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Brad Kloewer

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The Spaghetti Bowl of Preferential Trade Agreements and the Declining Relevance of the WTO

Keywords

Commerce, Economics, International Trade, Politics

**THE SPAGHETTI BOWL OF PREFERENTIAL TRADE
AGREEMENTS
AND THE DECLINING RELEVANCE OF THE WTO**

*Brad Kloewer**

I. INTRODUCTION

The renowned economist and prolific scholar Jagdish Bhagwati once famously referred to the variety of preferential trade agreements (“PTAs”) in the world as a “spaghetti bowl” phenomenon, wherein the diversity of trade arrangements between nations and regions makes for a confusing and convoluted mess.¹ The metaphor is apt, he argued, because the increasingly fragmented nature of these varying accords means each transaction must be traced from its origin through a twisting maze of diverse regimes before ever arriving at its destination.² These arrangements are difficult for even seasoned practitioners to untangle, and doubly so for the lay observer.

The confusion these agreements provoke is no surprise, especially when one considers that this multiplicity of norms was precisely what the World Trade Organization (“WTO”) was ostensibly designed to avert. Of course the WTO is an extremely complicated institution, but the order it espouses is fundamentally premised on two basic principles: National Treatment and Most Favored Nation.³ The principle of national treatment is essentially a requirement that imports be treated the same as domestically produced goods, whereas the most favored nation principle requires that all trade benefits offered from one nation to another must be similarly extended to all other nations.⁴ These principles, in turn, are premised on the widely accepted belief that liberalizing trade and reducing barriers such as tariffs leads to benefits for everyone involved.⁵ Preferential trade agreements

* Brad Kloewer is a recent graduate from the University of Denver Sturm College of Law. He received his BA in International Affairs from the University of Colorado in 2008. After working for the Environmental Secretariat of the Central American Free Trade Agreement in Guatemala City, Brad won the Sutton Writing Competition in 2015 and was awarded a scholarship to study at The Hague Academy of International Law in The Netherlands.

1. *CFR's Jagdish Bhagwati Argues Against Preferential Trade Agreements in New Book; Recommends Completion of Multilateral Doha Round*, COUNCIL ON FOREIGN RELATIONS (July 16, 2008), <http://www.cfr.org/world/cfrs-jagdish-bhagwati-argues-against-preferential-trade-agreements-new-book-recommends-completion-multilateral-doha-round/p16798>.

2. Jagdish Bhagwati, *US Trade Policy: The Infatuations with FTAs, in THE DANGEROUS OBSESSION WITH FREE TRADE AREAS* (Claude Barfielde ed., 1995).

3. Warren H. Maruyama, *Preferential Trade Arrangements and the Erosion of the WTO's MFN Principle*, 46 STAN. J. INT'L L. 177, 179 (2010).

4. *Id.*

5. *Why Trade is Good for You*, THE ECONOMIST, Oct. 1, 1998,

("PTAs"), however, obviously confer additional benefits: benefits that exceed those offered to every other "most favored nation." As a result, these agreements essentially amount to more-than-most or even most-most favored treatment.

The Marrakech Agreement,⁶ which created the WTO in 1995 and subsumed the General Agreement on Tariffs and Trade ("GATT")⁷ as well as the General Agreement on Trade in Services ("GATS"),⁸ allows for the creation of PTAs given that certain conditions are met. These provisions are intended to prevent an unwieldy diversity of international trade norms, but, as will be more thoroughly discussed below, scholars from around the world have seriously questioned their effectiveness. In fact, an incredible and unprecedented proliferation of PTAs has been proceeding almost unabated since the inception of the WTO, leading to a substantial number of these agreements having been reported to the WTO by 2014.⁹

In his often-cited commentary of the subject from nearly two decades ago, Professor Bhagwati warned that if the proliferation of PTAs continued, "it is likely that the dilution of the multilateral trading regime by the spaghetti bowl of preferential trade agreements will be our fate."¹⁰ With the benefit of nearly twenty years of hindsight, can we yet determine if he was right? This paper will contend not only that Professor Bhagwati's prescience was well-founded, but moreover that the proliferation of PTAs was an inevitable course of action for a world not yet willing or able to accept a global system of homogenous norms.

Part Two will establish some context by looking at the requirements of Article XXIV of the GATT, the Enabling Clause, and the surprising but telling paucity of WTO Appellate Body jurisprudence on the topic. Part Three will highlight and address some of the most prominent factors that may lead a country or region to engage in PTAs despite the WTO's more comprehensive umbrella. Part Four will look at specific examples of global realities in existence today and explain how these circumstances are demonstrative of a world order that isn't ready or able to submit to a trade regime governed by the standards of the WTO.

II. GATT AND PTAS

Despite their undeniable departure from the Most Favored Nation principle, and the trade distorting effects that result, different provisions of the GATT do in

<http://www.economist.com/node/605144>.

6. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter Marrakesh Agreement]; *see generally* General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, art. XXIV, 1867 U.N.T.S. 187, 33 I.L.M. 1153.

7. General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, 1867 U.N.T.S. 187, 33 I.L.M. 1153 [hereinafter GATT 1994].

8. General Agreement on Trade in Services, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 33 I.L.M. 1167, art. XIV [hereinafter GATS].

9. *See generally*, *List of PTAs*, WORLD TRADE ORG., <http://ptadb.wto.org/ptaList.aspx> (last visited Mar. 4, 2016). *See also* *Regional Trade Agreements*, WORLD TRADE ORG., http://www.wto.org/english/tratop_e/region_e/region_e.htm (last visited Dec. 4, 2014).

10. Bhagwati, *supra* note 2, at 20.

fact permit the formation of PTAs. The Enabling Clause, for example, allows for deviations from the Most Favored Nation principle for “[r]egional or global arrangements entered into amongst less-developed contracting parties for the mutual reduction or elimination of tariffs.”¹¹ This provision obviously applies only to agreements between developing countries, however, so the far more common mechanism under which these arrangements are allowed is Article XXIV, which lays out the criteria for three different allowable types of PTAs: customs unions, free trade agreements (“FTAs”), and interim agreements.¹²

A. Article XXIV

The substantive portions of Article XXIV are found in paragraphs 5 through 9. As a preliminary matter, Paragraph 5 emphasizes that while GATT rules do not prevent the creation of PTAs, they do limit the manner in which they can function.¹³ More specifically, the formation of a PTA cannot justify an increase in any sort of barriers to trade—notably tariffs—to states not party to the PTA.¹⁴ That is, PTAs can only function to reduce barriers to trade between the states that engage in them. They cannot act as a wall to shut out the rest of the world. Paragraph 6 requires that if a state does embark on a PTA that leads to duties or tariffs increasing for any bound tariff item, that state must formulate some means of compensation in line with the requirements of GATT Article XXVIII.¹⁵ Paragraph 7 requires WTO members to notify the WTO whenever they intend to join a PTA, and further stipulates that those agreements must be reviewed to ensure that they do not violate other provisions of the GATT.¹⁶

Paragraph 8 is especially important because it explains the different types of PTAs and establishes rules for their implementation. Paragraph 8(a) deals with customs unions and requires that within a custom union, barriers to trade must be eliminated for “substantially all trade” taking place between its members.¹⁷ For trade taking place outside a custom union, however, members must maintain “substantially” uniform regulations with respect to all third parties.¹⁸ A custom union also must not result in higher tariffs for the group than existed before.¹⁹ Equally relevant to this discussion is paragraph 8(b), which address FTAs.²⁰ Here the requirements are very similar. Within the FTA, barriers to trade must be eliminated for “substantially all trade” between members, and the FTA must not

11. World Trade Organization, *Different and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries*, ¶ 2(c), WTO Doc. No. L/4903 (Nov. 28, 1979), https://www.wto.org/english/docs_e/legal_e/tokyo_enabling_e.pdf [hereinafter Enabling Clause].

12. See GATT 1994, *supra* note 7, at art. XXIV. For the purposes of this article, the umbrella term “PTA” is intended to encompass all three of these arrangements.

13. GATT 1994, *supra* note 7, at art. XXIV, ¶ 5.

14. *Id.*

15. *Id.* at art. XXIV, ¶ 6.

16. *Id.* at art. XXIV, ¶ 7.

17. *Id.* at art. XXIV, ¶ 8(a).

18. *Id.* at art. XXIV, ¶ 8(b).

19. Maruyama, *supra* note 3, at 181.

20. GATT 1994, *supra* note 7, at art. XXIV, ¶ 8(b).

result in an increase in barriers to third parties.²¹

B. WTO Jurisprudence on Article XXIV

The dizzying proliferation of PTAs has continued unabated for over two decades. In 1990, the GATT had only received notification of forty regional trade agreements (“RTAs”) then in existence.²² By June of 2014, however, that number had skyrocketed to 585.²³ In addition, bilateral investment treaties, which typically grant preferential treatment between only two states, have similarly seen an unprecedented growth in popularity, with more than 2,265 having been signed since 1989.²⁴ FTAs too have become increasingly common in recent years, with every WTO member (with the exception of Mongolia) being party to at least one FTA, and with the average WTO member being party to thirteen such agreements.²⁵

With all this expansion, one would expect the WTO Dispute Settlement Body to have produced volumes of commentary on the proper interpretation of Article XXIV. In reality, the Appellate Body has had remarkably little to say on the topic. Despite the explosion of PTA formation around the world, the Appellate Body has never directly interpreted one of the most fundamental elements of Article XXIV—the meaning of the “substantially all” requirement²⁶—nor has there ever been consensus as to whether this term should be understood as a percentage or as something else.²⁷

The leading case dealing with Article XXIV at the WTO is *Turkey – Textiles*, wherein Turkey sought to impose a quota on imports of Indian textiles in order to join a customs union with the European Communities.²⁸ Turkey had ostensibly imposed the quotas in order to prevent Indian textiles that had been imported into Turkey from then being immediately shipped onward into Europe, which would violate the European Communities’ more restrictive quotas on Indian imports.²⁹ Without addressing the more pressing questions regarding the ways in which Custom Unions themselves violate the Most Favored Nation principle and thereby potentially undermine the WTO regime itself, the Appellate Body ruled simply that Article XXIV can be used as a valid defense to trade distorting practices only if it meets two conditions.³⁰ “First, the party claiming the benefit of this defence must

21. *Id.*

22. Mohammad F.A. Nsour, Abdullah Dmour, & Lana Nimri, *Trends in Free Trade: Legal and Policy Perspectives on Jordan's Regional Trade Arrangements*, 24 IND. INT'L & COMP. L. REV. 313, 313 (2014).

23. Bhagwati, *supra* note 2.

24. Chris Brummer, *The Ties that Bind? Regionalism, Commercial Treaties, and the Future of Global Economic Integration*, 60 VAND. L. REV. 1349, 1363 (2007).

25. Maruyama, *supra* note 3, at 193.

26. *Id.*

27. *Id.* at 184.

28. ANDREW T. GUZMAN & JOOST H.B. PAUWELYN, *INTERNATIONAL TRADE LAW* 338, 338-42 (WOLTERS KLUWER, 2D ED. 2012).

29. *Id.*

30. Appellate Body Report, *Turkey – Restrictions on Imports of Textile and Clothing Products*, ¶

demonstrate that the measure at issue is introduced upon the formation of a customs union that fully meets the requirements of sub-paragraphs 8(a) and 5(a) of Article XXIV.”³¹ Second, “that party must demonstrate that the formation of that customs union would be prevented if it were not allowed to introduce the measure at issue.”³² The Appellate Body ruled that, because Turkey and the European Communities could have introduced a rule of origin regime to determine the origin of those textiles, then the import quota could not be justified. This determination did little—if anything—to address the larger and more pressing issues.

Perhaps even more surprising than the lack of guidance on how countries should go about avoiding the trade distorting effects of PTAs is the almost total silence on whether and when notified PTAs meet the requirements of Article XXIV. As already mentioned, paragraph 7 of Article XXIV requires that states notify the WTO of any such agreements so that they may be reviewed for compliance.³³ In acknowledgement of the increasing demand for such assessments, the WTO established the Regional Trade Agreements Committee (“RTAC”) in February of 1996.³⁴ However, in nearly twenty years of operation, the RTAC has only reached consensus on one such agreement, that between the Czech Republic and Slovakia after the breakup of Czechoslovakia in 1993.³⁵

III. WHY FORM A PTA?

But why would anyone want to undermine a system that economists laud by violating the very principles on which that system is based? If the models are correct, then a global economy wherein every state has equal trading benefits with every other would promise to improve everyone’s lot; after all, “a rising tide lifts all boats.”³⁶ It turns out that there are many reasons why a state might prefer regional or bilateral arrangements over the global norms proffered by the WTO. A handful of the most prevalent will be discussed below.

Before delving into those, it may help to ground our considerations in a study from a slightly different branch of economics that professors from the University of Miami and the Harvard School of Public Health conducted nearly two decades ago.³⁷ Researchers there asked subjects a simple question: Assuming that prices remained at their current levels and that the purchasing power of money did not change, would they rather have a yearly income of \$50,000 in a society where

10, WTO Doc. WT/DS34/AB/R (adopted Nov. 19, 1999).

31. *Id.* ¶ 58.

32. *Id.*

33. GATT 1994, *supra* note 7, at art. XXIV, ¶ 7.

34. *Rules: Regional Agreements, Building Blocks or Stumbling Blocks?*, WORLD TRADE ORG., http://www.wto.org/english/thewto_e/minist_e/min05_e/brief_e/brief09_e.htm (last visited Dec. 4, 2014).

35. *Id.*

36. See TED SORENSEN, COUNSELOR: A LIFE AT THE EDGE OF HISTORY 227 (2008) (explaining the phrase “A rising tide lifts all the boats” came from an New England Council regional chamber of commerce).

37. Sara J. Solnick & David Hemenway, *Is more always better?: A Survey on Positional Concerns*, 37 J. OF ECON. BEHAV. & ORG. 373 (1998).

others make only \$25,000, or would they prefer to make \$100,000 in a society where others make \$200,000?³⁸ Shockingly for economists, 50% of respondents preferred to live in the former society rather than the latter.³⁹

This example is intended to highlight what economists so often prefer to overlook: the real world does not function as cleanly or as rationally as theory would suggest. Put simply, different people find different things to be more valuable than money, and material comfort is only one of various considerations that can affect the decision making process. To state the premise a bit more bluntly as it pertains to world trade, for many, global welfare means little when compared to national welfare, especially when considerations such as power and influence come into play. As the numbers above suggest, many people are willing to sacrifice greater comfort for both themselves and others if it means that they can secure a position of influence or power.

A. Foreign Policy

All countries have political aspirations. Large, powerful countries seek to expand and solidify the power they can wield over others while small, relatively powerless countries seek to improve on their positions relative not only to more powerful countries, but also in relation to their peers. Here, too, “better” is often understood not in comparison to a former version of self, but rather in comparison to a current version of others.

With this in mind, the vast expansion of PTAs throughout the world should come as no surprise. Not only are poor, developing countries signing on to PTAs with their similarly situated neighbors and more distant nations alike, but so too are the most powerful nations in the world expanding their base of trade agreements.⁴⁰ In fact, the United States is one of the leaders of this global trend, having signed free trade agreements with twenty different countries, and plans for more on the way.⁴¹

Trade agreements strengthen ties between countries.⁴² They can lead not only to a deepening of economic codependence, but also to greater political cooperation, as clearly demonstrated by the European Union (“EU”).⁴³ They can establish relationships that can later be utilized to expand cooperation on matters of national security or more overtly political machinations at institutions like the

38. *Id.* at 377.

39. *Id.* at 378.

40. See generally, Leonardo Baccini & Johannes Urpelainen, *Preferential Trading Agreements: Helping Economic Reform in Developing Countries*, VOX, <http://www.voxeu.org/article/preferential-trading-agreements-helping-economic-reform-developing-countries>, (last visited Mar. 4, 2016).

41. See generally, *Free Trade Agreements*, INTER'L TRADE ADMIN., <http://trade.gov/fta/> (last visited Dec. 4, 2014).

42. Bhagwati, *supra* note 2.

43. See John McCormick, *Ten Reasons Why the European Union is a Good Idea*, JOHN MCCORMICK ABOUT EUR. AND THE EUR. UNION, <http://johnmccormick.eu/2013/09/ten-reasons-why-the-european-union-is-a-good-idea/> (last visited Mar. 4, 2016).

U.N.⁴⁴ They can even buy leverage to discourage sanctions for unpopular behavior, as is readily demonstrated by European reluctance to jeopardize the flow of Russian oil over the crisis in Ukraine.⁴⁵

PTAs between a select number of nations can also serve another useful political purpose by pitting regions against one another in ideological battles. Venezuela's decision to leave the Andean Community in favor of Mercosur,⁴⁶ or Russia's ongoing efforts to establish a customs union with Kazakhstan and Belarus⁴⁷ are fitting examples of this trend.

B. Deficiencies in the WTO

Many countries prefer to establish PTAs on a regional or bilateral basis because those agreements feature elements that are lacking or inefficient at the WTO. The most obvious example of this sort of shortcoming is the incredible amount of time required to arrive at a consensus in the WTO.⁴⁸ The Doha Round of trade negotiations began thirteen years ago, and prospects remain bleak for any near-term resolution of its most contentious issues.⁴⁹ PTAs, on the other hand, can be negotiated much more quickly, and with far fewer voices clamoring to be heard.⁵⁰

Another glaring omission pertains to the WTO's Dispute Settlement Body, which is only empowered to hear complaints from states.⁵¹ This leaves investment disputes between private parties, or between private parties and states, completely unattended to.⁵² An international trade regime that does not provide a mechanism for settling disputes with private parties is practically begging for alternative

44. Richard Feinberg, *The Political Economy of United States' Free Trade Arrangements*, 26 WORLD ECONOMY 1019, 1038 (2003).

45. Charlemagne, *Europe, Russia, and Sanctions: Limp wrist diplomacy?*, THE ECONOMIST (Mar. 21, 2014), <http://www.economist.com/blogs/charlemagne/2014/03/europe-russia-and-sanctions>.

46. Brummer, *supra* note 24, at 1380-90.

47. Boris N. Mamlyuk, *Regionalizing Multilateralism: The Effect of Russia's Accession to the WTO on Existing Regional Integration Schemes in the Former Soviet Space*, 18 UCLA J. INT'L L. & FOREIGN AFF. 207, 210 (2014).

48. ABC OF PREFERENTIAL TRADE AGREEMENTS: FREQUENTLY ASKED QUESTIONS, MONOGRAPHS ON GLOBALIZATION AND INDIA, MYTHS AND REALITIES, ¶14 (CUTS Centre for International Trade 2009).

49. Duncan Green, *Doha round has run its course but new trade realities demand solutions*, THE GUARDIAN (May 4, 2011), <http://www.guardian.co.uk/global-development/poverty-matters/2011/may/04/doha-trade-realities-demand-solutions>. ABC OF PREFERENTIAL TRADE AGREEMENTS: FREQUENTLY ASKED QUESTIONS, MONOGRAPHS ON GLOBALIZATION AND INDIA, MYTHS AND REALITIES, ¶14 (CUTS Centre for International Trade 2009).

50. Regional Trade Integration and Conflict Resolution (Shaheen R. Khan ed., 2009), http://samples.sainsburysebooks.co.uk/9781134023004_sample_509655.pdf (last visited Mar. 4, 2016).

51. *Understanding the WTO: Settling Disputes*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm (last visited Feb. 5, 2016).

52. Alberto Alemanno, *Private parties and WTO Dispute Settlement System* (2004), Cornell Law School Inter-University Graduate Student Conference Papers. Paper 1, http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1000&context=lps_clap (last visited Feb. 5, 2016).

institutions to step in. To fill this void, a variety of competing and often overlapping institutions have sprung up over the years, including the International Court of Justice ("ICJ"),⁵³ regional dispute settlement bodies such as the NAFTA tribunals,⁵⁴ investor-state arbitration mechanisms such as the International Centre for Settlement of Investment Disputes ("ICSID"),⁵⁵ and even municipal courts applying local laws and the principles of comity.⁵⁶ To be sure, this variety of dispute settlement mechanisms has caused numerous problems of its own, not least of which being duplication of hearings and often fragmentation of jurisdictions.⁵⁷

Nonetheless, these mechanisms are often preferable because they can at least provide some sort of acceptable remedy for aggrieved parties. The WTO is only empowered to provide prospective rather than retrospective remedies, and it can only impose the burden for securing those remedies on states.⁵⁸ Most private investors seek damages when they bring a complaint to one of these tribunals, thereby rendering the DSB simply inadequate for the demands of many of the global economy's most significant players.⁵⁹

C. *Labor and the Environment*

While it is true that the WTO does provide a number of exceptions under GATT Article XX that pertain to non-economic state objectives such as protection of public morals and public health concerns,⁶⁰ it is essentially silent on labor standards and decidedly unhelpful in regards to environmental protections.

Currently, WTO rules and disciplines do not even apply to labor standards.⁶¹ This is remarkable when one considers the enormous role that labor conditions play in assessments of comparative advantage. More importantly, improvements in labor standards are one of the most consistent and fundamental demands posed by the electorates of many countries around the world, but especially those of developing countries.⁶² An absence or diminution of labor standards in one

53. Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 933.

54. See North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993); see also *Overview of the Dispute Settlement Provisions*, NAFTA SECRETARIAT, <https://www.nafta-sec-alena.org/Home/Dispute-Settlement/Overview-of-the-Dispute-Settlement-Provisions#Chapter11> (last visited Apr. 20, 2016).

55. *About ICSID*, INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, <https://icsid.worldbank.org/apps/ICSIDWEB/about/Pages/default.aspx> (last visited Apr. 20, 2016).

56. Andrea K. Bjorklund, *Private Rights and Public International Law: Why Competition Among International Economic Law Tribunals Is Not Working*, 59 HASTINGS L.J. 241, 246-56 (2007).

57. *Id.* at 258-61.

58. Thomas Sebastian, *World Trade Organization Remedies and the Assessment of Proportionality: Equivalence and Appropriateness*, 48 HARV. INT'L L. J. 337, 369 (2007).

59. Dan Sarooshi, *Investment Treaty Arbitration and the World Trade Organization: What Role for Systemic Values in the Resolution of International Economic Disputes?* 49 TEX. INT'L L.J. 445, 461 (2014).

60. GATT 1994, *supra* note 7, at art. XX.

61. World Trade Organization, Briefing Note, *Trade and Labour Standards: Subject of Intense Debate.*, http://www.wto.org/english/thewto_e/minist_e/min99_e/english/about_e/18lab_e.htm (last visited Feb. 5, 2016).

62. World Trade Organization, Briefing Note, *Trade and Labour Standards: A Difficult Issue for*

country can cause serious tension for the workers of another country when they are made to compete as though they were on an equal footing.⁶³ This issue inevitably poses political problems for the leaders of all WTO member states. The absence of guidance on this most basic concern is why many post-WTO PTAs feature agreements and the establishment of standards on this topic.⁶⁴ The side agreement to NAFTA, the North American Agreement on Labor Cooperation (“NAALC”), is an early example of the recognition that contracting parties to PTAs pay to this political necessity.⁶⁵ Just over a decade later, the passage of the Central American Free Trade Agreement (“CAFTA”) expanded on this framework, including an entire chapter on labor standards.⁶⁶ The efficacy of these mechanisms is hotly debated,⁶⁷ but these examples demonstrate the naiveté that characterizes a trade regime that pretends it can overlook such a foundational economic concern. Trade agreements that omit this consideration are doomed to perceptions of inadequacy.

Another growing concern for the global economy is environmental standards.⁶⁸ These too play an enormous role in assessments of comparative advantage. A country that does not protect its environment is far more appealing for foreign investors than one that does, at least in many sectors such as mining, logging, or chemical engineering (to name a few).⁶⁹ Countries that have painstakingly developed environmental protections are understandably weary of being made to compete with countries that have not. As mentioned above, GATT Article XX does in fact provide some protections under subsection (b) for states to craft policy that is “necessary to protect human, animal or plant life”⁷⁰ or under subsection (g) for measures that are “relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.”⁷¹ While these inclusions are noteworthy, they hardly address the fundamental question of whether or not an absence of environmental protections constitutes an unfair distortion of trade. Moreover, a system in which countries can secure an advantage over others by carelessly pillaging their own environment is tantamount to a race to the bottom

Many WTO Member Governments,

https://www.wto.org/english/thewto_e/minist_e/min01_e/brief_e/brief16_e.htm.

63. Drusilla K. Brown, *Labor Standards: Where Do They Belong on the International Trade Agenda?*, 15 J. ECON. PERSPECTIVES 89 (2001).

64. Samira Salem & Faina Rozental, *Labor Standards and Trade: A Review of Recent Empirical Evidence*, J. INT’L COM & ECON. 1 (2012).

65. Frank H. Bieszcza, *Labor Provisions in Trade Agreements: From the NAALC to Now*, 83 CHI.-KENT L. REV. 1387, 1388 (2008).

66. Central American-Dominican Republic-United States Free Trade Agreement, U.S.-Costa Rica-Dom. Rep.-El Sal.-Guat.-Hond.-Nicar., May 28, 2004, Chapter 16, 43 I.L.M. 51 [hereinafter CAFTA].

67. Kimberly A. Elliott, *Labor Standards, Development, and CAFTA*, THE PETERSON INST. FOR INT’L ECON. (2004), <http://www.iie.com/publications/pb/pb04-2.pdf> (last visited Feb. 5, 2016).

68. PATRICK F. J. MACRORY ET AL., THE WORLD TRADE ORGANIZATION: LEGAL, ECONOMIC AND POLITICAL ANALYSIS 145 (2005).

69. *Id.*

70. GATT 1994, *supra* note 7, at art. XX, ¶ b.

71. *Id.* at art. XX, ¶ g.

that many would prefer to avoid. For this reason, it is no surprise that more recent PTAs such as CAFTA include an entire chapter on environmental protections and a secretariat empowered to investigate state compliance.⁷² These things do matter and they cannot be overlooked.

IV. THE WORLD TODAY

As already mentioned, the Doha Round of negotiations has been ongoing for more than a decade, and few if any expect breakthroughs any time soon.⁷³ Meanwhile, virtually every country in the world has gone about deepening its network of trade relations in forums removed from the auspices of the WTO.⁷⁴ This should come as no surprise, however, when one considers the stark contrasts between the world of today and that of 1995. In the interim, the economies of India, Brazil, and especially China, have grown at an incredible and unforeseeable rate.⁷⁵ World population has increased by over a billion. Left-leaning populists have been elected across South America and Russia has reassumed a frequently oppositional stance to Western initiatives. Global financial crises have shaken faith in Western institutions and the dawn of the internet has altered how people from around the world communicate and share information.⁷⁶ Climate change has progressed to the point of inevitably pending crises.⁷⁷ The crafters of the WTO seem to have anticipated none of the strains these developments would impose. Perhaps when Francis Fukuyama declared "The End of History" in 1992, they actually believed him.⁷⁸ In any case, the WTO in its current form is unequipped to act as the voice of authority that the world needs to resolve any of these pressing global economic concerns. The world simply is not ready or even interested in abiding by its norms.

A. *The New Powers*

When the Cold War ended, the United States assumed a position of unprecedented power.⁷⁹ No nation could effectively counter its influence, and

72. CAFTA, *supra* note 66, Chapter 17.

73. Green, *supra* note 49.

74. Matthew Wilson, *Friend or Foe? Regional Trade Agreements and the WTO*, INT'L CTR. FOR TRADE AND SUSTAINABLE DEV. (Feb. 1, 2008) <http://www.ictsd.org/bridges-news/bridges/news/friend-or-foe-regional-trade-agreements-and-the-wto>.

75. Jerry Harris, *Emerging Third World Powers: China, India and Brazil*, 46 RACE & CLASS 7, 8 (2005), http://graduateinstitute.ch/files/live/sites/iheid/files/sites/mia/users/Rachelle_Cloutier/public/Drager%20Global%20Public%20Health/Harris%20Emerging%20third%20world%20powers%20China%20India%20Brazil.pdf.

76. Mindi Orth, *Technology & How We Communicate*, CHRON.COM, <http://smallbusiness.chron.com/technology-communicate-27322.html> (last visited Feb. 8, 2016).

77. Ben Brumfield, *Global warming is epic, long-term study says*, CNN (Mar. 8, 2013), <http://www.cnn.com/2013/03/08/world/world-climate-change/>.

78. See generally, FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* (1992)

79. See generally, Kylie Poulin, *Intervention from Above: The United States, Russia, and Power Transition in the Middle East*, IND. UNIV. DEP'T OF POL. SCI., <http://polisci.indiana.edu/undergraduate/theses/Poulin.pdf>.

given its ascent to global dominance, few dared to question the wisdom of its economic prescriptions.⁸⁰ Today, however, there are several nations that—while not yet finding themselves on exactly equal footing with the U.S.—have secured enough power and influence to resist and even counter the objectives of the United States. Foremost amongst these powers is China.⁸¹ In 1995, China's GDP was roughly \$727 billion.⁸² Today, that number has skyrocketed to over \$9 trillion.⁸³ China holds over \$1.3 trillion in U.S. debt.⁸⁴ Along with India and Russia, it recently launched "The New Development Bank," which is intended to act as a rival institution to the World Bank.⁸⁵ Similar transformations are also happening in various other developing countries.⁸⁶

These shifts have been very difficult to cope with for the Western powers that crafted the WTO. When they designed the system, as already mentioned, they likely did so under the impression that their power would somehow continue unrivaled. Many commentators have made note of the irony this situation presents. For example, it has been noted that "[t]he west, which has been the traditional defender of free trade – because free trade always favors the most powerful and advanced economies – is likely to run for cover and put up protectionist barriers, unable to cope with the political, social and economic implications of the rise of China."⁸⁷ Such a turn of events would clearly demonstrate that not even the U.S.

80. David Pierce, *America in the Post War Period*, STUDENT PULSE, http://www.studentpulse.com/articles/2/american-the-post-war-period?utm_expid=226251561.jO_KIIIQVuEPc9uLGsmiQ.0&utm_referrer=https%3A%2F%2Fwww.google.com (last visited Feb.10, 2016).

81. See generally, Andrew Soergel, *America's Days Are Numbered as the World's Top Economy*, U.S. NEWS (Dec. 28, 2015), <http://www.usnews.com/news/articles/2015-12-28/americas-days-are-numbered-as-the-worlds-top-economy>.

82. See Thitapha Wattanaputtipaisan, *The Topology of ASEAN FTAs, with Special Reference to IP-Related Provisions in INTELLECTUAL PROPERTY AND FREE TRADE AGREEMENTS IN THE ASIA-PACIFIC REGION* 109, 116, n.14 (Christoph Antons et al. eds., 2015) (stating China's GDP was \$700.2 billion in 1995); World Heritage Encyclopedia, *Historical GDP of the People's Republic of China*, WORLD PUBLIC LIBRARY, http://www.worldlibrary.org/articles/Historical_GDP_of_the_People's_Republic_of_China (last visited Apr. 20, 2016) (providing "a list of China's historical domestic product (GDP) values").

83. *Statistical Communiqué of the People's Republic of China on the 2013 National Economic and Social Development*, NAT'L BUREAU OF STAT. OF CHINA (20 Jan. 2014) http://www.stats.gov.cn/english/PressRelease/201401/t20140120_502079.html.

84. Max Fisher, *This surprising chart shows which countries own the most US debt*, Wash. Post, Oct. 10, 2013, <http://www.washingtonpost.com/blogs/worldviews/wp/2013/10/10/this-surprising-chart-shows-which-countries-own-the-most-u-s-debt/>.

85. Damien Sharkov, *Russia, China, India to Launch Rival to World Bank*, NEWSWEEK (Jul. 9, 2014), <http://www.newsweek.com/russia-china-india-ready-launch-rival-world-bank-258058>.

86. "Rise of South" *Transforming Global Power Balance, Says 2013 Human Development Report*, UNITED NATIONS DEV. PROGRAMME (Mar 14, 2013), <http://www.undp.org/content/undp/en/home/presscenter/pressreleases/2013/03/14/-rise-of-south-transforming-global-power-balance-says-2013-human-development-report.html>.

87. Martin Jacques, *The Death of Doha Signals the Demise of Globalisation*, THE GUARDIAN (Jul. 13, 2006), <http://www.theguardian.com/commentisfree/2006/jul/13/comment.globalisation>.

has full faith in the wisdom of the “Washington Consensus.”⁸⁸

B. *Climate Change*

The overwhelming global scientific consensus is that human behavior is influencing climate change in a way that is dangerous for the health and wellbeing of our species.⁸⁹ This year is likely to be the hottest in known history.⁹⁰ The polar ice caps are melting at an incredible rate and threatening to raise sea levels worldwide, imperiling substantial portions of many of Earth’s most densely populated metropolises.⁹¹

As stated above, the WTO has very little to say about environmental regulations, and even less power to enforce them.⁹² For an institution that aspires to dictate global norms, this is unacceptable. A trade regime that does not recognize and prioritize the survival of our species and make enforceable demands in line with that mandate cannot expect to be deferred to in a future inevitably marked by environmental calamity. On the contrary, a regime which deems such pressing concerns unworthy of attention may well be understood in retrospect as being much of the problem. Regional, bilateral, and even non-governmental agreements will—as they have already been doing—be made to step in to fill the void and establish new means for imposing restrictions on the most harmful economic policies.

V. CONCLUSION

When Jagdish Bhagwati warned of the danger posed by an overwhelming multitude of PTAs,⁹³ he was correct in believing that these would dilute the multilateral system proffered by the WTO. As the failure of the Doha talks and the resultant deferral to PTAs in their wake has clearly demonstrated, that dilution has resoundingly occurred. More importantly though, that PTAs were occurring at the time of the WTO’s formation, and that they have occurred with increasing frequency ever since, is ample demonstration that few if any ever really wanted or believed in the promise of the WTO in the first place.

88. *See generally*, STEVEN ORTLEPP, *A NEW LOOK AT THE PROPHECIES OF DANIEL 153* (2010).

89. Intergovernmental Panel on Climate Change, *Climate Change 2014 Synthesis Report Contribution of Working Groups I, II and III to the Fifth Assessment Report of the IPCC* (2014), https://www.ipcc.ch/pdf/assessment-report/ar5/syr/SYR_AR5_FINAL_full.pdf.

90. Carol J. Williams, *2014 set to be hottest year on record, U.N. climate agency reports*, L.A. Times, Dec. 3, 2014, <http://www.latimes.com/world/europe/la-fg-world-climate-20141203-story.html> (last visited Dec. 5, 2014).

91. Zoe Schlanger, *Antarctica Ice Sheet Sheds an Everest of Ice Every Two Years: Study*, NEWSWEEK (Dec. 5, 2014) <http://www.newsweek.com/key-ice-sheet-antarctica-losing-everest-sized-volume-ice-every-two-years-study-289669>.

92. *See generally*, Vandana Shiva, *WTO deemed unfit for environmental management*, UNIV. OF WOLLONGONG (Mar. 24, 1994), <http://www.uow.edu.au/~sharonb/STS300/equity/economic/WTOnews/wtonews4.html>.

93. Bhagwati, *supra* note 2.

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