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World Trade Law after Doha: Multilateral, Regional and National Approaches

David A. Gantz
The University of Arizona
James E. Rogers College of Law

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David A. Gantz*

I. Introduction

After ten years, the Doha Development Round is effectively dead, at least in its present form, even if no one seems willing to affirm its passing in so many words for fear of being blamed for its demise.¹ At best, “the Doha Rounds seems likely to lapse into an indefinite period of hibernation—with little idea of when or how the talks could be awakened.”² Doha will not likely again be a comprehensive “single undertaking, and it is unlikely that a broadly comprehensive round of trade negotiations reminiscent of Doha or the Uruguay Round will be attempted in the foreseeable future. Although some have suggested a “time out,”³ with resumption only after political changes in the United States and China, in 2013, there is little reason at this writing, with the inability of the Ministers at the WTO’s 8th Ministerial Meeting in December 2011 to resurrect the Doha Round,⁴ to believe that a few years’ delay would make a major breakthrough in the negotiations possible.

While some have suggested that Doha’s demise threatens the continued existence of the GATT/WTO system,⁵ many more see continued strength in the system as developed over the past nearly 65 years, with its extensive body of rules and a mandatory dispute settlement system that despite its flaws works reasonably well, and consider it unlikely that the binding rules that have been negotiated in prior GATT rounds will atrophy.⁶ Even with some risks of backsliding and increasing protectionism many nations, the United States, the European Union (EU), Japan, Brazil, China and India, among others, have far too much to lose to make abandoning the WTO

* Samuel M. Feghtly Professor of Law and Director, International Trade and Business Law Program, the University of Arizona, James E. Rogers College of Law. Copyright© 2011, David A. Gantz.

¹ Alan, Beattie, *WTO: World waits to move on after Doha*, Financial Times (UK electronic edition), Sep. 22, 2011, at 1.

² Jeffrey J. Schott, *The Doha Dilemma: Implications for Korea and the Multilateral Trading System*, Sep. 26, 2011, at 1, available at <http://www.piie.com/publications/papers/schott20110926.pdf> (last visited Oct. 20, 2011) [hereinafter “Schott I”].

³ Jeffrey J. Schott, *What Should the United States do About Doha?*, Jun. 2011, at 3, available at <http://www.iie.com/publications/pb/pb11-08.pdf> (last visited Oct. 20, 2011) [hereinafter “Schott II”].

⁴ See Chairman’s Concluding Statement, Dec. 17, 2011, available at http://www.wto.org/english/thewto_e/minist_e/min11_e/min11_11_e.doc (last visited Dec. 17, 2011) (reaffirming the Members’ commitment to WTO principles but reflecting no progress on the Doha agenda, or other achievements other than approving membership for Vanatu, Russia, Samoa and Montenegro).

⁵ “Failure of the Doha Round will create a dangerous situation in the WTO . . .” according to Peter Sutherland, quoted in Viv Davies, *The Future of Doha and the WTO: a CEPR Trade Seminar*, Apr. 27, 2011, at 7, available at <http://www.voxeu.org/index.php?q=node/6431> (last visited Oct. 20, 2011).

⁶ See Sandra Polaski, *What Future for the WTO?*, *L’Economie Politique*, Jul. 2007 (English version published by Carnegie Endowment for International Peace), at 3 (arguing that existing WTO rules will still set trade rules for major players) [hereinafter “Polaski”].

rules or even departing substantially from them a rational option. Thus, the WTO system, with its inefficiencies and deficiencies (of which there are many⁷) is here to stay.

Over the past 25 years, international trade has expanded in a robust manner, outpacing world population by about 5 percent, compared to 1 percent from 1870 to 1950.⁸ Between 1994 and 2006, world merchandise trade increased each year except for 2001, in amounts ranging from approximately 10 percent in 1997, 2000 and 2004, to only 3.5 percent in 2002.⁹ While world trade rules undoubtedly facilitated this growth, other factors, including trade in components as a result of just-in-time manufacturing processes and the revolution in shipping brought about by the containerization phenomenon,¹⁰ as well as some of the more successful regional trade agreements (RTOs) such as the EU and NAFTA, also contributed. Perhaps Doha has been a victim of the success of prior GATT negotiating rounds, because of the extent of liberalization except with regard to agricultural subsidies, sensitive agricultural good and certain manufactured products.¹¹

The last several decades have also been a time of fundamental change to the global trading system. The “Quad” countries (the United States, EU, Japan and Canada) no longer dominate the negotiations. China (since November 2001), Brazil, India, Indonesia and South Africa in particular are major players without whose concurrence little can be accomplished in Geneva. This trend will likely continue, as it is estimated that in 20 years or so ten of the largest economies will be what we currently regard as developing countries, and China will likely be almost every WTO Member’s largest trading partner.¹² Peter Sutherland, the last secretary general of GATT, states bluntly that because China is *the* “world’s most successful trading nation and will remain so for a long while . . . China [is] the key player in the World Trade Organization.”¹³ Less significant change is likely for most other developing countries, which despite increasing their share of world trade are likely to remain poor.¹⁴

The Doha process has also been plagued by a confluence of negative political factors in the United States, the EU, India and elsewhere. The expiry of Trade Promotion Authority (TPA) in the United States in mid-2007 and divided government since 2010 have made continued

⁷ Various members have complained, *inter alia*, about U.S. alleged abuse of the antidumping laws; unfairness of the dispute settlement mechanism for small developing countries; US and EU agricultural subsidies; major developing country markets (particularly China, India and Brazil) to imports of both agricultural and manufactured products from other Members; extraordinarily high tariffs imposed by many countries on a variety of agricultural and non-agricultural products; insufficiently “special and differential treatment” of imports from developing countries, particularly the least-developed countries; continued tariff and non-tariff restrictions to textile, apparel and footwear imports from developing country members; insufficient

⁸ See Uri Dadush, *The Future of the World Trading System*, Int’l Economic Bulletin, Jul. 14, 2010, at 3, available at <http://www.carnegieendowment.org/2010/07/14/future-of-world-trading-system/45b> (last visited Oct. 18, 2011) [hereinafter “Dadush”].

⁹ Polanski, *supra* note ___, at 4.

¹⁰ MARC LEVINSON, *THE BOX: HOW THE SHIPPING CONTAINER MADE THE WORLD SMALLER AND THE WORLD ECONOMY BIGGER* (Princeton: Princeton UP, 2006)

¹¹ Schott I, *supra* note ___, at 2.

¹² See Dadush, *supra* note ___, at 3.

¹³ Peter Sutherland, *A Future for the World Trade Organization*, Sep. 2010, at 9, available at <http://www.ecipe.org/publications/jan-tumlr-policy-essays/a-future-for-the-world-trade-organisation/PDF> (last visited Oct. 29, 2011).

¹⁴ *Ibid.*

negotiations more difficult, given that most nations are reluctant to conclude negotiations with the United States unless they are assured (as TPA provides) that Congress cannot unilaterally change the agreement.¹⁵ Elections in India in 2009 likely contributed to the failure of progress in the negotiations in 2008, as did Brazil's more recent defensive approach toward rapidly increasing imports from China and currency appreciation at home.¹⁶ So did the inward focus of those and other developing nations, for which reducing poverty remains a major focus of government policy and actions.¹⁷ If one adds Japan's on-going political paralysis, the EU's focus on internal debate about the Eurozone and a stagnant regional economy and implementation of the Lisbon Treaty, and China's reluctance to accept the full responsibilities of WTO membership and world economic power status (likely in part as a result of a coming leadership transition),¹⁸ there has arguably been a perfect storm of extreme political caution among the major players in the negotiations.

If there is reason for cautious optimism post-Doha it is because there are alternatives to a broad package of new or amended WTO agreements. These alternatives while less than ideal may nevertheless provide an impetus for continuing trade liberalization both among specific countries and in some instances world-wide. Such possibilities include existing and future "plurilateral" trade agreements (specialized agreements among willing Members but not the entire membership such as the WTO's Government Procurement Agreement and the Information Technology Agreement), hundreds of regional trade agreements (RTAs) and various national laws and regulations in the soon to be 156 member nations of the WTO.

I begin in Part II by reviewing briefly the evolution of the world trading system since 1947, along with the major reasons for Doha's failure and for the widespread belief that a broad agenda of "single undertaking" negotiations cannot be re-created in the foreseeable future. Part III discusses the specific areas in which relatively widespread international agreement may be reached, including information technology, trade facilitation, government procurement, services, fisheries subsidies and treatment of state owned enterprises (SOEs). Part IV discusses the historical development, current state and likely future expansion of RTAs, while Part V addresses the importance of national, largely unilateral trade liberalization through tariff and non-tariff barrier reduction such as that which has recently taken place in Chile and Mexico, and may well be more common, even in the United States and the European Union (EU) and even in the agricultural sector.¹⁹

When trying to assess the future, I have focused on the relatively near term, primarily the coming 5-10 years. Predictions beyond that period are fraught with peril, in the international

¹⁵ 19 U.S.C. § 3803-3805 (2002, expired 2007).

¹⁶ Susan Schwab, *After Doha: Why the Negotiations are Doomed and What we Should do About It*, Foreign Affairs, May 1, 2011, at 104 (in which the former U.S. Trade Representative catalogues the political challenges) [hereinafter "Schwab"].

¹⁷ See Dadush, *supra* note ___, at 3 (arguing that reducing income gaps are much more important than a free trade offensive).

¹⁸ Based in part on Schwab, *supra* note ___.

¹⁹ See *Agricultural Committees Devising Proposal to cut \$23 Billion in Spending*, WORLD TRADE ONLINE, Oct. 17, 2011, available at <http://insidetrade.com/201110172379317/WTO-Daily-News/Daily-News/agriculture-committees-devising-proposal-to-cut-23-billion-in-spending/menu-id-173.html> (last visited Oct. 18, 2011) (discussing plans because of budgetary pressures to reduce agricultural subsidies).

trade area as in most others. I doubt than anyone, and certainly not I, has a crystal ball that would give an accurate reading 40 or even 20 years hence. Among other constraints are the impossibility of assessing the impact of unexpected events, ranging from a nuclear bomb or other catastrophic attack in a developed country by a terrorist group, to economic and social dislocation resulting from much more rapid climate change than experts currently anticipate, to a decline in Chinese economic growth on the one hand to a reversal of the economic decline of Europe and the United States on the other.

As others have pointed out, “the WTO is an integral part of the world trading system, but it is only one part”²⁰ There is insufficient political will to conclude the Doha Round. It remains to be seen whether among the willing trading nations there exists the necessary political foresight to assure that the process of expanding world trade through the reduction of trade and non-trade barriers will continue well into the 21st Century. If such will exists there are tools other than a major WTO negotiating round to achieve such goals.

II. World Trade as of 2011

The GATT 1947, as modified and expanded in eight major multilateral rounds culminating with the Uruguay Round’s Marrakesh Agreement in April 1994,²¹ resulted by 2000 (when the Uruguay Round tariff concessions were fully implemented) in an aggregate reduction of tariffs imposed by developed countries of approximately 40 percent and for developing countries of 20 percent compared to pre-Uruguay Round levels.²² Beginning with the completion of the Tokyo Round in 1978, rules relating to a number of non-tariff areas, such as dumping, subsidies, government procurement and customs valuation were added as “codes,” albeit on a plurilateral basis.²³

The watershed event for the world trading system was the completion of seven and a half years of negotiations that resulted in the Uruguay Round agreements, which became effective for most existing GATT Contracting Parties in 1995. The Uruguay Round constituted a massive expansion of the international system, by adding to the GATT trade in goods disciplines services trade; trade-related intellectual property; limited coverage of trade-related investment; coverage of agriculture, textiles, sanitary and phytosanitary measures and standards; and a mandatory dispute settlement system.²⁴ Moreover, disciplines which under the Tokyo Round had been optional, such as those relating to dumping, subsidies and customs valuation, were no longer so

²⁰ Dadush, *supra* note ___, at 1.

²¹ Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, *available at* http://www.wto.org/english/docs_e/legal_e/legal_e.htm (last visited Oct. 18, 2011) [hereinafter “WTO Agreement”].

²² Mark R. Sandstrom, Julia M. Cheung & Michelle D. Lynch, *Market Access, in* THE WORLD TRADE ORGANIZATION 122-23 (Terrence P. Stewart, ed.) (Chicago: ABA, 1996).

²³ See WTO, The Tokyo Round Codes, *available at* http://www.wto.org/english/thewto_e/minist_e/min98_e/slide_e/tokyo.htm (last visited Oct. 24, 2011).

²⁴ WTO, The Uruguay Round, *available at* http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm (last visited Oct. 24, 2011); WTO Agreement and annexes, *supra* note __.

after the Uruguay Round. Also, discretionary plurilateral agreements applicable to government procurement, civil aviation, dairy products and bovine meat were included in the package.²⁵

While this expansion has proven relatively easy to digest for developed countries, the additional obligations, particularly in the areas of intellectual property and services, imposed enormous burdens on developing nation administrative agencies and the courts, among others. Even with long grace periods—India and other least developed WTO members were not required to fully implement the Agreement on Trade-Related Aspects of Intellectual Property (TRIPS) for ten years after January 1, 1995 (recently extended to 2013 and likely to be extended further)²⁶—the burdens of full compliance were and are substantial, factors which have clearly influenced the reluctance of some developing countries to move forward again under Doha.

The United States and the EU, very unwisely in retrospect, sought at a WTO Ministerial Meeting in Seattle in 1999 to obtain agreement to kick off yet another negotiating round. The effort was a miserable failure going well beyond street demonstrations, in part because the majority of the Members were still experiencing grave difficulties in implementing the obligations they had accepted in the Marrakech Agreement, and neither the United States nor the EU had in the preliminary sessions shown much willingness to include on the agenda issues of importance to developing country members, such as alleged U.S. abuses of the Anti-dumping Agreement.²⁷ Perhaps the most significant result of the Seattle meeting was confirmation that world trade negotiations would no longer be dominated by the United States, EU, Japan and Canada but that major developing nations, particularly Brazil, India and South Africa, would play a major role.²⁸

The time of initiation of the Doha Round, in November 2011, was no coincidence. Built-in incentives to initiate the Round came in part from several of the Uruguay Round Agreements, including the General Agreement on Trade in Services and the Agreement on Agriculture, because both incorporated in their texts obligations (beginning in 2000) to continue expanding the disciplines in those fields. A spirit of unity briefly following 9/11, the negotiating skills of U.S. Trade Representative Robert Zoellick and WTO Secretary General Mike Moore, and labeling the round the “Doha Development Round” probably helped bring about the accord, given that many of the developing country members after seven years operating under the WTO agreements felt that they had not received the benefits they expected from the package.²⁹ The labeling also reflected reality; developing members were and are a substantial majority of the WTO members and thus could determine in 2001 whether new trade rules would be attempted.³⁰

²⁵ WTO Agreement, *supra* note ___, Annex 4.

²⁶ TRIPS, WTO Agreement, *supra* note ___, Annex ___; **cite to general counsel extension.**

²⁷ Agreement on the Interpretation of Article VI of GATT 1994, WTO Agreement, *supra* note ___, Annex 1A, art. 66. For a discussion of the Seattle meeting and the reasons for its failure see David A. Gantz, Failed Efforts to Initiate the “Millennium Round” in Seattle: Lessons for Future World Trade Negotiations, 17 ARIZONA J. INT’L & COMP. L. 349 (2000).

²⁸ China did not become a member until December 11, 2001. See WTO, China and the WTO, available at http://www.wto.org/english/thewto_e/countries_e/china_e.htm (last visited Oct. 24, 2011).

²⁹ RAJ BHALA, INTERNATIONAL TRADE LAW: INTERDISCIPLINARY THEORY AND PRACTICE 61-63 (3rd ed., Newark: Lexis Nexis, 2008).

³⁰ Polanski, *supra* note ___, at 3.

In retrospect, the declaration, with 52 paragraphs covering a broad variety of procedural and substantive areas, was overly optimistic and perhaps naive.³¹

From the outset there were signs that the negotiations would be difficult. The developing world was skeptical about the willingness of the major developed countries to offer major concessions in such areas as agricultural subsidies without asking for painful concessions in return. The “Singapore Issues” of investment, anti-competition rules, trade facilitation and transparency in government procurement (the latter shorthand for corruption) were included in the Doha Declaration but never accepted by a majority of the members, and dropped completely from the negotiations a few years later.³²

After six or so years of negotiations it became apparent that disagreements between key developed nations such as the United States and the EU on the one hand, and the largest developing countries, including Brazil, China and India, had become impossible to bridge. Nor, by 2007, was there agreement between the United States and the EU on reduction of agricultural subsidies, while Brazil, on behalf of the “G20” developing country Members, insisted on substantial reductions. India, on behalf of the “G33” countries whose agricultural sectors were dominated by small farmers, sought to shield 20% of its agricultural tariffs on “sensitive products.”³³ Manufactured goods tariffs have been similarly controversial, with the United States and the EU seeking such tariffs (non-agricultural market access or “NAMA”) of no more than 10% for developed countries and no more than 15% for developing countries. Developed members believed that better market access for both agricultural and manufactured exports, and for key services such as those in the financial and telecommunications areas, were the only means to securing domestic support for further concessions on agricultural subsidies and additional tariff reductions. Argentina, Brazil, China, India, South Africa and other developing nations adamantly refused.³⁴

The negotiations were also complicated by the fact that despite common positions in public the developing country members’ interests were hardly monolithic. Not only the United States and the EU would have benefitted from greater market access for both agricultural and manufactured goods to these major developing country markets; smaller and poorer developing countries will suffer economically, probably much more than the United States and the EU) from the China, Brazil and India’s intransigence.³⁵ It was only late in the process that a few middle-income developing countries such as Chile, Colombia, Costa Rica, Hong Kong, Malaysia, Pakistan and Singapore advocated more market-opening measures by the dominant developing countries, with harsh criticism from them the result.³⁶

³¹ Doha Ministerial Declaration, Nov. 14, 2001, available at http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm (last visited Oct. 19, 2011).

³² See WTO secretariat, *The Doha Declaration Explained*, Relationship between Trade and Investment, Relationship between Trade and Competition Policy, available at http://www.wto.org/english/tratop_e/dda_e/dohaexplained_e.htm#investment (last visited Oct. 20, 2011).

³³ Polaski, *supra* note ___, at 5.

³⁴ *Ibid.*

³⁵ Schwab, *supra* note ___, at 3.

³⁶ *Ibid.*

Also, although the criticism has seldom been articulated by member governments in public, concerns in such countries as Argentina, Brazil and MERCOSUR generally over rapidly increasing imports from China alone may well have contributed to their own and other developing members' reluctance to reduce tariffs on a most-favored-nation (MFN) basis,³⁷ as is reflected in a recent series of highly protectionist, if understandable, actions by those two countries designed to reduce Chinese imports.³⁸

Ultimately, the divergent interests of developed countries, major developing countries and the least developed countries could not be adequately bridged. It seems unlikely that this central impasse can be resolved in the foreseeable future, or perhaps even in a decade.³⁹ Add to this the leadership vacuum among developed nations, the multi-polar system divide noted above, the developed country view of the new economic powerhouses as more economic rivals than export destinations, and the sheer complexities of addressing issues as services, investment and agricultural subsidies, the probabilities for future success under the current single-undertaking and consensus-based WTO system seem slight indeed.⁴⁰ While the WTO will continue to play an important role, both in enforcing current international trading rules and in selected areas where consensus or broad if not universal agreement is possible (Part III, below), the WTO's status as the focal point for trade liberalization is likely to further erode as it has for much of the past decade.

III. Future Trade Liberalization in Geneva

The post-Doha opportunities in Geneva likely include those where a consensus may be possible, and those where "plurilateral" agreements among the willing, are legal and politically achievable. Other broadly-based international measures relating to trade, such as those implemented regionally and through adoption of model laws, are discussed in Parts IV and V, below.

A. Areas of Possible Consensus

There appear to be very few areas where broad consensus among the WTO membership will be achievable in the foreseeable future, beyond tariff-free, quota-free developed market access for least developed member (LDC) exports, subsidies to industrial fishing fleets, trade facilitation measures and somewhat less likely, elimination of tariffs and tariff barriers for green technologies. Under the WTO Agreement adoption of new agreements and amendments is possible in most cases with vote of two-thirds of the membership.⁴¹ However, in practice the

³⁷ See Adyta Mattoo, Francis Ng & Arvind Subramanian, *The Elephant in the "Green Room": China and the Doha Round*, May 2011, at 1, available at <http://www.iie.com/publications/pb/pb11-03.pdf> (last visited Oct. 20, 2011).

³⁸ *Keep Out: South America's two biggest economies are imposing heavy-handed trade restrictions*, THE ECONOMIST, Sep. 24, 2011, at 47-48; see also David Haskell, *Mercosur Plans to Raise Import Duties to Counter 'Avalanche of Predatory Exports'*, 29 Int'l Trade Rep. (BNA) 25 (Jan. 5, 2012).

³⁹ Dadush, *supra* note ___, at 3, suggests that this could take 25 years or more.

⁴⁰ *Ibid.*

⁴¹ The actual vote under the WTO Agreement, art. X. Article X(3) also provides in pertinent part that an amendment "shall take effect for the Members that have accepted them upon acceptance by two thirds of the Members and thereafter for each other Member upon acceptance by it."

more customary consensus rule has usually been followed. Consensus does not mean that all members must support a measure or agreement, but if even one objects strenuously, as Georgia did earlier with regard to Russia's desired WTO accession (later resolved with approval of Russia's accession in December 2011),⁴² all progress is blocked. At the same time, for arrangements that do not result in tariff reductions, the plurilateral route may be an option (part B of this section).

1. Trade Barriers for LDCs

Tariff-free, quota free access could be provided to developed member markets for most or all manufactured goods from the LDC members, generally all members with annual per-capita GDPs of under \$1000, with a few possible exceptions such as Vietnam. These proposals have been under discussion at least since the 2005 Hong Kong WTO Ministerial meeting,⁴³ when "developed-country Members, and developing-country Members declaring themselves in a position to do so, agreed to implement duty-free and quota-free market access for manufactured products originating from LDCs,"⁴⁴ but have not yet been implemented (except unilaterally to some extent by the EU). Support for the plan is not universal, since discrimination would occur against lower middle income countries that do not qualify as LDCs but compete for access in developed country markets with LDCs, and the practical lines between so-called middle income and lower middle income developing countries and LDCs may be blurred. This is a serious problem if the implementation of the plan were to be followed by a reduction of the availability of benefits now available to all developing countries under the Generalized System of Preferences and similar regional programs.⁴⁵ Whether members such as the United States and the EU would allow expanded access, even for LDCs, for sensitive products such as textiles and apparel is also problematic,⁴⁶ particularly when the program would be seen by domestic politicians as unilateral, without any corresponding benefits accruing to developed country exporters. Should exceptions be incorporated for apparel and footwear tariff lines, for example, the economic benefits of the plan for LDCs would be substantially eroded.

2. Industrial Fishing Subsidies

Broad but not unanimous support also ends for ending subsidies to industrial fishing fleets, primarily on environmental/protection of species grounds, but also to protect smaller coastal fishing industries. As outlined by the WTO Secretariat,

The proposed new disciplines on fisheries subsidies as reflected in the Chairman's first draft text would include a prohibited category covering, inter alia, subsidies

⁴² See Daniel Pruzin & Eric J. Lyman, *Russian Accession Bid Clears WTO, but Duma's Ratification Postponed*, 28 Int'l Trade Rep. (BNA) 2055 (Dec. 22, 2011).

⁴³ Doha (Hong Kong) Ministerial Meeting, Dec. 18, 2005, para. 47, Annex F (listing the covered goods), available at http://www.wto.org/english/thewto_e/minist_e/min05_e/final_text_e.htm#ldc (last visited Oct. 19, 2011).

⁴⁴ *Ibid.*

⁴⁵ Generalized System of Preferences (19 U.S.C. §§ 2462(b)(2)(D) (renewed Oct. 2011). See also Andean Trade Preference and Drug Eradication Act ("ATPDEA"), 19 U.S.C. §§ 3201 et seq. (expired Feb. 2011) and the Caribbean Basin Initiative ("CBI"), 19 U.S.C. §§ 2701-2707.

⁴⁶ See Schott I, *supra* note __, at 8 (noting that legislation would be required to avoid blocking access by such barriers as restrictive rules of origin).

for construction of new fishing vessels and subsidies for operating costs of fishing. LDCs would be exempted from the new disciplines, and other developing Members would have substantial flexibilities, especially for subsidies to subsistence-type fishing in their territorial waters. All exceptions to the proposed prohibition would be conditioned on compliance with certain provisions related to fisheries management.⁴⁷

Discussions have been underway in Geneva since early 2002, with the major players apparently relatively near agreement under pressure not only from developing country coastal fishing industries but by environmentally minded NGOs and civil society groups in the United States, the EU and other developed nations. However, there appears to be little reported progress since the end of 2009.⁴⁸

3. Trade Facilitation

Few members openly oppose so-called “trade facilitation” measures, reducing the costs of physically moving goods across national borders, which some experts estimate could increase global GDP by over \$100 billion annually.⁴⁹ This increased level of interest reflects in large part the success of the GATT/WTO system in reducing tariff levels and non-tariff-barriers since 1947; in many markets trade is likely more restricted by border delays and infrastructure limitations and excessive regulation than by tariffs. Exports as well as imports would be facilitated, a factor that for the most part reduces opposition by national business groups. Since any agreement is likely to be coupled with strong commitments of financial and technical assistance toward such “capacity building” in achieving the objectives of the agreement (as has been the case with some regional trade agreements),⁵⁰ it is likely to receive broad support from the developing members who would receive the assistance.

4. “Green” Technology

As part of the Doha Round the WTO members have been engaged in negotiations which if successful would eliminate tariff and non-tariff barriers for trade in “green” technology products and services. There has been no agreement to date; the United States, as the major proponent, has asked WTO members to freeze current tariffs first on 155 then as a compromise on 25 ‘green’ tariff lines, but to date Brazil and India have refused.⁵² Of course, under the MFN principle if the United States and other proponents were to eliminate tariffs on “green” goods all

⁴⁷ WTO, *Introduction to Fisheries Subsidies in the WTO*, available at http://www.wto.org/english/tratop_e/rulesneg_e/fish_e/fish_intro_e.htm (last visited Oct. 19, 2011).

⁴⁸ *Ibid.*

⁴⁹ Schwab, *supra* note ___, at 8 (quoting the Peterson Institute).

⁵⁰ For example, CAFTA-DR Chapter 5, on “customs administration and trade facilitation” contains a statement in art. 5.12 that “The Parties recognize the importance of trade capacity building activities in facilitating the implementation of this Chapter.” The United States-Central America-Dominican Republic Free Trade Agreement, U.S.-CAFTA-DR, Aug. 5, 2004, http://www.ustr.gov/Trade_Agreements/Bilateral/CAFTA/CAFTA-DR_Final_Texts/Section_Index.html (last visited Oct. 19, 2011).

⁵² Daniel Pruzin, *Hopes Fading for WTO ‘Deliverables’ Deal as Delegations Take Hard Line on LDC-Plus*, 28 INT’L TRADE REP. 1164 (Jul. 14, 2011).

other WTO members, including China, would benefit. Similarly, MFN obligations reduce the option of discriminatory application of reductions in services market access.⁵³

Despite disagreements and game-playing with the lists of products to be covered,⁵⁴ some have argued that an accord on green technologies might be possible separately from the Doha package.⁵⁵

However, it is difficult not to be skeptical, given that China as of early 2010 became the world's largest producer of both wind turbines and solar panels,⁵⁶ allegedly through currency manipulation and WTO illegal subsidies. It seems unlikely under these circumstances that the U.S. president (whoever he or she may be as of January 2013) and Congress would continue an initiative to facilitate entry of Chinese green technology goods into the United States without China making major concessions as well. Even should China agree to open its markets to foreign products, which it has refused to date,⁵⁸ unless the tariff reductions were accompanied by changes in mandatory transfer of technology rules in China and agreement not to subsidize production of such goods China's acceptance into such an accord seems a total non-starter. A decision in November 2011 by the U.S. Department of Commerce to initiate a countervailing duty investigation of Chinese solar subsidies makes such an agreement even less likely in the foreseeable future.⁵⁹

B. Agreements among the Willing

With the exceptions noted above, broadly based (but not universally applicable) progress is more likely to be achieved through plurilateral agreements comprised only of the members who are willing to accept the obligations in order to reap the benefits, whether undertaken within the WTO or separately. As one scholar has observed, "[M]any complex issues, including services, investment, agricultural subsidies, and the import of manufactures in developing countries, remain *de facto* outside the WTO's reach."⁶⁰ Some of these may be effectively beyond any broad international accord even on a plurilateral basis, and thus destined only for treatment in RTAs (since only the latter permits departure from MFN principles absent a WTO waiver), but others seem more promising.

The ability of nations who are WTO members to reduce tariffs further is limited than through a negotiating round in Geneva because tariff reductions must be offered on a MFN basis, whether or not the beneficiaries of the reductions are part of the bargain,⁶¹ absent a waiver from the membership, which may be problematic. Fortunately, if there is adequate political will there are other possibilities, the most promising of which include further refinements in the existing

⁵³ General Agreement on Trade in Services (GATS), Annex 2 of the WTO Agreement, *supra* note ____, art. ____.

⁵⁴ Schott II, *supra* note ____, at 8.

⁵⁵ Schwab, *supra* note ____, at 8.

⁵⁶ Keith Bradsher, *China Leading Global Race to Make Clean Energy*, NEW YORK TIMES (Electronic Ed.), Jan. 30, 2010.

⁵⁸ *US, China Solar Tensions Threaten to Eclipse Environmental Trade Talks*, BRIDGES WEEKLY, Nov. 9, 2011, available at <http://ictsd.org/i/news/bridgesweekly/117948/> (last visited Nov. 13, 2011).

⁵⁹ *Ibid.*

⁶⁰ Dadush, *supra* note ____, at 3.

⁶¹ GATT 1994, art. I.

GPA and the Information Technology Agreement (ITA), where negotiations have been taking place in Geneva for some time. Other possibilities include further efforts at anti-competition and investment rules, although those are likely long term rather than medium term aspirations, and protection of intellectual property that goes beyond the current TRIPS.⁶²

1. Expanded Government Procurement Agreement (GPA)

After initial discussions at the OECD government procurement was included in the Tokyo Round GATT negotiations, resulting in the conclusion of a Government Procurement Code (GPC). The GPC entered into force in 1981 and was amended in 1988; at that time it covered only central government procurement and only goods, not services.⁶³ Like the other Uruguay Round Codes it was not mandatory for GATT Contracting Parties. The plurilateral Uruguay Round GPA became effective January 1, 1996.⁶⁴ The GPA's membership as of October 2011 includes 42 nations, including the 27 members of the European Union.⁶⁵ New applications for membership include China, Jordan, the Ukraine and six others.⁶⁶

As explained by the WTO, "The GPA is based on the principles of openness, transparency and non-discrimination, which apply to Parties' procurement covered by the Agreement, to the benefit of Parties and their suppliers, goods and services."⁶⁷ Government procurement of goods and services is an important sector in most economies, accounting for 15-20 percent of GDP.⁶⁸ The dream of a GPA that would include Brazil, China, India, Russia and South Africa (BRICS) is likely some years away, since China is the only one of the five now seeking membership, and Russia will likely complete the WTO accession process only in mid-2012.

The GPA contains requirements for further negotiations after the first three years in force and "periodically thereafter"⁷⁰ and such negotiations were incorporated into the Doha Round. While provisional agreement on a revised GPA was reached in September 2006 as part of the Doha Round, the negotiations have continued into December 2011, where agreement was finally reached.⁷¹ The negotiators sought to add more than 200 listed government ministries and

⁶² Agreement on Aspects of Trade-Related Intellectual Property, WTO Agreement, *supra* note ___, Annex ____.

⁶³ WTO Secretariat, *The Plurilateral Agreement on Government Procurement*, available at http://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm (last visited Oct. 21, 2011) [hereinafter "WTO—GPA"].

⁶⁴ Agreement on Government Procurement, Apr. 15, 1994, Annex 4 of the WTO Agreement, *supra* note ____.

⁶⁵ The others include Armenia, Hong Kong, Iceland, Israel, Japan, South Korea, Lichtenstein, Aruba (Netherlands), Norway, Singapore, Switzerland, Chinese, Taipei and the United States. WTO, Parties to the Agreement, available at http://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm#parties (last visited Oct. 21, 2011).

⁶⁶ *Finish Line "Clearly in Sight" for WTO Govt Procurement Deal: Chair*, Int'l Centre for Trade and Sustainable Development (ICTSD), Oct. 19, 2011, at 3, available at <http://ictsd.org/i/news/bridgesweekly/116637/> (last visited Oct. 21, 2011) [hereinafter "ICTSD—GPA"]

⁶⁷ WTO—GPA, *supra* note ____.

⁶⁸ ICTSD—GPA, *supra* note ___, at 1. The WTO secretariat suggests that the value of an expanded GPA with additional coverage and members would be worth \$380—\$970 billion worth of trade annually. *Id.*, referencing a WTO working paper.

⁷⁰ GPA, *supra* note ___, art. XVI(7).

⁷¹ Daniel Pruzin, *Negotiators Clinch WTO Procurement Deal*, INT'L TRADE REP. (BNA)—BREAKING NEWS, Dec. 15, 2011 [hereinafter "Pruzin—Procurement Deal"].

agencies, as well as sub-central entities, to member's annexes that would be newly subject to the GPA, as well as full coverage of construction services;⁷² Over 150 were ultimately agreed upon.⁷³ Among the most difficult outstanding issues was EU dissatisfaction with Japanese and U.S. proposals on future commitments for liberalized public procurement and the future GPA work program.⁷⁴ The EU has also been pressuring the United States to add more central government entities to those covered (with 12 added in the new accord), and to expand U.S. state coverage beyond the current thirty-seven.⁷⁵ This suggests that the GPA discussions will continue well into the future with expansion of both commitments and membership. Other changes including updating that would take into account the increasing use of on-line advertising for tenders and electronic procurement. In an effort to attract more developing country members, longer implementation provisions and more individually tailored accession protocols would be offered.⁷⁶ The negotiators also rejected efforts by some members to withdraw concessions granted in the Uruguay Round,⁷⁷ and the United States successfully insisted that the revised GPA be concluded by December 2011, rejecting in October the idea of no more than an agreement in principle by that date.⁷⁸

2. Revisions to the Information Technology Agreement

The original ITA was not a part of the Uruguay Round package. Rather, it was concluded as a plurilateral agreement at the WTO's Singapore Ministerial Conference in December 1996. The original number of participants (29) has grown to 70, representing some 97 percent of world trade in IT products. (Brazil appears to be the only major member that has not become a party.) The ITA provides for complete elimination of tariffs on IT products, with some developed country members afforded extended grace periods for certain products.⁷⁹ The WTO's ITA Committee had been discussing since 2010 a proposal by the EU for a broad review of the ITA, which would include negotiations on non-tariff barriers and expand both product coverage and membership.⁸⁰ (The tariff reductions apply under the MFN principle to all WTO members, whether or not they are party to the ITA.) Because of GATT's MFN clause the tariff reductions under the ITA apply to all WTO Members.

3. Other Plurilateral Agreements on Trade in Goods

⁷² *Ibid.*

⁷³ Pruzin—Procurement Deal, *supra* note ____.

⁷⁴ *Ibid.*

⁷⁵ Daniel Pruzin, *GPA Talks Chair Cites Growing Confidence in WTO Procurement Deal in December*, 28 INT'L TRADE REP. (BNA) 1689 (Oct. 20, 2011) [hereinafter "Pruzin—GPA"]. The U.S. states that have not permitted any of their procurement to be covered are Alabama, Alaska, Georgia, Indiana, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, South Carolina, Virginia and West Virginia.

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

⁷⁸ *U.S. Says Revised GPA Must be Fully Concluded by December Ministerial*, WORLD TRADE ONLINE, Oct. 20, 2011.

⁷⁹ WTO, *Information Technology Agreement*, available at http://www.wto.org/english/tratop_e/inftec_e/inftec_e.htm (last visited Oct. 20, 2011).

⁸⁰ See *EU Pushes for Review of Information Technology Agreement*, Nov. 11, 2010, available at http://www.wto.org/english/news_e/news10_e/ita_11nov10_e.htm (last visited Oct. 20, 2011).

Former U.S. Trade Representative Schwab has suggested that the ITA approach might also be applied in a plurilateral agreement that would cover pharmaceuticals, medical equipment and/or health care services, with the objective to reduce the costs associated with delivering health care.⁸¹ In some areas, such as pharmaceuticals, the major producers include both developed nations such as the United States and the EU and developed Members such as India, Brazil and Thailand. Whether those interested would be willing to conclude such agreement or agreements knowing that most of the benefits would accrue to free riders remains to be seen.

4. Electronic Commerce

The WTO “Work Programme on Electronic Commerce,” has made little progress as reflected by a cryptic statement in 2001, “As part of the Work Programme, the General Council has engaged in substantive discussions based on the reports submitted to it by the subsidiary Councils and Committees as well as on other relevant considerations. Given the rapid evolution of electronic commerce, many Members attach importance to further focused deliberations on a number of the issues raised.”⁸² This is an area in which the WTO has already had considerable success in reaching a “standstill” understanding not to impose customs duties on electronic commerce; the longstanding policy has been rolled over at least until October 2012,⁸³ with further extensions likely.

The issues have been addressed much fully in some regional trade agreements, including many of those concluded by the United States in recent years. For example, the United States—Korea Free Trade Agreement provides *inter alia* that the parties will not “impose customs duties, fees, or other charges on or in connection with the importation or exportation of . . . a digital product fixed on a carrier medium; or a digital product transmitted electronically.”⁸⁴ Other members would likely consider similar commitments on a reciprocal basis.

5. Investment and Anti-Competition Law

Both investment and competition law as they relate to trade were included in the Doha Declaration,⁸⁵ but strong support for negotiations on these two issues has been limited to the EU and Japan. The topics were dropped from the Doha negotiating agenda in 2004.⁸⁶

Efforts over more than 50 years, beginning with the Havana Charter, to conclude broadly based international agreements on investment and competition law have been notoriously unsuccessful even among developed nations despite the proliferation of bilateral investment

⁸¹ Schwab, *supra* note ___, at 8.

⁸² Introduction to the Report of the General Counsel for Doha, Nov. 9, 2001, WT/MIN(01)/14, available at http://www.wto.org/english/thewto_e/minist_e/min01_e/wt_min01_14_e.pdf (last visited Oct. 20, 2011).

⁸³ *Continued Doha Disagreements Raise Doubts About Ministerial Declaration*, World Trade Online, Oct. 13, 2011, at 1.

⁸⁴ Free Trade Agreement between the United States and the Republic of Korea, U.S.-S. Korea, June 30, 2007, http://www.ustr.gov/Trade_Agreements/Bilateral/Republic_of_Korea_FTA/Final_Text/Section_Index.html [signed by the President Oct. __, 2011 but not yet in force], art. 15.3.

⁸⁵ Doha Ministerial Declaration, *supra* note ___, paras. 20-22 (investment), 23-25 (competition).

⁸⁶ See WTO secretariat, *The Doha Declaration Explained*, Relationship between Trade and Investment, Relationship between Trade and Competition Policy, available at http://www.wto.org/english/tratop_e/dda_e/dohaexplained_e.htm#investment (last visited Oct. 20, 2011).

treaties (BITs)⁸⁷, and new efforts are no more promising except perhaps in the long term. The most recent “multilateral agreement on investment” (MAI), undertaken by the then 25 members of the Organization for Cooperation and Development (OECD) and the European Commission, would have been open to all interested nations.⁸⁸ That effort collapsed in 1998 due to concerns in several developed nations, particularly France, that the accord would give foreign investors excessive power to challenge as indirect expropriation governmental actions protecting the environment and human health, and undermine state authority for these and other exercises of police power without incurring liability.⁸⁹

Efforts to conclude broad multilateral accords on standards for anti-competition law have been even less successful. Plans to improve international cooperation on anti-competition issues began with the Havana Charter, but the Charter was rejected by the Congress in part because of the anti-trust provisions.⁹¹ Subsequently, no international agreement has been concluded that “requires cooperation by states in the identification or prosecution of conduct that violates competition laws.”⁹² United States bilateral competition agreements with the EU and several of the individual members, Australia, Canada, Brazil, Israel, Japan, and Mexico are mostly limited to notification and information sharing.⁹³ Occasional more extensive anti-competition provisions appear to be limited to certain RTAs, such as the United States—Singapore FTA competition chapter.⁹⁴

Perhaps a notification and information-sharing agreement along the lines of those noted above could be concluded with a larger group of countries, but whether it would improve antitrust enforcement significantly world-wide is less clear. Longstanding differences in approach, including the private treble damage actions and injunctions that are features of U.S.

⁸⁷ More than 2760 bilateral investment treaties (BITs) and 250 free trade agreements (FTAs) with investment chapters had been concluded, with more than 2000 in force. UNCTAD—Prevention and Alternatives to Arbitration II, at xvii, available at http://www.unctad.org/en/docs/webdiaeia20108_en.pdf (last visited Oct. 6, 2010); see also Americo Beviglia & Pierre Sauve, *International Investment*, in *Research Handbook in International Economic Law* 215 (Andrew T. Guzman & Alan O. Sykes, eds.) (Cheltenham: Edward Elgar, 2007) (citing 2005 data).

⁸⁸ OECD, *Multilateral Agreement on Investment*, available at http://www.oecd.org/document/35/0,3343,en_2649_33783766_1894819_1_1_1_1,00.html (last visited Oct. 20, 2011) [hereinafter “OECD—MAI”].

⁸⁹ See Peter T. Muchlinski, *The Rise and Fall of the Multilateral Agreement on Investment: Where Now?*, 34 INT’L LAW. 1033, 145-48 (2000); see also Riyaz Dattu, *A Journey from Havana to Paris: the Fifty-Year Quest for the Elusive Multilateral Agreement on Investment*, 24 FORDHAM INT’L L.J. 275 (2000) (for a discussion of the MAI and several alternatives). The OECD website simply states tersely that “Negotiations were discontinued in April 1998 . . . and they will not be resumed. OECD—MAI, *supra* note ____.

⁹¹ Andrew T. Guzman, *International Competition Law*, in *RESEARCH HANDBOOK IN INTERNATIONAL ECONOMIC LAW* 418, 413-24 (Andrew T. Guzman & Alan O. Sykes, eds.) (Cheltenham: Edward Elgar, 2007)

⁹² *Id.*, at 425.

⁹³ *Ibid.* See, e.g., Agreement Between the Government of the United States of America and the Commission of the European Communities Regarding the Application of Their Competition Laws, Sep. 23, 1991, US-EU, reprinted in 4 TRADE REG. REP. (CCH) ¶ 13, 504.

⁹⁴ United States-Singapore Free Trade Agreement, U.S-Sing., May 6, 2003, 42 I.L.M. 1026 (2003) [hereinafter Singapore FTA], available at http://www.ustr.gov/sites/default/files/uploads/agreements/fta/singapore/asset_upload_file708_4036.pdf (last visited Oct. 20, 2011), art. 12.2.1. It requires *inter alia* that “Each Party shall adopt or maintain measures to proscribe anticompetitive business conduct with the objective of promoting economic efficiency and consumer welfare, and shall take appropriate action with respect to such conduct.

law⁹⁵ and the efforts the United States makes to apply its anti-trust laws on an extraterritorial basis,⁹⁶ along with differing approaches to mergers and acquisitions between the U.S. Department of Justice and the European Commission⁹⁷ suggest that any meaningful accord is likely a long way away.

6. Services

While it is at least conceivable that some sort of services disciplines could be available to a significant group as a plurilateral agreement, MFN considerations among others make this difficult.⁹⁸ While waivers of MFN requirements are at least theoretically possible under GATS,⁹⁹ the likelihood of a waiver for the multiple parties to a plurilateral services agreement that does not meet the requirements of GATS Article V “economic integration agreements” seems slight. Rather, it would seem much more practical to focus on expanding services disciplines through a regional trade agreement or “economic integration agreement” (EIA) as authorized under GATS, as discussed in Part IV, below.

IV. Continued Proliferation of RTAs

The authority of GATT/WTO members to enter into customs unions and free trade agreements dates from the original GATT 1947, Article XXIV. The compromise between the MFN principle and the perceived need for an exception for regional trade agreements was designed to deal primarily with the then-existing relationships between the United Kingdom and the members of the commonwealth (former colonies). The United States was concerned that without some limitations they would adversely affect U.S. interests.¹⁰⁰ As a result, Article XXIV was crafted to limit, at least in theory, customs unions and FTAs to situations in which the agreement covered “substantially all trade,” achieved their objectives of eliminating tariffs and most tariff barriers “within a reasonable period of time” (usually ten years), and did not result in increasing tariffs on imports from non-members of the customs union or RTA.¹⁰¹ Article XXIV also incorporated explicit notification and monitoring requirements, modified on several occasions over the years.¹⁰² Unfortunately, the Committee on Regional Trade Agreements (CRTA) and its predecessors have been largely ineffective in assuring that the RTAs actually

⁹⁵ 15 U.S.C. §§ 15, 26.

⁹⁶ See, e.g., AARON XAVIER FELLMUTH, *THE LAW OF INTERNATIONAL BUSINESS TRANSACTIONS* 530-34 (St. Paul: West, 2009) (discussing the jurisdictional reach of the U.S. antitrust laws); Guzman, *supra* note ___, at 419-22.

⁹⁷ Guzman, *supra* note ___, at 423.

⁹⁸ At the 8th Ministerial Meeting in Geneva in December 2011, the Ministers agreed to a waiver of non-discriminatory treatment so that preferential treatment in services could be offered by developed and developing countries to least developed countries. *WTO ministers adopt waiver to permit preferential treatment of LDC service suppliers*, Dec. 17, 2011, available at http://www.wto.org/english/news_e/news11_e/serv_17dec11_e.htm (last visited Dec. 17, 2011).

⁹⁹ Waivers for individual members are contemplated under GATS Article II.2 and Annex on Article II Exemptions, but they apply primarily upon accession to GATS.

¹⁰⁰ JOHN H. JACKSON, *WORLD TRADE AND THE LAW OF THE GATT* 576-77 (New York: Bobbs-Merrill, 1969).

¹⁰¹ GATT, art. XXIV(8), XXIV(5).

¹⁰² GATT, art. XXIV(6); Uruguay Round Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994, Uruguay Round Final Act, Apr. 15, 1994; General Counsel, Transparency Mechanism for Regional Trade Agreements, Dec. 14, 2006.

complied with the requirements.¹⁰³ Efforts to further improve the review system as part of the Doha Round evidenced little progress in a decade.¹⁰⁴ In fairness, the number of RTAs submitted for review has overwhelmed the review system, and the inability of the Members to agree on such critical definitions as the meaning of “substantially all trade” has made a difficult task virtually impossible.

What Professor Jagdish Bhagwati calls the “spaghetti bowl” effect of proliferation and expansion of RTAs¹⁰⁵ has nevertheless been a relatively recent phenomenon, with the majority having been negotiated since the early 1990s. As of May 2011, more than 394 customs unions, free trade areas, and less restricted trade agreements permissible for developing countries under the 1979 “Enabling Clause”¹⁰⁶ had been notified to the WTO Secretariat, with another 95 notified under Article V of the General Agreement on Trade in Services.¹⁰⁷

This “modern” era of RTAs originated in part as a result of a major change in U.S. policy toward RTAs beginning in the early to mid-1980s. The Single Market Initiative adopted in the EU in 1986 had a significant demonstration effect elsewhere in the world, as with MERCOSUR and the ASEAN FTA.¹⁰⁸ The United States, although a long-term supporter of European integration, grasped the importance of Europe’s enhanced access to relatively low-wage production with the accession of Ireland (1973), Greece (1979) and Spain and Portugal (1986)¹⁰⁹ and the implications for Europe’s competitiveness with the Western Hemisphere and with Asia.

The United States was also frustrated from 1982-1985 in its efforts to bring about a new GATT negotiating round because of indifference from the internally preoccupied Europeans. U.S. Trade Representative William Brock and his colleague in the U.S. Government decided to respond to this rebuff by championing FTAs with the Israel and then Canada. The logic then as today with the WTO’s Doha Round was that if the preferred global freer trade initiatives could not move forward, regional trade arrangements could provide a viable alternative.¹¹⁰

¹⁰³ For example, despite the requirement of review of each RTA by the CRTA, “no examination report has been finalized since 1995 because of lack of consensus.” WTO, Work of the Committee on Regional Trade Agreements (CRTA), available at http://www.wto.org/english/tratop_e/region_e/regcom_e.htm (last visited Oct. 24, 2011).

¹⁰⁴ Negotiating Group on Rules Chair Amb. Dennis Francis, on 17 March 2011, “noted the limited progress so far in negotiations on regional trade agreements . . .”, quoted at WTO, Regional Trade Agreements, http://www.wto.org/english/news_e/news11_e/rta_17mar11_e.htm (last visited Oct. 24, 2011).

¹⁰⁵ See Jagdish Bhagwati & Arvind Panagariya, *Preferential Trading Areas and Multilateralism—Strangers, Friends, or Foes?*, in THE ECONOMICS OF PREFERENTIAL TRADE AGREEMENTS, (Jagdish Bhagwati & Arvind Panagariya, eds., AEI Press, 1996) [hereinafter Bhagwati & Panagariya--PTAs].

¹⁰⁶ Differential and more favourable treatment reciprocity and fuller participation of developing countries (Enabling Clause), Nov. 28, 1979, available at http://www.wto.org/english/docs_e/legal_e/enabling1979_e.htm (last visited Oct. 25, 2011).

¹⁰⁷ WTO, Regional Trade Agreements, available at http://www.wto.org/english/tratop_e/region_e/region_e.htm (last visited Oct. 21, 2011) [hereinafter “WTO—RTAs”].

¹⁰⁸ JEFFREY A. FRANKEL, REGIONAL TRADING BLOCS IN THE WORLD ECONOMIC SYSTEM 4-5 (Inst. for Int’l Economics, 1997).

¹⁰⁹ PAOLO MENGOLZI, EUROPEAN COMMUNITY LAW 3 (Kluwer, 1992). These developments are also discussed in WILLIAM A. LOVETT, ALFRED E. ECKES, JR. & RICHARD BRINKMAN, U.S. TRADE POLICY: HISTORY, THEORY AND THE WTO 94-95 (M.E. Sharpe, 1999).

¹¹⁰ Gantz—RTAs, *supra* note ____, at 14-15.

An enormous volume of literature debates on the pros and cons of regional trade agreements.¹¹¹ Bhagwati and some other economists have decried the expanding numbers of RTAs, terming them (with some logic) “preferential trade agreements” instead.¹¹² The WTO Secretariat offers a more nuanced view (perhaps keeping in mind that only Mongolia among the WTO members is not party to a single RTA):

They [the WTO and RTAs] seem to be contradictory, but often regional trade agreements can actually support the WTO’s multilateral trading system. Regional agreements have allowed groups of countries to negotiate rules and commitments that go beyond what was possible at the time multilaterally. In turn, some of these rules have paved the way for agreement in the WTO. Services, intellectual property, environmental standards, investment and competition policies are all issues that were raised in regional negotiations and later developed into agreements or topics of discussion in the WTO. The groupings that are important for the WTO are those that abolish or reduce barriers on trade within the group. The WTO agreements recognize that regional arrangements and closer economic integration can benefit countries. It also recognizes that under some circumstances regional trading arrangements could hurt the trade interests of other countries . . . In particular, the arrangements should help trade flow more freely among the countries in the group without barriers being raised on trade with the outside world. In other words, regional integration should complement the multilateral trading system and not threaten it.¹¹³

One factor noted earlier is concern among many WTO members about increasing imports from China. RTAs provide an obvious solution to this problem; a member can reduce or eliminate tariffs among members of an RTA without offering such reduced tariffs to China on an MFN basis, and likely can find many reasons other than fear of China to justify a new RTA.

What will happen with RTAs if there is an extended period when no major negotiations are taking place at the WTO? It seems likely that there will be two major types of activity, the expansion and deepening of existing RTAs and the negotiation and conclusion of new ones, the former driven by the realization that any further expansion of world trade in the short and medium term will likely be driven by RTAs. Also, given the lack of interest by many WTO members in further services marketing opening it seems likely that services RTAs—perhaps stand-alone, without accompanying market opening in trade in goods—may interest those members who wish to expand services trade.

A. Widening and Deepening of Existing RTAs

¹¹¹ See, e.g., JAGDISH BHAGWATI, *FREE TRADE TODAY* (Princeton, 2002); *ECONOMICS OF PREFERENTIAL TRADE AGREEMENTS* (Jagdish Bhagwati & Arvind Panagariya, eds., American Enterprise Institute, 1996); BERNARD M. HOEKMAN & MICHAEL M. KOSTECKI, *THE POLITICAL ECONOMY OF THE WORLD TRADING SYSTEM: THE WTO AND BEYOND* (Oxford, 2001); RICHARD POMFRET, *THE ECONOMICS OF REGIONAL TRADING ARRANGEMENTS* (Clarendon, 1997); Frankel, *supra* note ____; Gantz-RTAs, *supra* note ____, ch. 2.

¹¹² Bhagwati & Panagariya—PTAs, *supra* note ____, *passim*.

¹¹³ WTO, *Regionalism: Friends or Rivals?*, available at http://www.wto.org/english/thewto_e/whatis_e/tif_e/bey1_e.htm (last visited Oct. 21, 2011).

With the end of the Doha Round as we know it and no prospect of another comprehensive round in the foreseeable future the members of some RTAs will see the expansion and improvement of existing agreements to be of a higher priority than in the past, even though changes may have been considered desirable before. In this subsection, I look briefly at four RTAs, the EU, MERCOSUR, the ASEAN FTA and NAFTA, and postulate that three of the four, which have in fact been subject to modification periodically over their existence to date, will be expanded again. Still, one cautions that with RTAs as with the WTO, the political will to take apparently desirable, sometimes necessary steps may be lacking with or without the impetus of deadlock at the WTO, as the history of all four agreements demonstrates.

While this subsection focuses on only a handful of RTAs, many other countries are actively engaging in RTA negotiations and may be expected to continue to do so. For example, as of October 2011, fifteen WTO members have ten or more RTAs in force.¹¹⁴

1. European Union

After more than 55 years, and despite the Eurozone crisis,¹¹⁵ the EU remains the world's most successful customs union, having expanded from the original six members (France, Germany, Italy, Belgium, the Netherlands and Luxemburg) to 27 by 2007. Tariffs and non-tariff barriers have long been eliminated, most border controls no longer exist, EU legislation ("regulations" and "directives") dominates in such areas as international trade regulation, intellectual property, competition law, and environmental law, and with some exceptions the EU has achieved free movement of labor and capital as well as goods and services. With the approval of the Treaty of Lisbon in 2009, at least the seventh major treaty since founding, the Commission and European Parliament's authority continued to increase, encompassing, inter alia, foreign investment by the members in third countries and the equivalent of a foreign minister. A true political union nevertheless remains some years away. Much of the success of the EU is based on the ability of the members to muster at least on some occasions the political will to engage in a process of deepening regional integration, albeit not always on a linear basis and not always with the full support of national populations.¹¹⁶ Consequently, the EU, at least until recently, has been considered by other aspirants as a model for other customs unions such as ASEAN and MERCOSUR.¹¹⁷

As of January 2012 the EU faces its most serious crisis ever, with Greece unable to pay its debts and questions arising whether Italy, Portugal, and Spain can remain solvent in light of

¹¹⁴ WTO, Regional trade agreements notified to the GATT/WTO and in force, Oct. 20, 2011, available at <http://rtais.wto.org/UI/publicPreDefRepByCountry.aspx> (last visited Oct. 25, 2011). This group includes the EU (as a group), Chile, India, Japan, Korea, Malaysia, Mexico, Norway, Peru, Singapore, Switzerland, Thailand, Turkey, the Ukraine, and the United States.

¹¹⁵ See, e.g., Jacob Funk Kirkegaard, *The Euro Area Crisis: Origin, Current Status and European and US Responses*, Oct. 27, 2001 (testimony before the House Committee on Foreign Affairs Subcommittee on Europe and Asia), available at <http://www.piie.com/publications/testimony/kirkegaard20111027.pdf> (last visited Nov. 5, 2011).

¹¹⁶ See, e.g., CATHERINE BARNARD, *THE SUBSTANTIVE LAW OF THE EU* (2nd ed., Oxford Univ. Press, 2007); Henrik Bull, *The Constitutional Development of the European Union*, 83 N.D. L. REV. 1, 16 (2007); Elizabeth F. Defeis, *A Constitution for the European Union? A Transatlantic Perspective*, 19 TEMP. INT'L & COMP. L.J. 351 (2005); Thomas Eilmansberger, *IP and Antitrust in the European Union*, 13 SW. J.L. & TRADE AM. 261, 263 (2007); T.C. HARTLEY, *THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW* (6th ed., Oxford, 2007).

¹¹⁷ Frankel, *supra* note ____, at 4-5.

historically high interest rates for the sale of government bonds. The Eurozone, created in 2001 with great fanfare and now encompassing seventeen of the EU members (with ten, including the United Kingdom, remaining outside), has chronically suffered from poor fiscal discipline and a European Central Bank that lacks the necessary powers to step in and serve beleaguered governments as a lender of last resort, providing them with the liquidity they require to recover from the crisis (for example, with a Eurobond backed by all members of the Eurozone, including Germany).

If the EU and the Eurozone survive in their present forms, it seems almost certain that the treaties will again be supplemented, presumably with the tougher rules to restrict government spending deficits and greater European Central Bank and/or community legal powers to monitor members' national financial policies.¹¹⁸ The challenges of globalization and financial stability, particularly with the dual system, may not be sustainable under such circumstances and could lead to a "downward spiral."¹¹⁹ It is unclear at this writing whether most of the 27 members—or perhaps the 17 Eurozone members—will be able to agree on broad reforms of the EU accords (a process that could take several years or more to complete) or will need to restructure the Union to take into account a reduced or post-Eurozone reality.

The December 2011 plan is for a treaty (technically outside the EU process) providing for tighter regional oversight of government spending to be concluded by the 17 Eurozone members and many if most of the other 10, with only the United Kingdom demurring, but the plan does not effectively address the high interest rates that threaten the financial viability of Greece, Italy, Spain, and perhaps other members. Inevitably, and regardless of the survival of the Euro, many further changes in the EU agreements are almost certain to occur in the coming years.¹²⁰ These changes like many others in the history of the EU are taking place largely independently of developments in Geneva, but the longer the current crisis continues the less attention the EU nations are likely to pay to improving the global trading system.

Eventually, additional countries will likely be brought in to the EU, and perhaps ultimately even to the Eurozone. Croatia, Montenegro and perhaps Bosnia, Kosovo, Macedonia and even Serbia may ultimately be encouraged to meet the criteria for EU admission more quickly as a result of the lack of action in Geneva and the understanding that complying with the EU entrance requirements means a level of modernization of national laws that probably cannot be achieved any other way.¹²¹ The present membership, in contrast, is sufficiently preoccupied with the Eurozone crisis and slow economic growth generally that they may resist further accessions for years. The current levels of economic and political integration may be increased again despite popular resistance, but probably not in the short or medium term.

¹¹⁸ See Charlemagne, *Wake up, Euro Zone*, THE ECONOMIST, Oct. 22, 2001, at 65.

¹¹⁹ *Staring into the Abyss*, THE ECONOMIST, Special Report, Nov. 12, 2011, at 3-4.

¹²⁰ Steven Erlanger & Stephen Castle, *German Vision Prevails as Leaders Agree on Fiscal Pact*, N.Y. TIMES (Electronic ed.), Dec. 9, 2011).

¹²¹ See *The Pull of Brussels: At least the western Balkans is still starry-eyed about the European Union*, THE ECONOMIST, Oct. 15, 2011, at 60 (discussing the various candidates and their prospects for meeting the criteria for admission).

2. MERCOSUR¹²³

MERCOSUR (Argentina, Brazil, Paraguay and Uruguay) represents one of the most ambitious and important regional trade agreements ever concluded. In the aggregate, MERCOSUR nations have more than 230 million inhabitants and a gross domestic product of more than \$1.25 trillion.¹²⁴ MERCOSUR continues to hold promise in the longer term—whatever that is—for trade liberalization among the four Member States and within South America,¹²⁶ although as of January 2012 the members are becoming more rather than less protectionist.¹²⁷ The group benefits from common borders, a history of intra-regional trade and relative lack of competition among the constituent economies.¹²⁸ On paper, MERCOSUR seeks to include the common market characteristics of labor and capital mobility and coordination of economic policies. For Brazil, by far the most economically powerful member, MERCOSUR has political significance, offering the promise of a closely linked group of economic allies to assist a world power in offsetting the dominance of the United States in the Western Hemisphere.¹²⁹

Unfortunately, as is often the case with RTAs, the implementation of the MERCOSUR agreements lags well behind the formal legal and institutional framework. The early years, 1992-1999, embodied a general commitment to gradual economic integration and considerable progress in eliminating intra-regional customs duties for originating products, some reduction in non-tariff barriers and increased coverage of the common external tariff (“CET”). Since then, MERCOSUR has fallen behind in timetables and expectations. Institution-building has languished.¹³⁰ Little progress has been made in establishing the free movement of persons, services and capital.¹³¹ The development of a rules-based system with strong institutions and viable dispute settlement has been an aspiration rather than a reality despite improvements in the dispute settlement system in recent years, and both Argentina and Brazil are going their separate

¹²³ This subsection is based on Gantz—RTAs, *supra* note ___, at 365-66; *see also* RAFAEL A. PORRATA-DORIA, JR., *MERCOSUR: THE COMMON MARKET OF THE SOUTHERN CONE* (Carolina Academic Press, 2005); Thomas Andrew O’Keefe, *Economic Integration as a Means for Promoting Regional Political Stability: Lessons from the European Union and MERCOSUR*, 80 CHI.-KENT L. REV. 187 (2005); John AE Vervaele, *Mercosur and Regional Integration in South America*, 54 ICLQ 387 (2005).

¹²⁴ EU, *Mercosur Trade*, available at http://trade.ec.europa.eu/doclib/docs/2006/september/tradoc_113488.pdf (last visited Apr. 27, 2008) (2006 data converted to dollars).

¹²⁶ Comprehensive sources for analysis of MERCOSUR include RAFAEL A. PORRATA-DORIA, JR., *MERCOSUR: THE COMMON MARKET OF THE SOUTHERN CONE* (Carolina Academic Press, 2005); THOMAS ANDREW O’KEEFE, *LATIN AMERICAN TRADE AGREEMENTS* (Martinus Nijhoff Publ. 2007) (Chapters 4-8, Common Market of the South); and John AE Vervaele, *Mercosur and Regional Integration in South America*, 54 ICLQ 387 (2005); Inter-American Development Bank, *MERCOSUR Report*, 2009-10, Mar. 2011.

¹²⁷ Haskell, *Mercosur Plans to Raise Import Duties*, *supra* note __.

¹²⁸ Samuel A. Arieti, *The Role of MERCOSUR as a Vehicle for Latin American Integration*, 6 CHI. J. INT’L L. 761, 764 (2006).

¹²⁹ *See* Mario E. Carranza, *MERCOSUR, the Free Trade Area of the Americas, and the Future of U.S. Hegemony in Latin America*, 27 FORDHAM INT’L L.J. 1029, 1063-1064 (2004) (asserting that “the Southern Cone countries are now makers and not simply takers of international policy, having decided to take their destiny into their own hands”).

¹³⁰ *See* Arieti, at 764 (discussing some of the causes, including reluctance to cede political sovereignty).

¹³¹ *See* John AE Vervaele, *Mercosur and Regional Integration in South America*, 54 ICLQ 387, 408 (2005) (discussing the lack of progress in these areas as well as with recognition by the Parties of general principles of MERCOSUR law).

ways when dealing with increasing imports from China.¹³² It remains to be seen whether the members of MERCOSUR will make renewed efforts toward improving the functioning common market as a result of the demise of Doha, and ultimately bring about the accession of Venezuela,¹³³ or if the group will continue to reflect a lack of progress and frequent back-sliding, thus failing to meet its long-stated goals and objectives.

3. ASEAN FTA¹³⁴

ASEAN as now constituted includes a population of around 500 million persons, land area of 4.5 million square kilometers, total trade of \$850 billion (internal and external) and GDP of about \$700 billion.¹³⁵ The group encompasses several of the most dynamic trading nations of the world (Singapore, Malaysia, Thailand, Indonesia and Vietnam) as well as several of the least open (Laos, Myanmar), along with Brunei, Cambodia and Indonesia. The wide differences in levels of development and receptiveness to foreign investment and open markets among other factors have led to a “least common denominator” effect in which accords among the now ten members inevitably represent significant compromise by the bolder, more open member governments. Moreover, ASEAN Members have historically faced political and security challenges which discouraged and delayed greater economic integration, such as border clashes between Thailand and Cambodia.¹³⁶ ASEAN also suffers from poor infrastructure, including but not limited to lengthy land travel routes that are served by poor road and railroad networks.¹³⁷

ASEAN and AFTA consist legally of literally dozens of agreements and declarations, often overlapping and/or in conflict,¹³⁸ sometimes un-ratified after many years. The reluctance on the part of some of the member governments to make firm commitments and to adopt functioning and binding legal rules and structures includes a lack of apparent support for

¹³² See Ed Taylor, *Brazil Increases Excise Tax on Car Imports, Exempts Those With 65% Domestic Content*, 28 Int'l Trade Rep. (BNA) 1546 (Sep. 22, 2011) (reporting on measures taken by Brazil alone to protect domestic manufacturers against Chinese auto imports); *Protectionism in Argentina*, THE ECONOMIST, Sep. 24, 2011, at 47 (reporting on the use of “non-automatic licensing” and other measures to slow imports).

¹³³ See David Haskell, *Venezuela's Admission, Free Trade Talks with EU, Top Mercosur Leader's Agenda*, INT'L TRADE DAILY (BNA), Dec. 14, 2011.

¹³⁴ This subsection draws on Gantz—RTAs, *supra* note ___, at 411-12, 432-33. Major sources for information on ASEAN include ZAKIR HAFEZ, *THE DIMENSIONS OF REGIONAL TRADE INTEGRATION IN SOUTHEAST ASIA* (Transnational, 2004); Lay Hong Tan, *Will ASEAN Economic Integration Progress Beyond a Free Trade Area?*, 53 ICLQ 935 (2004); Paul. J. Davidson, *The Asean Way and the Role of Law in Asean Economic Cooperation*, 8 S.Y.B.I.L. 165 (2004).

¹³⁵ ASEAN Secretariat, *Overview: Association of Southeast Asian Nations*, available at <http://www.aseansec.org/147.htm> (last visited Nov. 13, 2007).

¹³⁶ See, e.g., Neil Chatterjee, *ASEAN summit fails to resolve Thai-Cambodia conflict*, REUTERS (Electronic ed.), May 8, 2011 (reporting on ongoing border skirmishes).

¹³⁷ Even in 2002, one of the key areas of China-ASEAN cooperation was acceleration of various multinational rail and highway projects, as well as development of the Mekong River basin. Framework Agreement on Comprehensive Economic Co-Operation Between ASEAN and the People's Republic of China, Nov. 5, 2002, annex 4(a), available at <http://www.aseansec.org/13197.htm> (last visited Nov. 15, 2007) [hereinafter “ACFTA Framework Agreement”].

¹³⁸ See ASEAN Secretariat, *Table of Treaties/Agreements and Ratifications*, Oct. 29, 2007, available at <http://www.aseansec.org/Ratification.pdf> (last visited Nov. 14, 2007) (a list of 205 instruments that does not include dozens of ministerial and other declarations). This table is probably the best available source of the status of ratification of the various ASEAN and AFTA agreements.

effective dispute resolution. “Framework” agreements are particularly popular, likely because they allow the members to announce their intention to conclude arrangements while accession to more significant and binding obligations is deferred. The cautious approach has persisted despite China’s soaking up the lion’s share of the region’s direct foreign investment, continuing credibility problems with foreign traders and investors over vague and non-transparent rules that really are not legally binding and in any event cannot be enforced, and evidence that the market-based approach increasingly in use elsewhere works better than ASEAN’s heavy reliance on government regulation.

Perhaps inevitably, the policies of Singapore, Thailand, Malaysia, Indonesia and recently Vietnam have emphasized investment in export-intensive industries and greater integration with global economies rather than restricted markets and import-substitution either individually or as part of ASEAN.¹³⁹ Many ASEAN Members have greater interest and see more economic benefit in fostering expanded trade relations with nations outside Southeast Asia than with the other members of ASEAN,¹⁴⁰ although after nearly a decade of negotiations a free trade agreement between China and the ASEAN nations went into effect January 1, 2010.¹⁴¹ Still, improvements in the dispute settlement system and the ratification of the Bali Concord II by all ten members within a year may be reason for cautious optimism. Will the challenges of competition from China and from members who are concluding FTAs and bilateral investment treaties with third countries, augmented by a lack of trade liberalization in Geneva, encourage the members of ASEAN to move forward with their regional integration? One hopes so but it is risky to make predictions.

4. North American Free Trade Agreement (NAFTA)

The North American Free Trade Agreement (“NAFTA”)¹⁴² (United States, Canada and Mexico) is the world’s largest free trade area, accounting for over \$1 trillion worth of trilateral trade in goods and services in a region of over 450 million persons with \$17 trillion in GDP, more in than any other regional trading bloc except the European Union.¹⁴³ NAFTA provides for elimination of all intra-regional tariffs and removal of essentially all non-tariff barriers except for those applicable a few agricultural products. It also incorporates comprehensive rules for, *inter alia*, treatment of foreign investment (including investor-state dispute settlement); government procurement; trade in services, including financial and transportation services; customs procedures; technical standards; sanitary and phytosanitary standards; protection of

¹³⁹ See Lay Hong Tan, *Will ASEAN Economic Integration Progress Beyond a Free Trade Area?*, 53 ICLQ 935, 938 (2004) (discussing early efforts at greater regional economic cooperation among ASEAN governments to encourage intra-regional trade and investment) [hereinafter “Tan”].

¹⁴⁰ For example, in a book on the EU and ASEAN, the authors effectively suggested that EU nations might prefer to deal with individual ASEAN nations such as Malaysia and Singapore rather than as a group. See MARY T. YEUNG, NICHOLAS PERDIKIS & WILLIAM A. KERR, *REGIONAL TRADING BLOCS IN THE GLOBAL ECONOMY: THE EU AND ASEAN* 134-135 (Edward Elgar, 1999).

¹⁴¹ *The China-ASEAN Free-Trade Agreement—Ajar for business; More Breadth than Depth*, THE ECONOMIST, Jan. 7, 2011, available at <http://www.economist.com/node/15211682> (last visited Oct. 24, 2011).

¹⁴² North American Free Trade Agreement, Dec. 17, 1992, U.S. – Mexico – Canada, [hereinafter “NAFTA”], 32 I.L.M. 289 (1993), also available at http://www.nafta-sec-alena.org/DefaultSite/index_e.aspx?CategoryId=42 (full text and annexes) (last visited Jul. 20, 2007).

¹⁴³ USTR, North American Free Trade Agreement (NAFTA), available at <http://www.ustr.gov/trade-agreements/free-trade-agreements/north-american-free-trade-agreement-nafta> (last visited Oct. 24, 2011).

intellectual property; trade in agriculture, energy, and basic petrochemicals; temporary immigration entry for business purposes; appeals of administrative decision; appeals in antidumping and countervailing duty trade actions; and comprehensive dispute settlement regarding disagreements among the governments concerning the application or interpretation of NAFTA provisions and administrative determinations in unfair trade (dumping, subsidies) cases.¹⁴⁴

NAFTA differs in two major ways from the EU, MERCOSUR and the ASEAN FTA: a) it is an FTA rather than a customs union, with the three Parties remaining free to set their own MFN tariffs under WTO rules; and b) with minor exceptions NAFTA is a single instrument, one that has not been amended in 18 years. It is effectively a “confederation among independent sovereigns, each maintaining autonomous political decision-making authority within the constraints defined by agreement.”¹⁴⁵ Also, like the EU but unlike MERCOSUR and ASEAN, NAFTA’s internal trade liberalization measures have been fully implemented in accordance with the schedules agreed upon during the negotiations.¹⁴⁶ The built in mechanism for accelerating tariff reductions and making rules of origin more flexible has been utilized but not with regard to “sensitive” goods. U.S. law provides authorization for the United States to agree with Canada and Mexico on periodic modifications of the rules of origin to facilitate achievement of freer trade,¹⁴⁷ and such authority is exercised on a regular basis.¹⁴⁸

Otherwise, major changes in NAFTA have been impossible to achieve, even though after 18 years it is obvious that revisions are desirable (if not urgent) in areas including government procurement (extending the chapter to state and local entities), rules of origin and achieving parity for Mexico with newer U.S. FTAs. Mexican politicians beginning with President Vincente Fox in 2000 have periodically called for a widening and deepening of NAFTA, moving toward a common market with a common currency and free labor flows that more closely reflects European integration.¹⁴⁹ Then as now such expansion, requiring amendment of the agreement, is politically unacceptable in the United States (and probably in Mexico today as well), as President Obama’s decision in 2009 to effectively abandon campaign promises to amend NAFTA demonstrated.¹⁵⁰ Still, it is possible that the United States and Canada may be more willing in the future to consider such proposals in the absence of negotiations in Geneva in

¹⁴⁴ Useful sources include THE NORTH AMERICAN FREE TRADE AGREEMENT: A NEW FRONTIER IN INTERNATIONAL TRADE AND INVESTMENT IN THE AMERICAS (Judith H. Bello et al., eds.) (ABA, 1994); The Future of North American Integration (Peter Hakin & Robert E. Litan, eds., Brookings, 2002); GARY CLYDE HUFBAUER & JEFFREY J. SCHOTT, NAFTA REVISITED: ACHIEVEMENTS AND CHALLENGES (Inst. for Int’l Economics, 2005).

¹⁴⁵ Frederick M. Abbott, *The North American Integration Regime and its Implications for the World Trading System*, in *The EU, the WTO and the NAFTA* 169, 171, (J.H.H. Weiler, ed.) (Oxford: Oxford UP, 2000).

¹⁴⁶ NAFTA, *supra* note __, art. 302, annex 302, Party schedules to annex 302.

¹⁴⁷ NAFTA Implementation Act, sec. 202(q) (19 U.S.C. § 3332(q) (1993).

¹⁴⁸ See, e.g., White House Press Release, *Proclamation by the President to Modify Rules of Origin Under the North American Free Trade Agreement*, Oct. 11, 2006, available at <http://www.whitehouse.gov/news/releases/2006/10/print/20061011-11.html> (last visited Mar. 5, 2008).

¹⁴⁹ See Fox’s Calls for Expansion of NAFTA Held Unlikely to Gain U.S. Approval, 17 INT’L TRADE REP. (BNA) 1085 (Jul. 13, 2000) (suggesting that Mexico requires a 7% annual growth rate to create the jobs necessary to keep Mexican workers from migrating to the United States).

¹⁵⁰ See Nacha Cattani & Rossella Brevetti, *Mexico Sees Need to Dust Off, Rehabilitate Aging NAFTA with U.S., Canada*, 27 INT’L TRADE REP. (BNA) 93 (Jan. 1, 2010) (discussing the lack of pressure to renegotiate NAFTA in both the U.S. and Canada and some of the changes that have been discussed).

the longer term, or do a “backdoor” modernization of NAFTA through participation by all three NAFTA Parties in the Trans-Pacific Partnership.

B. Conclusion of New or Pending RTAs

1. European Union Economic Partnership Agreements (EPAs)¹⁵¹

While the EU at any given time is negotiating a number of RTAs, including a potentially significant agreement with Canada in 2011¹⁵² and a proposed “WTO Plus” agreement with Russia,¹⁵³ this discussion focuses on EU negotiations with former colonies, the Asian, Caribbean and Pacific (ACP) states, those most likely to be made most urgent by the collapse of Doha. The EPAs arise out of a long-term trade and development policy that pre-dates the European Union and originates in the colonial era. France, the Netherlands and the United Kingdom in particular have sought to maintain close relationships with their former colonies, although historical links have been replaced by economic development needs as the most significant (although not only) justification.¹⁵⁴ It was and is a discriminatory policy in which former colonies in general were afforded more favorable access to the EU market than the rest of the developing world (including those in Latin America who obtained their independence from Spain and Portugal 150-200 years ago). The evolution of individual EU Member State policies was subsumed into the EU beginning in the 1950s; the EC Treaty includes among the list of EU activities “the association of overseas countries and territories in order to increase trade and promote jointly economic and social development.”¹⁵⁵

Initial efforts to maintain special trade relations with former colonies, the Yaoundé Conventions with new African states, were generally reciprocal in nature. Nevertheless the EC Treaty provisions (although not the Yaoundé Conventions *per se*) raised consistency issues under GATT Article XXIV. According to the Working Party, duties were not to be eliminated on substantially all trade, and there were also objections to the limited (five year) term of the agreements. Questions of law were shelved in favor of an informal agreement to GATT consultations should any future problems arise.¹⁵⁶ EU maintenance of association or economic partnership agreements with its former colonies, with the less advantageous GSP offered to other developing countries, continues to complicate EU trade and development policy to this day.

The Community’s trade and development policies in the 1970s and 1980s were primarily non-reciprocal, both in the association agreements and in implementation of GSP. Fortunately for the EU, legal challenges under GATT did not occur for some years. In 1975, the EU

¹⁵¹ This subsection draws on Gantz—RTAs, *supra* note ___, at 346-49.

¹⁵² See Peter Menyas, *Free Trade Talks Between Canada, EU Enter Ninth Round of Negotiations*, *Fast Says*, 28 INT’L TRADE REP (BNA) 1700 (Oct. 20, 2011) (reporting on what Canadian authorities have called “our most significant trade initiative since the North American Free Trade Agreement”).

¹⁵³ *EU, Russia Moving Towards ‘WTO Plus’ Trade Agreement, Eventual FTA*, WORLD TRADE ONLINE, Dec. 15, 2011.

¹⁵⁴ Lorand Bartels, *The Trade and Development Policy of the European Union*, 18 EUR. J. INT’L L. 715 (2007). The former Spanish and Portuguese colonies in Latin America, most of which became independent around 1820, are treated differently.

¹⁵⁵ EC Treaty, art. 3(s).

¹⁵⁶ See, *id.*, at 722-729 (discussing the Yaoundé Conventions and the GATT Article XXIV legality questions).

concluded the first of what would be a thirty-five year series of still non-reciprocal agreements with the ACP states, the four Lomé conventions¹⁵⁷ and Cotonou Agreements.¹⁵⁸ The trade cooperation provisions of the Cotonou Agreement (providing duty-free treatment for most ACP products entering the EU) were not GATT legal because they departed from MFN treatment in GATT, Article I without meeting the requirements of Article XXIV.

In 2001 the WTO Ministers authorized a waiver for the trade provisions of the Cotonou Agreement effective through 2007,¹⁵⁹ which everyone understood would not be renewed. Thus, the goal for both the EU and the ACP states was a series of EPAs that are considered legal under GATT Article XXIV. The EU decided in consultation with the ECP states that the trade preference provisions of the Cotonou Agreement would have to be replaced with new arrangements that would be GATT-legal, using Cotonou as the “foundation” for such discussions.¹⁶⁰ Failing agreement the ACP exports to the EU would as of January 1, 2008 benefit only from the Generalized System of Preferences rather than from the superior preferential access under Cotonou.¹⁶¹ The impact of this change on ACP states would not have been uniform. The least developed developing states, mostly in Africa, would have had duty-free access to the EU market for “everything but arms,” and thus would not have seen enormous differences in market access compared to Cotonou. However, for “middle income” Caribbean states (all except Haiti) and many African nations the EU GSP benefits¹⁶² would have been considerably less favorable than those available under Cotonou or under a new EPA.¹⁶³

For the EU, the focus has shifted toward a greater level of reciprocity, while continuing the emphasis on development. As EU Trade Commissioner Peter Mandelson affirmed in April 2008 (while defending the EPA negotiations against criticism): “the whole idea of the EPA is to harness trade in the cause of development, to create opportunities for trade linked to capacity building and development cooperation, which offers a much better deal than the old-style tariff preferences of Cotonou.”¹⁶⁴

The EU’s efforts to complete negotiations with all ACP nations by the end of 2007 were not successful except with respect to the Caribbean nations.¹⁶⁵ In several situations the EU

¹⁵⁷ Four Lomé Conventions were concluded, the most recent of which expired in 2000. See ACP: Lomé Convention, available at <http://homepages.uel.ac.uk/ben2417s/EUAid3.htm> (last visited Dec. 29, 2007).

¹⁵⁸ It first concluded in 2000 and revised in 2005. Commission, the Cotonou Agreement, available at <http://www.europa.eu/scadplus/leg/en/lvb/r12101.htm> (last visited Dec. 29, 2007).

¹⁵⁹ WTO Ministerial Decision, European Communities – The ACP-EC Partnership Agreement, Nov. 14, 2001, available at http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_acp_ec_agre_e.htm (last visited Dec. 29, 2007).

¹⁶⁰ Non-trade related provisions of Cotonou remain effective until 2020.

¹⁶¹ See Caribbean Regional Negotiating Machinery, *Update*, Oct. 29, 2007, No. 0714, at 1, available at http://www.crn.org/documents/updates_2007/rnmupdate0714.htm (last visited Jan. 10, 2007) (noting that without an economic partnership agreement in place by January 1, 2008 the region would be in a “disadvantageous position”).

¹⁶² See Commission, *Generalized System of Preferences 2006-2008*, available at <http://www.europa.eu/scadplus/leg/en/lvb/r11020.htm> (last visited Dec. 29, 2007).

¹⁶³ *Id.*, at 2.

¹⁶⁴ Mathabo le Roux, *Tricky Trade Negotiations Need More Discussion*, AllAfrica.com, Apr. 8, 2008, at 1, available at <http://allafrica.com/stories/printable/200804080659.htm> (last visited Apr. 21, 2008).

¹⁶⁵ See Bruce Zagaris & Elena Papangelopoulou, *An Overview of the CARIFORUM-EC Economic Partnership Agreement*, 49 TAX NOTES INT’L 689 (Feb. 25, 2008); Gantz—RTAs, *supra* note ___, at 349-59.

concluded interim EPAs (covering only trade in goods), accords which left many details to be negotiated until later, and/or did not cover services, intellectual property or government procurement.¹⁶⁶ Still, the ACP nations have continued to receive “duty free, quota free” (DFQF) access to the EU market. This approach is ending; the EU indicated in September 2011 that as of January 1, 2014 those ACP countries that had not concluded and ratified an EPA would lose their DFQF access.¹⁶⁷ Possibly, the absence of negotiations in Geneva will assist at least some ACP nations in completing the EPA negotiations by 2014. It also seems likely that in the absence of another broad negotiating round in Geneva the EU and the ACP states will continue to develop the trade relationships that are the subject of the EPAs.

2. Trans-Pacific Partnership (TPP) and Other U.S. Initiatives

The two-year-old negotiations aimed at a Trans-Pacific Partnership (TPP) agreement (Australia, Brunei, Chile, Malaysia, New Zealand, Peru, Singapore, the United States and Vietnam) represent the only major Obama Administration trade initiative (beyond the enactment in October 2011 of long-stalled Bush era FTAs with Colombia, Panama and South Korea).¹⁶⁸ Even after nine rounds of talks, no consensus has been reached on the difficult issues, including some that have eluded negotiators in Geneva, such as increased protection of intellectual property (“TRIPS-plus”), investment, competition, and market access in sensitive goods and services sectors such as certain industrial goods, agriculture and textiles. New language to regulate behavior of state-owned enterprises (SOEs) is also to be included in the comprehensive FTA,¹⁶⁹ along with the labor and environmental provisions that are politically required in any U.S. FTA. Agreement even on the “broad outlines of a final pact” will not likely be reached for some time, and much hard negotiating remains.¹⁷⁰

The potential expansion of world trade likely to result from a TPP with among the current negotiating group is modest, given that the United States already has free trade agreements in force with four of the TPP group (Australia, Chile, Peru and Singapore) and Australia, Brunei, New Zealand and Singapore are currently parties to the “P4” FTA among each other. However, many of the negotiators hope that the TPP could ultimately serve as the foundation for a much broader Free Trade Agreement of the Asia—Pacific; as the Chilean negotiator, Rodrigo Contreras observed, “Our objectives are to negotiate the highest quality agreement and set the foundation for an Asia-Pacific Agreement.”¹⁷¹ For example, should Japan ultimately decide to join the TPP negotiations or sign on later—preliminary steps to that end began in November

¹⁶⁶ Luisa Morgantini, *EU-ACP Trade – Unequal Partners, Unfair Rules*, Dec. 26, 2007, at 1, available at <http://allafrica.com/stories/printable/200712260449.html> (last visited Dec. 29, 2007).

¹⁶⁷ Int’l Center for Trade and Sustainable Development, *Special Update: European Commission Puts Renewed Pressure on EPA Negotiations*, TRADE NEGOTIATIONS INSIGHTS, Oct. 2011, at 2, available at www.ictsd.org/news/tni (last visited Oct. 20, 2011).

¹⁶⁸ See Rachel Boehm, *Obama Signs Robust Trade Package Implementation: TPP Next for U.S. Trade*, 28 INT’L REP. (BNA) 1735 (Oct. 27, 2011).

¹⁶⁹ See *U.S. Fixes Future-SOE “Loophole,” Sends TPP Partners Proposed Text*, WORLD TRADE ONLINE, Oct. 21, 2011.

¹⁷⁰ See Len Bracken, *Marantis Says Trade Deal Votes Validate Consultative Approach being Used with TPP*, 28 INT’L TRADE REP. 1707 (Oct. 20, 2011) (quoting Deputy U.S.T.R. Demetrios Marantis) [hereinafter “Bracken”].

¹⁷¹ Lucien O. Chavin, *Ninth Round of TPP Talks Concludes in Lima; U.S. Tables State-Owned Enterprise Proposal*, 28, INT’L TRADE DAILY (BNA), Oct. 31, 2011.

2011¹⁷²—the economic equation would radically change, as U.S. Congressional leaders have cautioned.¹⁷³ Similarly, the addition of Canada and Mexico would also greatly increase the economic significance of the TPP,¹⁷⁴ as well as the negotiating challenges. Trade expert Gary Horlick, a strong proponent of an expanded TPP, has suggested that such a TPP might be a workable alternative for the members to the WTO.¹⁷⁵ China has indicated that it might be willing eventually to take part¹⁷⁶, but China's presence would not likely be welcomed in the United States.

One hopes that the TPP negotiations can be successfully concluded although this is not likely before 2013 at the earliest, despite President Obama's expressed hope for a mid-2012 finalization.¹⁷⁷ The pace of the negotiations has been slow; the U.S. presidential election and other political constraints¹⁷⁸ and the added complexities of Japanese participation make this an extremely difficult process. Still, if the agreement is concluded promptly this, plus the absence of negotiations in Geneva, might well convince other Asia Pacific Economic Cooperation Forum (APEC) nations to participate in what with the United States, Japan, Canada and Mexico would rival the EU among regional trade agreements in total trade.

3. An EU—United States FTA?

Should there be a political opportunity for true boldness, the concept of a United States—EU trade agreement may again surface. The logic of a comprehensive free trade agreement between the United States and the EU, perhaps parallel to the ongoing negotiations (since 2009) of such an agreement between the EU and Canada,¹⁷⁹ is unassailable given the enormous volume of bilateral trade.¹⁸⁰ The options range from relatively narrow coverage, perhaps of services,

¹⁷² See *Noda Announces Japan Will Take Preliminary Steps Toward Joining TPP*, WORLD TRADE ONLINE, Nov. 11, 2011 (reporting on the prime minister's decision to enter into consultations).

¹⁷³ *Congressional Leaders Caution USTR on Possibility of Japan Joining TPP*, WORLD TRADE ONLINE, Nov. 9, 2011. The U.S. auto industry likely would be opposed. *U.S. Auto Companies Oppose Japanese Participation in TPP Negotiations*, WORLD TRADE ONLINE, Nov. 11, 2011.

¹⁷⁴ Len Bracken, *Nine Leaders Agree on Outline for TPP; Canada, Mexico Follow Japan in Bid to Join*, INT'L TRADE REP. (BNA) (Breaking News), Nov. 14, 2011, at 3.

¹⁷⁵ Gary Horlick, *The Future of Doha and the WTO*, *supra* note ____.

¹⁷⁶ Daniel Pruzin & Len Bracken, *Official Says China 'Open' to Participation in Trans-Pacific Partnership Negotiations*, 28 INT'L TRADE REP. (BNA) 1566 (Sep. 29, 2011).

¹⁷⁷ *White House Eyes Mid-2012 TPP Deal, Cautious On Prospect of Japan Joining Talks*, WORLD TRADE ONLINE, Nov. 13, 2011.

¹⁷⁸ These include the President's current lack of trade promotion authority, although Deputy U.S.T.R. Marantis has argued that extensive consultations between the Obama Administration and Congress on the TPP have obviated the need at the present time for TPA. Bracken, *supra* note _____. Another political constraint overshadowing the TPP negotiations disappeared in October 2011, when the long-stalled U.S. FTAs with Colombia, Panama and South Korea were approved. Rachel Boehm, *Obama Signs Robust Trade Package Implementation; TPP Next for U.S. Trade*, INT'L TRADE DAILY (BNA), Oct. 24, 2011.

¹⁷⁹ Peter Menyasz, *Services, Investment Offers Exchanged in Latest Round of Canada—EU Trade Talks*, 28 INT'L TRADE REP. (BNA) 1756 (Oct. 27, 2011). EU—Canada trade was C\$82.5 billion in 2010.

¹⁸⁰ In 2010, U.S. exports to the EU were approximately \$240 billion worth, while exports were worth \$319 billion, for total trade in goods of \$659 billion. U.S. Census, *Trade in Goods with the European Union*, available at <http://www.census.gov/foreign-trade/balance/c0003.html#2010> (last visited Oct. 29, 2011).

investment and competition law, to an agreement that would cover manufactured goods as well, to a fully comprehensive agreement that would also address agricultural trade.¹⁸¹

The obstacles are enormous as well, particularly in the GATT requirement that it apply to “substantially all trade” including agriculture and the political and economic need to apply to major services sectors. The fact that Canada, a nation of less than 35 million people with a GDP about 5% of that of the United States, may be able to successfully negotiate such an agreement doesn’t mean the same is true for the United States. Moreover, issues such as agricultural subsidies, agricultural trade, investment and competition have proven daunting for the United States and the EU nations to address in the past.¹⁸² The enormous volume of WTO litigation between the United States and the EU is also notable.¹⁸³ Perhaps the Doha failure in time will encourage the United States and the EU to consider an agreement of limited scope that nonetheless would result in significant trade expansion while still being WTO legal,¹⁸⁴ rather than insisting on a fully comprehensive FTA. Following a November 2011 EU-U.S. summit, the EU and the United States have committed to seeking new ways to increase bilateral trade and investment by the end of 2012,¹⁸⁵ possibly including an FTA.¹⁸⁶

C. Services RTAs

The objective of the *General Agreement on Trade in Services* (“GATS”)¹⁸⁷ is simple: over time, to assure that the basic disciplines that have applied to international trade in non-agricultural products for more than half century— MFN treatment, national treatment, subsidies, transparency, etc.-- are applied to services, with a minimum of exceptions. GATS provides a series of legal rules governing market access and national treatment restrictions. GATS rules apply to regional and local as well as national governments. Members of the WTO agree through a “positive list” approach to restrict use of market access and national treatment restrictions; obligations under GATS, except as noted below, are defined largely by Members’ individual schedules of commitments. National treatment commitments are limited by each government to the services specifically designated by that government in its individual annexes.

GATS also required the members, beginning in 2000, to enter into “successive rounds of negotiations . . . with a view to achieving a progressively higher level of liberalization.”¹⁸⁸ Unfortunately, little progress has been made in the Doha services negotiations, particularly since

¹⁸¹ See *Chamber of Commerce Eyes Expansion of U.S.—EU ‘Zero-Tariff’ Concept*, WORLD TRADE ONLINE, Oct. 27, 2011 (discussing various Chamber of Commerce proposals for a trade deal with the EU).

¹⁸² See, e.g., the failed negotiations at the OECD of a “multilateral investment agreement” in the 1990s, *supra* notes [88-89] and accompanying text.

¹⁸³ Since 1995, the EU had brought 29 WTO actions against the United States, and the United States had brought 24 actions against the EU or individual members. WTO, *Chronological List of Disputes Cases*, available at http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm (last visited Jan. 9, 2012).

¹⁸⁴ For example, a services bilateral agreement need only meet the requirements of GATS, art. VI, discussed in subsection C, below; agreements on most investment issues and competition law would be totally outside of WTO scope.

¹⁸⁵ *EU, U.S. to Explore Deeper Bilateral Economic Ties by End of 2012*, WORLD TRADE ONLINE, Nov. 28, 2011.

¹⁸⁶ *Kirk, Froman Say U.S.-EU FTA on the Table in New Working Group*, WORLD TRADE ONLINE, Nov. 30, 2011.

¹⁸⁷ GATS, WTO Agreement, *supra* note ___, Annex 1B.

¹⁸⁸ *Id.*, art. XIX(1).

2008.¹⁸⁹ Given that the services negotiations are part of the Doha Round “single undertaking,” the effective abandonment of the Doha Round means that services liberalization is also abandoned or indefinitely delayed in Geneva.

Because of the MFN provisions, plurilateral agreements on services are generally impractical; concessions among a few would automatically apply to other WTO members, including those who did not participate in the negotiations or make concessions of their own. However, GATS Article V contains language similar to that of GATT, Article XXIV:

1. This Agreement shall not prevent any of its Members from being a party to or entering into an agreement liberalizing trade in services between or among the parties to such an agreement, provided that such an agreement:

- (a) has substantial sectoral coverage¹⁹⁰, and
- (b) provides for the absence or elimination of substantially all discrimination, in the sense of Article XVII, between or among the parties, in the sectors covered under subparagraph (a), through:
 - (i) elimination of existing discriminatory measures, and/or
 - (ii) prohibition of new or more discriminatory measures,

either at the entry into force of that agreement or on the basis of a reasonable time-frame

Although it is evident from Article V(2) that the Parties contemplated situations in which trade in services would be typically be part of a broader RTA on goods,¹⁹¹ this is one factor to be considered rather than an absolute requirement. In other words, a free-standing services RTA (or “economic integration agreement”) is permissible.¹⁹² Nor is there a requirement that substantially all services trade be covered (as with goods in GATT, Article XXIV); rather only “substantial sectoral coverage is mandated. This GATS Article V approach is clearly far more flexible than a traditional “plurilateral” agreement which could not avoid the MFN questions.

GATS Article V thus provides a potentially powerful mechanism for services trade liberalization among those who are willing to liberalize services market access among a group of

¹⁸⁹ See WTO, Services Negotiations—State of Play, available at http://www.wto.org/english/tratop_e/serv_e/state_of_play_e.htm (last visited Oct. 25, 2011) (noting with typical understatement that “Progress has been limited since the Signalling Conference of July 2008).

¹⁹⁰ “This condition is understood in terms of number of sectors, volume of trade affected and modes of supply. In order to meet this condition, agreements should not provide for the *a priori* exclusion of any mode of supply.”

¹⁹¹ In the WTO’s evaluation of the agreement “consideration may be given to the relationship of the agreement to a wider process of economic integration or trade liberalization among the countries concerned.”

¹⁹² It is the responsibility of the Council for Trade in Services to determine if a services RTA is consistent with GATS Article V. However, given the unlikelihood that the Council, like the CRTA, could reach a consensus on the legality or illegality of a services RTA, the risks are minimal.

WTO Members even if they are reluctant to open their services markets more broadly. As one scholar suggested several years ago:

EIAs [economic integrations agreements] may not only revive negotiations among interested countries, but also offer a sensible way to account for different levels of Members' technological and infrastructural development while enabling further trade liberalization. As a vehicle to distance service negotiations from negotiations on agriculture and non-agriculture market access, an EIA could enable a closer cooperation between the US and EU, among the Organization for Economic Co-operation and Development countries or with Brazil and/or India.¹⁹³

One can reasonably assume that services negotiations will be pursued by the United States, the EU and other OECD members, and hopefully by some developing countries in the months after the December 2011 WTO ministerial meeting at which the Doha negotiations were abandoned. The focus will be on most of the same issues as in Geneva, i.e., market opening, domestic regulation, rules on the use of emergency safeguards, services subsidies and, possibly, rules for least developed countries.¹⁹⁴ (Government procurement of services is related, but generally covered in the GPA negotiations discussed in Part __, above.) A major objective is to expand individual country commitments to services market liberalization.¹⁹⁵

V. National Law

Despite much less attention internationally than is the case with multilateral trade negotiations, a very substantial portion of the increase in world trade in recent decades has resulted not from multilateral or even regional trade agreements, but through unilateral national actions to lower tariffs, reduce non-tariff barriers and/or make international commerce operate more smoothly. Several World Bank scholars have estimated that during the period 1983-2003, "autonomous changes in national law were responsible for the overwhelming majority (roughly 66 percent)" of trade liberalization in developing countries.¹⁹⁶ In this section I consider several important examples of the power and reach of unilateral action through national legislation alone, the country-specific actions of Chile and Mexico, the individual actions of many countries under the "Washington Consensus" and the use of uniform law to implement necessary change, such multilateral efforts at the Organization of American States (OAS) and UNCITRAL to offer model laws for secured financing.

A. Chile

¹⁹³ Petra L. Emerson, *An Economic Integration Agreement on Services: A Possible Solution to the Doha Development Round Impasse*, 2(2) TRADE L. & DEV. 252 (2010).

¹⁹⁴ See WTO, Services Negotiations, available at http://www.wto.org/english/tratop_e/serv_e/s_negs_e.htm#offers (last visited Oct. 25, 2011) (listing the major areas of negotiations).

¹⁹⁵ GATS, *supra* note __, art. XIX ("negotiation of specific commitments").

¹⁹⁶ Dadush, *supra* note __, at 2 (citing a study by Will Martin and Francis Ng of the World Bank).

As the government has explained, “Chile’s applied MFN tariff was unilaterally phased down from 11 per cent to six per cent between 1999 and 2003.”¹⁹⁷ “This low, uniform tariff is a distinctive feature of Chile’s trade policy that makes for more efficient resource allocation by establishing the basis for non-differential treatment of the various production sectors, and has also enabled Chile to negotiate preferential agreements with various countries.”¹⁹⁸ Since 2003 Chile has continued to apply the single MFN tariff rate of 6 per cent, with a few exceptions.¹⁹⁹ As the Chilean Government explained in a 2009 WTO report,

Chile’s trade policy maintains its objective of improving and ensuring access for its goods and services to all markets, as well as encouraging domestic and foreign investment. With a view to liberalizing the economy, all available channels have been used to give Chile’s trade policy an outward orientation, including unilateral market opening and multilateral and bilateral trade negotiations.²⁰⁰

The advantages of this tariff policy have been substantial. First, it greatly simplified the classification process for business stakeholders and the customs service alike. Secondly, it greatly reduced the likelihood of customs fraud—an endemic problem in many developing countries—because an importer received no financial advantage by seeking the fraudulent reclassification of goods to her advantage.

B. Mexico Before and After NAFTA

Mexico began liberalizing its economy in 1985 in preparation for accession to GATT in 1986, and has continued the process (with more than a few ups and downs and many delays) since that time. Much of Mexico’s reform legislation was mandated by NAFTA, such as the 1993 Foreign Investment Law.²⁰¹ However, that law, like many others, was applied from the outset by Mexico in a non-discriminatory manner to persons of other nationalities investing in Mexico, and that practice has not changed in more than eighteen years. In 2011, despite some continuing complexities in the system, Mexico is considered by the World Bank to be the easiest place in Latin America to do business and 35th in the world.²⁰² Mexico’s future, perhaps more than most countries given the enormous comparative advantages it received with NAFTA, depends today as it did a decade ago more on its ability to bring about internal reforms than from gains it has reason to expect from new trade agreements. As the WTO Secretariat observed in 2008:

¹⁹⁷ WTO, Trade Policy Review—Report by Chile, Sep. 7, 2009, at 7, *available at* http://docsonline.wto.org/imrd/gen_searchResult.asp?RN=0&searchtype=browse&q1=%28+%40meta%5FTitle+Chile%29+and+%28+%28+%40meta%5FSymbol+WT%FCTPR%FCG%FC%2A+%29%29&language=1 (last visited Oct. 20, 2011).

¹⁹⁸ *Ibid.*

¹⁹⁹ WTO Secretariat, Trade Policy Review—Chile, Nov. 5, 2009, at *available at* http://docsonline.wto.org/imrd/gen_searchResult.asp?RN=0&searchtype=browse&q1=%28+%40meta%5FTitle+Chile%29+and+%28+%28+%40meta%5FSymbol+WT%FCTPR%FCS%FC%2A+%29%29&language=1 (last visited Oct. 20, 2011).

²⁰⁰ WTO, Trade Policy Review—Report by Chile, *supra* note ___, at 7.

²⁰¹ *Diario Oficial*, Dec. 27, 1993.

²⁰² *Making the Desert Bloom: The Mexican economy has recovered somewhat from a scorching recession imported from America, but is still hobbled by domestic monopolies and cartels*, THE ECONOMIST, Aug. 27, 2011, at 59 [hereinafter “Economist—Mexico”].

Since its previous Review in 2002, Mexico has continued with the gradual and unilateral liberalization of its trade regime. It has also concluded new free-trade agreements, now conducting 85 per cent of its trade with preferential partners . . . At the same time, some barriers to MFN trade and foreign investment limit the access of Mexican consumers and producers to certain goods and services on more competitive terms.²⁰³

Despite significant improvements in recent years, Mexico still suffers in the areas of energy costs, education, tax inequality, legal system inefficiency and corruption, among others.²⁰⁴ Still, particularly in recent years, Mexico is an example of the power of internal, unilateral, legislative reforms that could be instructive to other nations.

C. The “Washington Consensus”

The “Washington Consensus” is the term commonly given to the post-Cold War program urged on the developing world beginning around 1990. The essence of the Washington Consensus was deregulation, along with a package of liberal economic, legal and political reforms that emphasized democracy through free elections. These changes were to be accompanied by balanced budgets, a smaller state sector and privatization of the national economy.²⁰⁵ Critics have charged that the program was imposed without regard to individual country and citizen needs²⁰⁶ and others have blamed it (probably unfairly) for the Argentine financial collapse.²⁰⁷

However, to the extent that the Washington Consensus stands for healthy, democratic institutions, less (but not an absence of) pervasive regulation, reduced corruption and emphasis on internal reforms rather than outside assistance, it seems very much alive, as the experience of both Mexico and Chile confirms. The Peruvian economist, Hernando de Soto, postulated that poor countries could benefit from globalization only if they reform their regulatory institutions,

²⁰³ WTO Secretariat, Trade Policy Review—Mexico, May 2, 2008, at vii, available at http://docsonline.wto.org/imrd/gen_searchResult.asp?RN=0&searchtype=browse&q1=%28+%40meta%5FTitle+Mexico%29+and+%28+%28+%40meta%5FSymbol+WT%FCTPR%FCS%FC%2A+%29%29&language=1 (last visited Oct. 20, 2011).

²⁰⁴ See Carol Wise, *Mexico’s Democratic Transition: the Search for New Reform Coalitions*, 9 LBUSRAM 283, 305-310 (2003) (discussing Mexico’s needs, *inter alia*, for tax reform, investment in education and human capital, reform of labor markets and reform of the tax system, including dependence on oil revenues); DAVID A. GANTZ, REGIONAL TRADE AGREEMENT: LAW, POLICY AND PRACTICE (Durham, NC: Carolina Academic Press, 2009) [hereinafter “Gantz—RTAs”] Gantz, *supra* note ___, at 156-57 (discussing the continuing need for internal reforms in Mexico).

²⁰⁵ Thomas Kelly, *Beyond the Washington Consensus and New Institutionalism: What is the Future of Law and Development*, 35 N.C. J. Int’l & Com. Reg. 539, 542-43 (2010) [hereinafter “Kelly—Washington Consensus”].

²⁰⁶ ²⁰⁷ See John Williamson, *A Short History of the Washington Consensus*, 15 L. & Bus. Rev. Am. 7, 13 (2009) (contending that the Argentine collapse was caused by a fixed, chronically overvalued exchange rate and an excessive debt/GDP ratio).

with the objective of reducing or eliminating unnecessary barriers to entry for local entrepreneurs.²⁰⁸

The George W. Bush Administration created the Millennium Challenge Corporation (MCC), which provides financial aid only to lower middle income developing countries which bring about certain internal reforms that are considered vital to sustainable economic growth and development, including providing legal and financial support for small and medium-sized businesses and strengthening and improving government institutions. Before a country is eligible the candidate country's performance on various policy indicators is examined, with those selected being based on policy performance. Those countries that are chosen must "identify their priorities for achieving sustainable economic growth and poverty reduction." The MCC requires that individual country proposals be developed in consultation with civil society and provide consultations with the countries to help them develop and refine their programs.²⁰⁹ As Professor Thomas Kelly has observed, funds are not made available by the MCC until after the country "has demonstrated progress in institution-building."²¹⁰

President Obama, in his first year in office, appeared to be a very strong supporter of strong institutions rather than "strongmen," as he indicated in a major speech in Ghana.²¹¹ As of December 2011, the program continues without major changes under the Obama Administration. The selected countries include Honduras, whose secured financing legislation and registry were supported by the MCC.

It is impossible to predict in this time of unacceptable budget deficits whether the United States, the EU and other developed countries will continue to provide existing levels of foreign assistance and funding for the international development banks. However, it seems likely that such assistance will be provided only under conditions in which the donors believe it will be effective. Consequently, developing nations which take the steps that are necessary in order to create improved conditions for economic development, even if there is less knee-jerk deregulation and more institution-building, are most likely to prosper.

D. Model Laws: Secured Transactions

Another approach that falls within the gambit of national legislation is the practice of drafting models laws for adoption by the states participating in the multilateral organizations, such as the United Nations Committee on International Trade Law (UNCITRAL) and the Committee on Private International Law at the Organization of American States. By definition, such model laws are for the willing; no members of the drafting organizations are ever required to adopt the laws, although competitive pressures in neighboring countries, for the foreign investment dollar, may make such reforms less "voluntary" than would otherwise be the case. Versions of the 2002 OAS model secured transactions law²¹² have been adopted in one form or

²⁰⁸ HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE* (New York: Basic Books, 2003).

²⁰⁹ About MCC, available at <http://www.mcc.gov/pages/about> (last visited Oct. 21, 2011).

²¹⁰ Kelly—Washington Consensus, *supra* note ___, at 547.

²¹¹ Kelly—Washington Consensus, *supra* note ___, at 540.

²¹² OAS, Model Inter-American Law on Secured Transactions, available at http://www.oas.org/dil/cidip-vi-securedtransactions_eng.htm (last visited Oct. 20, 2011).

another in Mexico, Honduras and Guatemala. Internal deliberations among government officials, banks and potential borrowers are underway at this writing in Colombia, Malawi and Uganda. The successor to the UNCITRAL working group that was responsible for the UNCITRAL Legislative Guide on Secured Transactions²¹³ is drafting a new secured transactions law, one that is likely to have appeal well beyond Latin America and which is expected to facilitate implementation of the necessary reforms, facilitating the availability of secured credit for small and medium-sized business in the developing world.²¹⁴

E. Unilateral Reduction of Agricultural Subsidies in the EU and United States?

Historically, reduction of agricultural subsidies has been one of the most difficult aspects of international trade negotiations. EU reluctance to decrease agricultural subsidies almost derailed the Uruguay Round negotiations in 1992, but the impasse was ultimately resolved through the “Blair House Accord.”²¹⁵ As noted earlier, further reductions were also significantly responsible for the demise of the Doha Round. Under such circumstances it may be considered strange to suggest that either the United States or the EU would consider reducing their agricultural subsidies on a unilateral basis. Nevertheless, particularly when one is considering the longer-term, this may be possible. The reason will likely have little to do with international trade negotiations *per se*. Rather, it will be due to budgetary constraints and the increasing importance of environmentally sound farming. The EC, which devoted almost 44% of the EU budget to agricultural support in 2007,²¹⁶ has already decided to freeze the budget in absolute numbers for seven years beginning in 2012 at about 36 percent of the total.²¹⁷ The EU agricultural commissioner noted in October 2011 that “The next decades will be crucial for laying the foundations of a strong agriculture sector that can cope with climate change and international competition while meeting the expectations of the citizen.”²¹⁸ Continuing financial pressures on the EU as a result of fiscal crises in Greece, Spain, Portugal, Ireland and elsewhere may accelerate this trend, despite the risk that reducing farm supports could further exacerbate economic problems in some of the EU’s more vulnerable economies.

The prognosis for reduced farm subsidies in the United States is much less clear. Financial constraints in the coming years have increased pressures to reduce agricultural

²¹³ UNCITRAL Legislative Guide on Secured Transactions: Terminology and Recommendations, 2009, available at <http://www.uncitral.org/pdf/english/texts/security-lg/e/Terminology-and-Recs.18-1-10.pdf> (last visited Oct. 20, 2011).

²¹⁴ This section is based on discussions with Boris Kozolchyk and Marek Dubovec who have been working with various Latin American and African governments on secured transactions legislation and the accompanying electronic registry systems since the mid-1990s. Mr. Dubovec is a member of the UNCITRAL Working Group VI.

²¹⁵ KEVIN C. KENNEDY, INTERNATIONAL TRADE REGULATION: READING, CASES, NOTES AND PROBLEMS 15 (New York: Aspen, 2009)

²¹⁶ European Commission, *Managing the Agricultural Budget Wisely* (2007), at 3, available at http://ec.europa.eu/agriculture/fin/clearance/factsheet_en.pdf (last visited Oct. 20, 2011).

²¹⁷ *EU farm budget frozen for next seven years and conditioned to ‘greening,’* MercoPress (Uruguay), Jul. 1, 2011 (republished Oct. 20, 2011), available at <http://en.mercopress.com/2011/07/01/eu-farm-budget-frozen-for-next-seven-years-and-conditioned-to-greening> (last visited Oct. 2011).

²¹⁸ Joe Kirwin, *EC Proposed Radical Reforms to Agricultural Subsidy Program*, 28 Int’l Trade Rep. (BNA) 1698 (Oct. 20, 2011) (quoting Commissioner Dacian Cioloș).

subsidies,²¹⁹ either as part of the ongoing super committee process or through continuing demands to reduce the budget deficit, including but not limited to actions by a re-elected or new President and Congress in 2013. However, the strength of the farm lobby within Congress, and particularly within the U.S. Senate, is such that substantial reductions, at least in the short to medium term, may be elusive. Still, the major U.S. subsidies for the ethanol industry, including a tariff of ____ per gallon, were allowed by the U.S. Congress to expire at the end of 2011.²²⁰

VI. Conclusions

While multilateral trade negotiations may well be the best route to the reduction of tariffs and non-tariff barriers for agricultural and manufactured goods, and increased market access for services, among others, in the absence of the political among WTO Members to move forward other options are likely to become more popular. Most observers would agree that some trade liberalization is better than no trade liberalization, or increased protection. The vehicles for “some liberalization” include new or expanded regional trade agreements, “plurilateral” accords among a willing sub-group of the WTO memberships, and increased attention as to how members can increase their own competitiveness and trade through changes in national laws and policies. There are risks in all of these alternatives, but the failure of Doha has given members who seek expanded trade and the benefits accruing therefrom no other choice.

²¹⁹ See *Farm Bill Proposals Foresee Elimination or Cuts for Direct Payments, CCPs*, WORLD TRADE ONLINE, Oct. 19, 2001, at 1.

²²⁰ **Inside UST or BNA on expiry.**