioner as leading to a lowest common denominator tendency in the talks.[85] In addition, some saw ASEAN's capabilities as stretched by the large number of FTAs it was negotiating.[86] These frustrations led to a British foreign minister's statement in January 2009 that a new approach to ASEAN-EU FTA talks may be required so the EU can negotiate agreements with individual ASEAN states instead of as a single bloc.[87] The EU expressed hopes for a solid response from ASEAN countries to their offers at a meeting in Malaysia in March 2009, and the Commission Ambassador and Head of Delegation in Malaysia told the press that with the economic slowdown creeping in, there is urgency in concluding the EU-ASEAN talks.[88] In December 2009, EU member states agreed to pursue bilateral FTA negotiations with ASEAN members.[89] The EU is currently pursuing trade agreement negotiations with Singapore[90] and has agreed to do so with Vietnam.[91] The EU has signed an agreement on textiles and clothing with Vietnam; ratification is in progress.[92]

Other EU Agreements in Progress in Asia

The EU also has ongoing preferential trade agreement talks with several important trading partners in Asia. In October 2009, two years of discussion with South Korea finally resulted in an agreement. The parties made headway on several thorny issues including certain

[84] *EU Expects Solid Response From ASEAN on FTA Offer*, Asia Pulse, Jan. 6, 2009, Lexis Nexis Library, Asia Pulse File.
[85] *Supra* note 61.
[86] *Supra* note 61.
[87] *Britain Proposes New Approach to ASEAN-EU Free Trade Talks*, Agence France Presse-English, Jan. 14, 2009, Lexis Nexis Library, Agence France Presse File.
[88] *EU Expects Solid Response From ASEAN on FTA Offer*, Asia Pulse, Jan. 6, 2009, Lexis Nexis Library, Asia Pulse File.
[89] *Supra* note 54.
[90] *EU and Singapore Conclude First Round of FTA Talks*, Europolitics, March 15, 2010 Lexis Nexus Library, Europolitics File.
[91] *Vietnam Urges New Free Trade Negotiations with EU*, Asia Pulse, March 4, 2010 Lexis Nexis Library, Asia Pulse File.
[92] *Supra* note 54.

tariff reductions, rules of origin, and auto-trade and auto-technical standards.[93] The agreement has not yet been ratified.[94] PTA negotiations with India started in June 2007, and in December 2008, the EU voiced optimism that an FTA with India would be concluded by the end of 2009.[95] However, as of April 2010 an agreement has still not been reached.[96] The EU is India's largest trading partner. During negotiations, India sought an FTA which would allow it to exempt a number of sensitive industrial and agricultural tariff lines.[97] The last round of talks took place in April 2010; issues included improved market access for goods and government procurement.[98]

China is perhaps the EU's most difficult challenge in trade policy. EU-China bilateral trade more than doubled between 2003 and 2007. The EU's imports from China are mainly industrial goods such as machinery, transport equipment, and miscellaneous manufactured articles, while the EU exports to China are also industrial products such as machinery, transport equipment, miscellaneous manufactured goods and chemicals. In 2006, the EU adopted a policy strategy that, while pledging it to accept Chinese competition, would push China to trade fairly. To that end, the EU and China began negotiating a comprehensive Partnership and Cooperation Agreement in 2007, with the goal of providing a framework for bilateral trade and investment and upgrading a 1985 EC-China Agreement.[99] In 2008, the EU and China launched discussions under the High Level Economic and Trade Dialogue Mechanism ("HLM") decided at the last EU-China Summit. The HLM is modeled after a similar process currently underway between China and the U.S.: the Strategic Economic Dialogue. EU Trade Commissioner Peter Mandelson said that the HLM was intended to "map out the long term strategic direction of our economic and trade relationship, and help smooth out issues we encounter along the way."[100] The HLM is intended to strengthen the dialogue between the European Commission and the State Council of China, at the Vice-Premier level, and deal with issues of strategic importance in trade, investment and economic cooperation, including intellectual property rights protection.[101] In November 2008, China and the EU agreed upon a new regulatory framework for the treatment of financial services information in China, settling a WTO dispute that the EU had launched in March 2008 together with the US.[102] There was a fifth round of negotiations on trade and investment in November 2009.[103]

---

[93] *S. Korea strives to ink free trade deal with EU at early date: official*, Yonhap News Agency, (Jan. 8, 2009, Lexis, Nexis Library, Yonhap News Agency File.
[94] *Heading towards a battle of the BITs*, April 1, 2010, Foreign Direct Investment, Lexis Nexis Library, Foreign Direct Investment File.
[95] *EU hopes to conclude free trade pact with India by next year*, The Press Trust of India, Dec. 19, 2008, Lexis, Nexis Library, The Press Trust of India File.
[96] *De Gucht Urges New Delhi To Show More Ambition on FTA*, Europolitics Monthly, March 22, 2010, Lexis Nexus Library, Europolitics File.
[97] *Supra* note 61.
[98] *Supra* note 54.
[99] European Commission, External Trade-Trade Issues-China, http://ec.europa.eu/trade/issues/bilateral/countries/china/index_en.htm (last visited Jan. 27, 2010).
[100] European Commission, External Trade-Trade Issues-China-Conferences and Studies, http://ec.europa.eu/trade/issues/bilateral/countries/china/pr250208_en.htm (last visited Jan. 30, 2010.
[101] *Supra* note 99.
[102] European Commission, External Trade-Trade Issues-China-Conferences and Studies, http://ec.europa.eu/trade/issues/bilateral/countries/china/pr131108_en.htm (last visited Jan. 27, 2010).
[103] *Supra* note 54.

IV. Conclusions

In the analysis above, we have reviewed a wide variety of bilateral and multilateral PTA of both the U.S. and the EU which are both numerous and remarkably different in complexity, purposes, and scope. It is not easy to summarize the common features of those heterogeneous agreements. Even the agreements entered into for a single nation cannot be said to share too many common features vis-à-vis important issues like agriculture, IP protection, labor, and environment. A PTA that a nation like the U.S. may make with one trading partner may be wildly different than one it makes with another trading partner of the approximate same level of trade and development, depending on the then current political considerations during negotiations. Clearly, the end result of the proliferation of PTAs is less than harmonious.

Despite the claims of proponents of bilateral trade deals as a practical, valid alternative to multilateral trade liberalization over the last few decades, the benefits of those bilateral negotiations were not quite as robust as claimed. There could even be said to have been some negative impact on global trade through its complex web of confusing agreements and rules. While it is difficult to generalize about these agreements, we nonetheless can draw some important inferences about these numerous and diverse PTAs that affect many nations and regions around the world. These could be summarized as follows:

First, the multilayered nature of bilateral agreements, their differing focus, and the complexities of varied regional concerns have meant the world has strayed from MFN and from the ideal of open global economy with transparent rules, i.e. the worldwide free trade based on a rule-based, transparent global economic system intended to bring maximum prosperity to the global populations of both developed and developing economies.

Second, those bilateral negotiations reveal the same difficult issues that effectively stalled the WTO Doha Round, i.e. the impasse on agriculture and other sensitive commodities, and trade in services.

Third, the history of these negotiations reveal that the "promotion of regional economic integration" does not always have as much substance as was claimed. Among the various regional trading blocs in the world, few are as coherent and integrated as the EU. As a result, when the EU negotiates a bilateral trade deal with another region, it often has to negotiate a bilateral agreement with each member within that bloc with different concerns, and that makes the negotiating process far more lengthy and complex than anticipated.

Fourth, the plenitude of different ongoing negotiations results in a dispersion of precious political capital and government resources and consequently detracts from the efficient achievement of stated trade policy goals. There is a strong indication that the efforts to negotiate difficult bilateral deals took much of the government and policy makers' motivation and zeal away from the critically important priority of breaking the impasses in the multilateral negotiation in the Doha Round.[104]

[104] *See e.g. Termites in the Trading System, supra* note 9, ch. 3.

Fifth, bilateral and regional negotiations clearly demonstrate inequality of bargaining power amongst the participants. Multilateral negotiation in the WTO forum will level the bargaining powers of large and smaller nations, and bring about a more fair trade agreement that truly benefits the people of both developed and developing nations. We now turn our focus to the question as to how the global policy makers should best approach this situation to fix the problem.

Professor Bhagwati evaluates three possible measures to reverse the phenomenon of the "pandemic" of PTAs: (i) halting the formation of new PTAs and eliminating the preferences in existing PTAs through built-in reductions of differentials between tariffs on non-members and preferential tariffs on members; (ii) reducing the chaos of the "spaghetti bowl" through harmonization; and, (iii) using multilateral trade negotiations such as the Doha Round to further reduce tariffs. [105]

Resuscitation of the Doha Round negotiation should be an urgent, number one priority. This would be a most pragmatic step as well, given the current financial crisis. This will be the most effective way to reduce tariffs and to further harmonize the trading systems globally. Without that, it is not likely that the tidal wave of PTAs will disappear in the near future. For developing countries, this route has obvious attractions, especially since as a group, they can muster a much stronger bargaining position together than dealing with bilateral deals individually—and they can avoid the pressure to accept unwanted non-trade related requirements that do not align with the true national interest.

For developed economies like the U.S. and the EU, the harmonization of global trade system will bring large net economic benefits from worldwide free trade. Policy makers need to come to grips with the fact that the major benefits, including job creation, can only be achieved by the successful conclusion of the Doha Round; further they must recognize that devoting their effort to breaking this impasse is an urgent priority. It will not be easy. Global leaders may need to use significant political capital and utilize their political and leadership skills to convince their constituencies of the great economic benefits that will result from the successful conclusion of the multilateral trade negotiation at Doha Round and the ensuing international trade system based on rule-based open economy.

Without the completion of the Doha Round, there is a realistic concern that the global economy will eventually plunge back into another bloc economy like in the 1930s, and we will be left with chaos and fragmentation of global economic rules. It is now critical to remember the lessons of the Great Depression and World War II, and to go back to the basic principles of Bretton Woods global economic plan.

In the aftermath of the near collapse of the global financial system and the Great Recession and the global economic crisis of 2008, which many believe attributable to the defective global economic regulation, global leaders of G20 declared on April 2, 2009 in the London Communiqué that they would work together to bring the global economy back to sustainable growth and prosperity, and that such a recovery could be achieved only through "an open world economy based on market principles, effective regulation, and strong global

[105] *Supra* note 9.

institutions", and pledged, amongst other things, to "promote global trade."[106] Further, the same Leaders of the Group of Twenty also declared:

> We remain committed to reaching an ambitious and balanced conclusion to the Doha Development Round, which is urgently needed. This could boost the global economy by at least $150 billion per annum. To achieve this we are committed to building on the progress already made, including with regard to modalities.[107]

However, they later seemed to backtrack a little, saying recently that:

> The G20 must go beyond merely advocating for trade and against protectionism. With regard to Doha, we need to determine whether we can achieve the greater level of ambition necessary to make an agreement feasible. Since last summer, a number of countries have engaged directly with each other to advance this goal. To reach a successful outcome we must give political impetus to our negotiators, which should also be reflected in national actions. We must continue to resist protectionist pressures, and to promote liberalization of trade and investment through the national reduction of barriers, as well as through bilateral and regional negotiations.[108]

In his State of the Union address on January 27, 2010, President Obama set a clear national goal to double exports over the next five years and therefore create jobs. He lent some support to Doha, stating:

> [T]onight, we set a new goal: We will double our exports over the next five years, an increase that will support two million jobs in America ... We have to seek new markets aggressively, just as our competitors are. If America sits on the sidelines while other nations sign trade deals, we will lose the chance to create jobs on our shores. But realizing those benefits also means enforcing those agreements so our trading partners play by the rules. And that's why we'll continue to shape a Doha trade agreement that opens global markets, and why we will strengthen our trade relations in Asia and with key partners like South Korea and Panama and Colombia.[109]

Perhaps this tepid support for the Doha Round is not aggressive enough. As for the Europeans, they have tended to indicate that while they will pursue bilateral agreements, they would support Doha if President Obama made a strong push for it:

---

[106] The Group of 20, London Communiqué, Global Plan for Recovery and Reform paras. 3, 4, 6–12 (2009), *available at* http://www.g20.org/Documents/final-communique.pdf.
[107] *Id*., ¶ 23.
[108] Letter from Leaders of the G20, to Fellow G20 Leaders (March 30, 2010), *available at* http://www.whitehouse.gov/the-press-office/joint-letter-g20-leaders.
[109] President Barack H. Obama, State of the Union Address (Jan. 27, 2010), *available at* http://www.whitehouse.gov/the-press-office/remarks-president-state-union-address.

> We have recently agreed to launch free trade negotiations with Canada. A very important milestone is being reached through an FTA with Canada. Already, the EU has well-functioning free trade agreements with both Mexico and Chile. We also expect to be able to conclude shortly the negotiations between the EU and three Andean nations—Colombia, Peru and Ecuador, as well as with Central America once democracy returns to Honduras. These Agreements will, we hope, provide for progressive and reciprocal liberalization by means of ambitious, comprehensive and balanced free trade areas fully compliant with WTO rules. Recently, Trade Commissioner Ashton has had successful discussions to explore the potential for a positive trade agenda with China and Russia.
>
> At the same time as we pursue these bilateral and regional opportunities, we should also make clear that our intentions do not weaken our commitment to a conclusion of the Doha Round of world trade talks. It is fair to say we from Europe would be delighted if President Obama came out explicitly in favor of a world trade deal with the WTO. Signals so far have been rather ambiguous. We were promised a presidential speech on trade before the Pittsburg [sic] meeting, but this appears now to have been postponed, perhaps reflecting, at least partly, the difficulties the administration is having in the adoption of a bill on health care.[110]

However, as of the date of this writing, some observers have noted that the obstacles are still great and the will to overcome them modest, but the stakes remain high:

> Crucially the DDA is still blocked. We have a G20 pledge to conclude in 2010 but even the most optimistic have started to doubt the feasibility of this deadline. The risk of yet another missed Doha deadline remains real. I continue to be a great DDA optimist but sometimes I feel like the last Mohican…..Closing the DDA will strengthen the WTO. The corollary is similarly true. Critics of the Round dangerously underestimate the value of locking in the big, emerging economies within a strengthened rules based trading system. What we call, in jargon, the "systemic" gains are fundamental—it is about providing companies everywhere with a long term insurance policy that borders will remain open. Moreover, Doha is the gateway for further reform of the WTO. The trade negotiations of the future will be less about tariffs (or even services) than about complex non-tariff barriers, standards and regulatory differences, and how to promote sustainable development including better protection of the environment and the respect of fundamental labor rights. But we can't get there until we've

[110] Angelos Pangratis, Minister and Deputy Head of Delegation of the European Commission to the U.S., Address at the Federal Reserve Bank of Philadelphia: Global Trade Today and the Risk of Protectionism: The View from Europe (July 18, 2009), *available at* http://www.eurunion.org/eu/index.php?option=com_content&task=view&id=3518&Itemid=152.

done Doha. And what everyone in the WTO knows is that this Round needs US leadership if it is to be concluded.[111]

It seems clear then that a new approach is in order. This new approach should not approach trade policy in a piecemeal fashion but must have clearly articulated goals, keeping in mind the successes and failures of the past. Progress in the Doha Round is the most feasible way to accomplish this. It is a fine thing to wish to double exports within five years, but it cannot be accomplished without an effective plan. The Doha Round gives us a chance to examine trade policy in a meaningful way, and to finally recognize its importance to the global economy.

[111] David O'Sullivan, Director General for Trade, European Comm'n, at the International Trade Association: *Is Trade Policy Stuck?* (Jan. 20, 2010), *available at* http://www.eurunion.org/oSullivan-WashIntlTradeAssn-1-20-10.pdf.