PROPHETIC LAW REVIEW
Volume 3, Issue 2, December 2021

THE SLOW DEMISE OF THE MOST FAVOURED NATION

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Citation Guide:
Frances Annmarie Duffy, **'THE SLOW DEMISE OF THE MOST FAVOURED NATIO'** [2021] 3 (2) Prophetic Law Review 111.

Received:
30 September 2021
Accepted:
12 December 2021
Published:
21 December 2021

DOI:
10.20885/PLR.vol3.iss2.art1

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Abstract

The Most Favoured Nation Treatment (MFN) is the founding principle of the General Agreement on Tariffs and Trade (GATT) and its successor The World Trade Organisation. Introduced in 1947 by the GAT, and re-affirmed in 1995 by the WTO, the MFN aimed to rid the world of discriminatory trade practices. This aspirational aim was to create a level playing field for all countries engaged in trade and create more opportunities for developing nations to trade with those already flourishing on the world trade stage. With normative research methodology, this article claims that MFN has never achieved this aim. It examines how the MFN has been eroded over time by exceptions to the MFN allowed by the GAT and the WTO. Preferential Trade Agreements and new trade initiatives such as The Regional Comprehensive Economic Partnership (RCEP) and The Belt and Road Initiative (BRI) are also evidence of more departures from the MFN as countries seek new vehicles for more effective trade. The article concludes that the MFN is becoming more and more irrelevant over time, and little can be done to revive it.

Key Words: *Free Trade Agreements, Most Favoured Nation Treatment (MFN), Preferential Trade Agreements, Plurilateral Trade Agreements.*

A. Introduction

Maruyama argues that Free Trade Agreements (FTAs) containing preferential trading arrangements are eroding the Most Favoured Nation Treatment principle (MFN).[2] This essay considers the founding principle of the General Agreement on Tariffs and

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[2] Warren H Maruyama, 'Preferential Trade Arrangements and the Erosion of the WTO's MFN Principle' (2010) 46 Stanford Journal of International Law 177, 180. He stated that "Today, the MFN principle is under assault... trade flows are shaped not by comparative advantage, but by various non-MFN preferential trading arrangements and rules of origin."

Trade (GATT), the MFN, and how it has been eroded over time. First, by the introduction of exceptions to the MFN: antidumping, safeguards, national security and customs unions. Second, by derogations to the MFN in allowing preferential treatment in trade with developing countries. Finally, the recent proliferation of Preferential Trade Agreements (PTAs).

New trends in agreement-making show a departure from the WTO rules of engagement resulting in non-binding, in-principal agreements that promote flexibility, as evidenced by the Belt and Road initiative. The non-binding, flexible nature of these trading arrangements by their very nature allows for and effectively encourage discrimination. These new trading arrangements may signal the final demise of the MFN and indicate new rules of engagement. This essay traces the journey of discriminatory practices legitimized within the GATT and the WTO and how they have eroded of the MFN over time. The essay examines Special and Differential Treatment (SDT) enjoyed by Developing Countries but finds it problematic and ineffective. It concludes that Preferential Trade Agreements are the main culprits in the demise of the MFN.

B. Problem Formulation

This essay focuses on one problem formulation: whether MFN has been effective in eliminating discriminatory trade practices between nations.

C. Methodology

This essay is normative legal research. The approach used in this study is conceptual and case study approaches. The primary legal material used was the GATT Article I (1947) which positions the MFN as the foundation for non-discriminatory trade practices. The secondary legal materials used were publications that provided analysis and commentary about the application and impact of MFN on world trade practices. The main text used was *preferential trade arrangements and the erosion of the WTO's MFN principle* by Warren H. Maruyama. Other legal publications used were case reports, articles published in legal journals, website content (chiefly that of the WTO) commentary on court decisions relating to cases brought before the GATT Panel or Dispute Resolution Panel (DSP). The data was analysed to examine how the MFN has been interpreted and applied; commentary from secondary sources has been used to find description and meaning, which has revealed trends or patterns of usage and interpretation.

D. Discussion and Results

1. The Exceptions

In 1947, the members of the newly formed General Agreement on Tariff and Trade in 1947 set the stage for post-war, free trade. The Most Favoured Nation (MFN) Principle was created to be the cornerstone of trade liberalization providing the non-discriminatory foundation for opening borders to fair trade under the GATT. It decreed that comparable product traded between members of the GATT must be treated the same in terms of tariffs, customs duty or any other forms of importation duty. This unconditional clause was set out in the GATT Article I (1947) and re-affirmed by WTO members in 1995:[3]

> "With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, ... any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties."

Soon after devising the MFN, exceptions to MFN were introduced: antidumping, safeguards, national security and customs unions.[4] While these exceptions were devised in good faith and with good intentions there is no doubt, they had an immediate effect of restricting free trade and by implication of favouring certain nations over others. By introducing exceptions to the MFN, the GATT began to chip away at the cornerstone of MFN, opening the door for further derogations and ultimately, discriminatory trade practices within the GATT.

The existence of free trade areas (FTAs) and customs unions prior to the formation of the GATT were fiercely defended by members comprising significant powers on the trading platform such as the US, (FTA with Canada) and UK and Germany (members of the European Union).[5] While their trade polices contradicted the

[3] General Agreement on Tariffs and Trade 1994 art.I.

[4] Dodik Setiawan Nur Heriyanto and Eko Rial Nugroho, 'Harmonizing the International Trade Policies and the Right for Health Protection Measures: Case Study on WHO DSB Ruling on US-Clove Cigarettes', *Proceeding The 2nd Indonesia Tobacco Control Conference And Capacity Building Program* (Lembaga Pengembangan Pendidikan, Penelitian dan Pengabdian Masyarakat UMY 2015) <http://thesis.umy.ac.id/datapubliknonthesis/PRO7649.pdf#page=27> accessed 17 May 2021.

[5] Maruyama (n 2)., p.181.

non-discriminatory MFN; the GATT conceded and allowed their continuation on condition that:[6]

a) trade barriers after formation of the PTA do not rise on average (Article XXIV:5).
b) all tariffs and other regulations of commerce are removed on substantially all trade within a reasonable length of time (Article XXIV:8); and,
c) they have been notified to the WTO Council.

Exceptions and allowances opened the door for further derogations. These came in the form of Special and Differential Treatment and Plurilateral Trade Agreements.

2. Special and Differential Treatment

Special and Differential Treatment is a technical term used throughout the WTO Agreement to denote provisions specific to developing country Members. The GATT decision, in 1979, allows derogations to MFN for developing countries under Article XVIII. This permits preferential trading arrangements by removing tariffs from imports from developing or Least Developed Countries. "Article XVIII of the GATT allowed developing members to raise tariffs and take other protective action in order to safeguard their infant industries from imports*"*.[7] Most GATT/WTO agreements contain other forms of special and differential treatment, with less onerous obligations and longer phase-in periods for developing countries.

The WTO considers its role in assisting developing countries as one of its key functions. This is clear from its purpose statement:[8] "The WTO has many roles: it operates a global system of trade rules, it acts as a forum for negotiating trade agreements, it settles trade disputes between its members, and it supports the needs of developing countries."

Special and Differential Treatment has been problematic since inception partially due to a lack of definition of 'developing countries.[9] Currently about two thirds of the WTO's 164 members are categorised as developing countries and 35 members of the WTO are listed as Least Developed Countries (LDCs).[10] In fact, developing countries comprise most WTO members. WTO does not define developing countries and LDCs.

[6] Bernard M Hoekman and Petros C Mavroidis, 'WTO "à La Carte" or "Menu Du Jour"? Assessing the Case for More Plurilateral Agreements' (2015) 26 The European Journal of International Law 319, 323.

[7] Anna Marie Brennan, 'The Special and Differential Treatment Mechanism and the WTO: Cultivating Trade Inequality for Developing Countries' (2011) 14 Trinity College Law Review 143, 147.

[8] WTO, 'WTO, About the Organization' (2021) <https://www.wto.org/english/thewto_e/thewto_e.htm> accessed 9 August 2021.

[9] Brennan (n 7) 153.

[10] WTO (n 8).

Countries simply self-select and nominate themselves as being in one of these categories, and unless challenged by another WTO member, will be accepted as such by the WTO. The difficulty with these categories lies in the fact that they do not set a level playing field. LDCs or countries opting to be categorized as 'developing', may be at very different stages of their development which inevitably creates a lack of equity within the MFN framework.

> "It may be argued that the standard which has been invoked under international trade law, that the WTO member in question must be developing, does not identify the group in question properly nor depict the trade associated inequality which grounds the provision."[11]

In 2018, President Trump famously challenged China's status as a developing country in a tirade against China.[12] In typical Trump style he used the media to rant against the US's biggest trade threat; tellingly, he did not challenge China's status formally using the legitimate procedures of the WTO. In fact, China was a poor country back in 1986, when it began its 15-year journey of accession to the WTO." It's GDP per capita, was around $677... compared to $19,078 for the United States".[13] These days China, the second largest trading nation in the world can hardly be described as poor. In 2017, China's GDP per capita, measured with PPP, was $16,660 indicative of more economic growth since it joined the WTO in 2001.[14] Of course the US economy did not remain static during this period, growing it's GDP to $59,501 in 2017, leaving China well and truly in its wake.[15] The reason China can legitimately claim developing country status is not a lack of capital but the distribution of that capital leaving big gaps between the incomes of the rich, the rising middle classes and the poor; a feature of many developing countries. Hence, as Simon Lester writes:

> "China can still call itself 'developing' in the context of the WTO. 'Nevertheless, it is undeniable that China is much richer than it used to be, and this is largely thanks to the economic reform, including lowering its tariffs and liberalizing some sectors of the economy, that accompanied China's accession to the WTO."[16]

[11] Brennan (n 7) 154.

[12] Simon Lester and Huan Zhu, 'Is China Still a Developing Nation? That's Its WTO Status' *Commentary* (2018) <https://www.cnbc.com/2018/04/25/what-trump-gets-right-about-china-and-trade.html> accessed 12 August 2021.

[13] ibid.

[14] ibid.

[15] ibid.

[16] ibid.

Lester agrees that China's 'developing' status, should be re-considered, its rapid economic development means it no longer lags significantly behind developed countries. It remains to be seen if any of the WTO members will challenge this formally in the WTO.

There is the view shared by many academics that the advantages bestowed by SDT are questionable. Anna Marie Brennan considers the effectiveness of Special and Differential Treatment in accelerating the trading ability of developing countries so they are can trade on a more equitable footing with developed nations like the US or Germany. She holds the opinion that SDT is an inefficient trade tool which is open to abuse by those with vested interest. She cites The *Sutherland Report,* commissioned by the WTO in 2005:

> "The economic theory, and the maths model which substantiates it, illustrates that member countries will profit most, collectively and also independently, from not being preferential nor protectionist towards their own goods and services, but by having equal regard for the goods and services of all members of the WTO."[17]

The report deduces from this that sustained use of SDT will disadvantage developing countries in the long term and prevent them from being able to reach trading parity with developed countries. However, Brennan acknowledges that WTO law does not support this view "increasing the engagement of developing countries and achieving for them a more proportionate share in the gains from international trade is expressly recognized in WTO law itself as legitimate."[18]

Trebilcock explains the reasons why GATT made concessions, namely:[19]

a) The colonial history of developing countries - left 'them with large, traditional and inefficient agricultural sectors where the marginal product of labour was often thought to be negligible or even zero".
b) Developing countries needed time and support to move from an agri-based economy to a manufacturing industry. "Protectionism was required for these fledgling manufacturing industries, in order to enable them to achieve minimum efficient scale and become competitive in both domestic and export markets"
c) Developed countries had enjoyed the benefits of protectionism during their development process (US, Canada and Germany) - allowing developing countries to catch up.
d) Disadvantages of developing countries embarking upon a strategy of trade liberalization ('low levels of education, poor physical infrastructure, weakly

[17] Brennan (n 7) 150.
[18] ibid 151.
[19] MJ Trebilcock and Joel P Trachtman, 'Trade Policy and Developing Countries', *Advanced introduction to international trade law* (Edward Elgar Publishing 2020).

developed financial, credit and insurance markets, and inadequate or non-existent social safety nets, adjustment costs").

e) Their market share was so small it was unlikely to affect the world market negatively.

Further derogations to the MFN were added in the 1970s to grow the trading power of developing countries; the Generalized System of Preferences (GSP) granted more favourable treatment to developing countries' exports, effectively negating their MFN obligations. Although proponents of GSP would argue this is not the case given the caveat that any trade preferences had to be generalized, non-discriminatory and non-reciprocal. Developing countries were also allowed to exchange preferences with each other.[20]

The benefits of the Enabling Clause as these measures became known, have been much debated. Many developed countries extend preferential terms of trade to developing countries but most of the provisions in SDT are non-binding, leaving developed countries to decide whether to accept and implement them in trading contracts with developing countries.[21]

In addition, the Agreement on Textiles and Clothing excludes textiles, clothing, and footwear from Special and differential treatment. This diminishes the benefits of SDT for many developing countries that are heavily engaged in these industries and would have an interest in increasing export market share.[22]

Interpretation of The Enabling Clause is also problematic as the WTO Appellate Body found in *EC – Tariff Preferences (2004).*[23] India brought the case against the European Union on the basis that the EU was extending GSP preferences, to a sub-set of developing countries that agreed to certain conditions pertaining to labour standards, environmental standards, and the war on drugs. India argued that this violated both the unconditionality requirement of Article I of the GATT, and the non-discrimination requirement in the 1979 Enabling Clause. The WTO Appellate Body interpreted the Enabling Clause as only allowing "GSP Schemes which were intended to respond encouragingly to the actual 'development, financial and trade needs' of member

[20] Brennan (n 7) 147.
[21] ibid 157.
[22] Trebilcock and Trachtman (n 19).
[23] ibid 180.

countries. All member nations which could be categorised into this group could therefore be beneficiaries under the scheme if they were 'similarly situated'."[24]

Brennan believes the 'Enabling Clause, and by association GSP schemes, is based on the assumption that developing countries will be able to comply more with their obligations under WTO law as their ability to do so "improves with the progressive development of their economies and improvement in their trade situation."[25] This has not proven to be the case as there is no onus on developing countries to revoke their developing status as evidenced by oft criticized major trading partners such as China, Brazil and Mexico.[26] However, it seems that few academics agree on the view that developing countries are achieving their economic goals. Trebilcock writes:[27]

> "Much research beginning in the 1960s and increasing through the 1970s has found that import-substitution policies were not achieving their goals and were actually hindering the growth of developing countries."

The arguments against the use of SDT are generally economic arguments refuting the effectiveness of WTO law regarding SDT. While economically the rules of SDT may not be achieving the envisaged results, this does not mean the law is invalid or ineffective. The facts to support the WTO's goal of having developing countries and LDCs participate are clear; WTO's 164 members are categorised as developing countries and 35 members of the WTO are listed as Least Developed Countries (LDCs).[28]

Also, economic profit is not the sole reason for inclusion of developing countries in the WTO, human rights, political and social aims are also factors. WTO states that their role is to facilitate the transition of developing countries to market economies "by giving them more time to adjust, greater flexibility and special privileges" [29] recognizing that these countries have many disadvantages in meeting the stringent provisions of WTO. The fact that there is not a level playing field due to the vagaries of history including war and colonialism creates the need for measures that allow them to 'catch up' with industrialised countries.

[24] Brennan (n 7) 154.
[25] ibid 153.
[26] Brennan (n 7).
[27] Trebilcock and Trachtman (n 19) 186.
[28] WTO (n 8).
[29] ibid.

Not all economists agree that a sink or swim approach to developing countries participation in the WTO is the best way of creating open trade access, many believe they need to be treated differently according to their economic development. This is not just based on economic justification but on human rights principles. According to Brennan "international trade law recognises that many member countries are at different levels of economic development compared to others. International trade law then attempts to combat this disparity by setting up mechanisms for alleviating it by means of favourable treatment for lesser developed countries."[30]

However, despite the implementation of SDT and the Enabling Clause, developing countries have not been shielded from the rule of MFN, as Indonesia found to its detriment in 1996, when the EC, Japan and US requested consultations about Indonesia's National Car Programme. The EC alleged that Indonesia had violated its obligations under Article 2 of the Trade-Related Investment Measures (TRIMs) Agreement and Article 3 of the Subsidies and Countervailing Measures (SCM)Agreement. To build its automotive industry, the Indonesian government established favourable conditions to attract foreign car manufacturers to assemble vehicles in Indonesia. Korea began assembling cars in Indonesia, using car components manufactured in Indonesia, thus benefiting from tax exemptions and tariff reductions. The Dispute Resolution Panel (DSP) found that Indonesia was in violation of Articles I and II:2 of GATT 1994, Article 2 of the TRIMs Agreement, Article 5(c) of the SCM Agreement. The Panel found the measures to be in violation of MFN "because the 'advantages' (duty and sales tax exemptions) accorded to Korean imports were not accorded 'unconditionally' to 'like' products from other members."[31]

Furthermore, the negative outcomes of complaints against developing countries discourages them from seeking remedy through the DSP. Following the integration of the member states of the EU into a single market, introduced a banana import regime. Restrictions were already in place to protect the EU market for bananas imported from former EU territories and developing countries in Africa, the Caribbean and the Pacific (ACP countries). Bananas from these countries were duty free under the Lomé Convention. When the new regime was introduced in 1993, "banana imports were subject to one of two two-tier tariff rate quota systems based on their country of

[30] Brennan (n 7) 152.

[31] *Indonesia – Certain Measures Affecting the Automobile Industry (Indonesia Autos), DS54, DS55, DS59, DS64, report of the Panel*.

origin."[32] ACP countries could export up to 857,7000 metric tons of bananas to the EU duty-free. ACP countries paid '750 ECUs' per metric ton on additional imports of bananas. Producers from other countries paid an import duty of "ECU 100 per metric ton on imports up to 2 million metric tons, and ECU 850 on imports above that amount."[33]

Five banana-producing countries, Colombia, Costa Rica, Guatemala, Nicaragua, and Venezuela brought GATT dispute settlement proceedings in June 1993. "The GATT panel ruled in January 1994 that the EU regime was GATT-illegal." However, the EU negotiated a settlement with most of complainants, "that increased and guaranteed the value of their export quotas, in return for their agreement to withdraw the GATT complaint and refrain from further GATT challenges until December 31, 2002".[34]

The US, then challenged both the EU regime and their new agreement with Latin American countries "on the grounds that they were discriminatory and reduced US companies' share of the EU market by more than 50%".[35] The US, Guatemala, Honduras, and Mexico, joined forces in 1995 and entered a dispute settlement proceeding in the WTO, with Ecuador entering the fray in 1996. They alleged "that the EU regime violated the GATT 1994 Articles I, II, II, X, XI, and XIII as well as the Agreement on Import Licensing Procedures, the Agreement on Agriculture, the General Agreement on Trade in Services (GATS), and the Agreement on Trade-Related Investment Measures."[36] The EU justified its concessions to ACP countries based on the pre-existing Lomé Convention.

The Dispute Resolution Panel (DSP) found that the EU banana import regime discriminated against banana producers in countries outside the ACP and contravened "Article I of the GATT 1994 (most-favoured-nation treatment) the WTO agreement on Import Licensing and the GATS. It also found the 'export certificate requirement accorded an advantage to some Members only, i.e., the BFA countries, in violation of GATT."[37] Even though the Panel found the EU treatment of countries outside the ACP

[32] Eliza Patterson, 'The US-EU Banana Dispute' (*ASIL Insights*, 27 February 2001) <https://research-information.bris.ac.uk/en/publications/epigenetic-modelling-of-former-current-and-never-smokers> accessed 13 June 2021.
[33] ibid.
[34] ibid.
[35] ibid.
[36] ibid.
[37] ibid.

inconsistent with the MFN principle, it agreed with the EU that favourable treatment for bananas from ACP countries was justified by the Lomé Convention. This was later overturned by the Appellate Body on appeal by the EU. During the appeal, the Appellate Body "upheld the panel findings and found that certain aspects of the EU licensing regime violated GATT Article X (publication and administration of trade regulations) as well as the WTO agreement on Import Licensing Procedures."[38] The battle did not end there, the EU proposed a new import regime with amended quotas which the US rejected. The US used the legislation of WTO rules to drive its anti-tariff stance resulting in retaliatory sanctions, in the form of customs duties amounting to '$191 million' per year, on certain products from most EU Member States.[39]

This case has many implications for WTO rules in the context of obligations from existing treaties and conventions between WTO members; how can countries meet their existing obligations and simultaneously uphold the iron clad rules of the WTO? For developing countries, the EU Banana illustrates how difficult it is for them to trade on an equitable basis with major powers like the US. While SDT and other programs have been initiated to assist developing countries to build their domestic industries and compete with developed countries, EU Bananas casts doubt their ability to achieve real equity in trade. SDT tackles substantive equality to promote trade, but economic results point to its failure.

Financial and administrative hurdles also provide a disincentive for developing countries to address issues through the WTO. Trebilcock highlights the fact that developed countries bring most of the actions to the WTO despite the special and differential treatment provided for in the Agreement on Subsidies and Countervailing Measures (SCM): "Out of the 168 countervailing duty initiations filed with the WTO from its inception in 1996 to 31 December 2003, 120 of those were filed by the European Community, United States, and Canada alone. Developing countries and economies in transition were the target of 110 of these initiations."[40] The more advanced developing countries such as Brazil, India, Chile and Argentina have brought most of the actions against developed nations in the last 10 years with very little

[38] *European Communities - Regime for the Importation, Sale and Distribution of Bananas, DS158*.

[39] European Commission, 'The Banana Case: Background and History' (2000). .<https://trade.ec.europa.eu/doclib/docs/2003/december/tradoc_114950.pdf> accessed 13 September 2021; David Harvey, 'The Banana War - A Case Study in Trade Restrictions'. <https://www.staff.ncl.ac.uk/david.harvey/AEF811/AEF811.9/Banana.html> accessed 12 September 2021.

[40] Trebilcock and Trachtman (n 19).

participation by developing countries in the Asia Pacific region. Thailand has been the most active of the Asia Pacific WTO members, bringing 14 complaints to the WTO disputes panel. Indonesia, Philippines and Malaysia have also brought complaints. However, "least-developed country Members have so far been neither complainant nor respondent in any WTO dispute."[41]

3. Preferential Trade Agreements

Preferential Trade Agreements (PTAs) are treaties between two or more countries granting preferential market access to each other's markets.[42] As Trebilcock observes, preferential agreements are an obvious contradiction to the MFN among other founding principles of the GATT, yet Article XXIV of the GATT provides for them. The original reason for including them was to accommodate customs unions which were treated as 'one country' from a trade perspective. However, existing free-trade partners such as Canada and the US lobbied for inclusion and in the interest of increasing trade liberalisation, PTAs were included. Currently, there are "approximately 460 PTAs in force, most of which are bilateral".[43] Ironically, few of the approximately 460 PTAs currently operating involve customs unions. In fact, they are more prevalent among developing countries, with only 10% of all PTAs being agreed with developed countries.[44]

Maruyama, in his article "Preferential Trade Arrangements and the Erosion of the WTO's MFN Principle" identifies several reasons for WTO members favouring FTAs over the traditional WTO 'Rounds' of trade negotiations:[45]

a) securing access to markets for commercial advantage
b) the stalemate of the Doha Round
c) the trend towards using trade agreements to further human rights, social, political and environmental aims
d) the use of trade negotiations to deliver political and economic stability as part of Foreign Policy, particularly US relations with Middle East, Central and Latin America
e) developing countries have used FTAs to accelerate market reforms and improve overall GDP
f) access to raw materials particularly in the Asia Pacific region.

[41] 'WTO | Disputes - Dispute Settlement CBT - Developing Countries in WTO Dispute Settlement - Developing Country Members in Dispute Settlement - Theoryand Practice - Page 1' (2017) <https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c11s1p1_e.htm> accessed 10 August 2021.

[42] Trebilcock and Trachtman (n 19) 48.

[43] Trebilcock and Trachtman (n 19).

[44] ibid.

[45] Maruyama (n 2) 177.

However, both Trebilcock and Maruyama find the legal complexities of GATT Article XXIV to be a major contributor to the prevalence of PTAs. The difficulty in interpreting GATT Article XXIV is evident throughout the *Turkey-Textiles* dispute. This is the only case ever brought before the WTO Dispute Settlement Body to challenge Article XXIV, probably due the oft criticised lack of legal rigour in Article XXIV.[46] India brought the case before the WTO when Turkey imposed quotas on the imports of textiles from India. At this time, Turkey wanted to be included in the EU and imposed the quota to prevent India using Turkey as the gateway to the European market. India, a WTO member, claimed Turkey had contravened Article XI and XII of the GATT and Article 2.4 of the Agreement on Textiles and Clothing.[47]

To defend its position, Turkey used GATT Article XXIV: 8(a)(i) which states WTO members outside the customs union or PTA, would not be disadvantaged '*on the whole*' after the creation of a PTA than before. Therein lay the first difficulty; the interpretation of '*on the whole*'[48] and the economic test necessary to ascertain whether the pre-existing trading party outside the PTA had been disadvantaged or not.

The Appellate Body used the chapeau of Paragraph 5 of Article XXIV in their conclusion that Turkey had indeed breached its GATT and WTO obligations:

> "...we believe that the chapeau of paragraph 5 of Article XXIV is the key provision for resolving the issue before us in this appeal. ...we note that the chapeau states that the provisions of GATT 1994 'shall not prevent' the formation of a customs union. We read this to mean that the provisions of the GATT 1994 shall not make impossible the formation of a customs union."[49]

The Appellate Body's emphasis on the chapeau led to an unpredictable interpretation of GATT Article XXIV:8(a)(i) which decided that Turkey should not have introduced quotas on textiles imported from India before it had formed a custom's union with the EU. Turkey also had to "demonstrate that the formation of that customs union would be prevented" without the import restrictions on India.[50]

According to Maruyama, the GATT and WTO working parties have reviewed hundreds of FTAs and have never been able to reach consensus on whether the FTAs met the provisions of GATT Article XXIV:8(a)(i). He describes the process as an

[46] Maruyama (n 2).
[47] ibid.
[48] ibid.
[49] ibid 186.
[50] ibid 187.

'empty shell'[51] and blames the lack of clarity in Article XXIV for the volume of 'low quality' FTAs in force today. Trebilcock agrees and points to some of the most recent FTAs:

> "The recent emergence of actual or potential mega-regional trade agreements raises important and difficult issues, especially their compatibility with the multilateral system. These include the Trans-Pacific Partnership Agreement ... the Canada-EU Comprehensive Economic and Trade Agreement (2017); the Trans-Atlantic Trade and Investment Partnership (TTIP) negotiations (now suspended) between the US and the EU; China's pursuit of the Regional Comprehensive Economic Partnership (RCEP) negotiations; and the 2018 African Continental Free Trade Agreement, comprising more than 40 sub–Saharan African countries."[52]

The Australian Productivity Commission also conducted studies into the effectiveness of PTAs and determined that PTAs divert more trade than they create: "The empirical results indicate that the merchandise trade provisions in various PTAs (Preferential Trade Arrangements) have generally diverted more trade than they have created. Some of the more prominent PTAs have not even succeeded in creating more trade among members."[53]

Plurilateral Agreements also allow for discriminatory treatment under Article II.3 of the WTO Agreement. Bernard M. Hoekman and Petros C. Mavroidis ponder the scant use of this type of Agreement by WTO members, assessing the case for more plurilateral agreements." [54] The authors echo Maruyama and Trebilcock in their assertion that the large membership base of the WTO hinders consensus and results in hiatus as seen during the stalemate of the Doha Round. They agree that governments are looking for alternate, more practical and efficacious instruments to promote trade. The hundreds of Preferential Trade Agreements in existence are testament to the fact that multilateral agreements based on MFN are not always efficacious. Plurilateral agreements provide another vehicle for less onerous agreements between multiple partners without the need to include all WTO members, but few have been negotiated and currently only two plurilateral agreements are in force: The Agreement on Government Procurement (GPA) and the Agreement on Civil Aircraft. The difference between a PTA and a Plurilateral Agreement is that PTAs must cover substantially all

[51] ibid 194.
[52] ibid 186.
[53] The Australian Productivity Commission.
[54] Hoekman and Mavroidis (n 6).

trade in goods and/or have substantial sectoral coverage of services whereas Plurilateral Agreements can be issue specific.[55]

Hoekman and Mavroidis attribute the trend towards plurilateral agreements to the fact that the legitimate option for employing them is permitted under Article II.3 of the WTO Agreement. "The existence of the PTA option may reduce the incentive to agree on rules on a multilateral basis. The proliferation of PTAs also suggests that deals are easier across a sub-set of the WTO membership."[56]

4. New Instruments for Engaging in Trade

The GATT and WTO have set and legalized the trade agenda for over 70 years. Constant rule making and regulating to suit the entry of new Members and keep pace with the extraordinary pace of change during the 20th and 21st centuries, have led to a rigid, and somewhat self-contradictory system, that locks its members firmly into their obligations. The Regional Comprehensive Economic Partnership (RCEP), the world's largest trading bloc (comprising around 30% of global GDP),[57] and the BRI initiative are based on principles and commitments rather than legislation. There is one word that appears frequently in new trade arrangements: flexibility. The characteristic flexibility of these trading arrangements is not without challenges as Deborah Elms points out in her blog post *'RCEP: A first look at the texts'; 'Flexibilities and exceptions are going to be tough to note, understand and unravel.'*[58] However, the blog is quick to point out that without the flexibility built into RCEP the 15 member countries would not have signed up. Delayed commitments and variable tariff schedules for developing countries were pivotal in gaining their support. As an example, Cambodia has negotiated an additional five years to implement provisions like the application of digital technology at customs and Indonesia has several tariff schedules in place for imported goods.[59]

RCEP, yet to be ratified, was signed by the 10 members of Association of Southeast Asian Nations (ASEAN) and Japan, China, South Korea, Australia and New Zealand in November 2020. It took 8 years of negotiations to reach this unique

[55] ibid 342.

[56] Hoekman and Mavroidis (n 6).

[57] Diane Desierto, 'The Regional Comprehensive Economic Partnership (RCEP)'s Chapter 19 Dispute Settlement Procedures – EJIL: Talk!' (*EJIL: Talk!*, 16 November 2020). <https://www.ejiltalk.org/the-regional-comprehensive-economic-partnership-rceps-chapter-19-dispute-settlement/> accessed 4 September 2021.

[58] Deborah Elms, 'RCEP: A First Look at the Texts' (2020). <http://asiantradecentre.org/talkingtrade/rcep-a-first-look-at-the-texts> accessed 1 September 2021.

[59] ibid.

Agreement across countries at vastly differing stages of development with discrete values, culture politics and economies. While RCEP aligns with WTO rules, its trade focus is on prioritizing trade among its signatories and providing concessions to ASEAN low-developed countries (such as Cambodia, Laos, Myanmar, etc.) so that they are not disadvantaged by the more mature trading States in RCEP.[60]

A key difference between RCEP and other FTAs is its dispute settlement provisions which mandate consultation before resorting to third party arbitration by a Panel. Consensus is preferable to adversarial means of settlement. This is a State controlled agreement where governments act on behalf of their traders without any involvement of non-State, local community, or the public. "RCEP appears thinner on environmental and social safeguards and regulatory freedoms, unlike many of ASEAN's regional investment and trade agreements."[61] Desierto views RCEP as a backwards step for trade agreements as it appears to be a closed shop with a focus purely on commercial trade and investment with no room for a socio-political agendas or human rights issues.

The Belt and Road Initiative is a momentous initiative both geographically and conceptually. President Xi encapsulated China's vision in launching the project "China will actively promote international co-operation through the Belt and Road Initiative. In doing so, we hope to achieve policy, infrastructure, trade, financial, and people-to-people connectivity and thus build a new platform for international co-operation to create new drivers of shared development".[62]

Inspired by the trading era of the ancient Silk Road, The Belt and Road Initiative is a major cross regional project with the physical and virtual connectivity of people and places at its heart. "BRI covers around 120 states, over 60% of world population and over 6,000 projects "with a value exceeding $1 trillion" (UNCTAD 2019)".[63] It is currently focussed on building the extensive infrastructure necessary to realise a vision of this magnitude.

Ultimately, the BRI will facilitate the trading of goods and services across the reaches of the east to the west. Backed by major financial and government institutions,

[60] Desierto (n 57).

[61] ibid.

[62] OECD, 'China's Belt and Road Initiative in the Global Trade, Investment and Finance Landscape' (2018) 61 <https://www.oecd.org/finance/Chinas-Belt-and-Road-Initiative-in-the-global-trade-investment-and-finance-landscape.pdf> accessed 18 September 2021.

[63] OECD (n 62).

it will assist developing countries to accelerate their development while securing key resources for China's own development and sustainability.[64]

The BRI shares the WTO goal of opening free trade zones "We will speed up efforts to implement the free trade area strategy, gradually establishing a network of high-standard free trade areas. We will actively engage in negotiations with countries and regions along the routes of the Belt and Road Initiative on the building of free trade".[65]

In contrast to treaty-making, the BRI uses legally non-binding primary agreements, for example MOUs like the China-New Zealand Memorandum of Arrangement (MOA)and for specific project development it uses secondary contractual agreements.[66] Commentators speculate the focus on flexibility and the lack of legality may prove problematic in the future. Some commentators agree with the opinion espoused by the Deputy Director-General of the WTO, Alan Wolff hold the view that the principles and rules of the GATT and the WTO may provide the legal structure needed:

> "Trade is central to China's economy, to its people's well-being and to its future. The One Belt One Road (BRI) Initiative provides the physical infrastructure for China's trade. That is only part of what is needed. The multilateral trading system provides the essential international legal structure. It is the necessary other half of what is needed to assure China's economic future through trade. The Belt and Road Initiative cannot succeed without the multilateral trading system's rules."[67]

Wolff considers the non-discrimination embodied in the key principle of the MFN as pivotal to a balanced trading system that does not allow Chinese products to dominate and skew the market.

E. Conclusion

While the principle of MFN as formulated in the GATT Article I (1947) was intended to eliminate discrimination from trade practices, over time exceptions and derogations have rendered it ineffective. Both the GATT and the WTO have allowed discrimination from inception beginning with the 'Exceptions to MFN', Customs Unions and FTAs, then Special Differential Treatment for LDCs and developing countries,

[64] ibid 9.
[65] ibid 10.
[66] Heng Wang, 'The Belt and Road Initiative Agreements: Characteristics, Rationale, and Challenges' (2021) 20 World Trade Review 282, 282–283.
[67] Wang (n 66).

Plurilateral Agreements and Preferential Agreements. Now WTO members are entering new trading arrangements that mark a departure from the rules of WTO, for example the RCEP and BRI. It is yet to be seen how these new forms of agreement will operate in world trade as they are in the early stages of implementation; BRI facilitating infrastructure development rather than trade as this stage in its realization. There are many unknowns for member states of RCEP and BRI:

Will they assume and follow the rules of WTO with its emphasis on non-discriminatory trade or will they abandon the obligations of the WTO to pursue new methods of trade that are less reliant on the litigious and fractious dispute settlement procedures? Will they take their cue from China, avoiding legally binding agreements in favour of more consultative means of negotiations and dispute settlement as is evidenced by China's approach to BRI?

Maruyama warned of the dangers of low-quality FTAs in 2010, cautioning stop the proliferation of low-quality FTAs. No one wants a trading system that consists of exclusive regional trading blocs. Few would argue for the systemic benefits of FTAs that consist of thinly disguised preferences with no real commitment to serious economic integration and broader trade expansion. If left unchecked, this trend would swallow up the MFN principle, and global trade could revert to the pre-war trading system in which trade flows were driven by discriminatory arrangements, undercutting economic efficiency and comparative advantage'. Maruyama's warning may have been prophetic in that the RCEP and BRI could become 'exclusive trading blocs' that continue to erode the MFN and promote restrictive trade by offering increasing partiality to their members. The lack of solid commitments in the in the form of non-binding undertakings and in-principle agreements in the BRI could be indicative of self-interested participation as opposed to 'serious economic integration and broader trade expansion'.

This remains to be seen but Plurilateral Agreements, as advocated by both Trebilcock and Maruyama, as a possible antidote to the popularity of Preferential Agreements which appear to pose the greatest threat to the MFN seem to be well and truly off the agenda. The WTO should review the MFN and decide whether it needs to be strengthened or dissolved in favour of revised or new mechanisms to halt the proliferation of Preferential Agreements and challenge in-principle agreements such as the BRI and RCEP. If the MFN is continually by-passed in favour of self-interested agreements, not only is the economic future of less developed countries at risk but also the viability of the

WTO itself. If the WTO cannot apply the MFN to achieve parity in trade, then arguably there is no role for the WTO in regulating and expanding world trade.

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