

THE WORLD TRADE ORGANIZATION AND REGIONAL TRADE AGREEMENTS: BRIDGING THE CONSTITUTIONAL CREDIBILITY GAP

YOURI DEVUYST*

ASJA SERDAREVIC**

INTRODUCTION

On July 10, 2006, negotiators of the World Trade Organization's (WTO) Doha Development Round approved a new WTO Transparency Mechanism (Mechanism) for Regional Trade Agreements (RTAs).¹ Instead of awaiting the final results of the

Copyright © 2008 by Youri Devuyt and Asja Serdarevic.

* Professor Youri Devuyt is a member of the Faculty of Law and the Department of Political Science at the Vrije Universiteit Brussel, Belgium.

** Asja Serdarevic is Researcher at the Center for European Law of the same university. Her research project is sponsored by the Fund for Scientific Research-Flanders.

1. The World Trade Organization (WTO) is based on the Final Act embodying the results of the Uruguay Round of Trade Negotiations, done at Marrakesh on April 15, 1994. It entered into force on January 1, 1995. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, 33 I.L.M. 1125 (1994) [hereinafter Final Act].

The Marrakesh Agreement Establishing the World Trade Organization has four annexes. Annex 1 includes substantive trade rules that are embodied in the General Agreement on Tariffs and Trade 1994, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments – Result of the Uruguay Round, 33 I.L.M. 1125 (1994) [hereinafter GATT 1994], the General Agreement on Trade in Services, *id.* Annex 1B [hereinafter GATS] and the Agreement on Trade-Related Aspects of Intellectual Property Rights, *id.* Annex 1C [hereinafter TRIPS]. Annex 2 consists of the Understanding on Rules and Procedures Governing the Settlement of Disputes, *id.* Annex 2. Annex 3 contains the procedures governing the Trade Policy Review Mechanism, *id.* Annex 3 [hereinafter TPRM], the WTO's peer review system of the trade policies of its Members. Annex 4 holds the Plurilateral Trade Agreements that are binding only on those Members that have accepted them. The agreements in Annexes 1, 2 and 3 are binding on all WTO Members. *See id.*

GATT 1994 is based upon the General Agreement on Tariffs and Trade of 1947, Oct. 30, 1947, 61 Stat. A-3, 55 U.N.T.S. 187 [hereinafter GATT 1947]. GATT 1947 never formally entered into force but found provisional application through the Protocol of Provisional Application to the General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-2051, 55 U.N.T.S. 308 [hereinafter Protocol of Provisional Application].

Doha Round, the WTO General Council formally established the Mechanism on a provisional basis on December 14, 2006.² The decision on the provisional application of the new Mechanism is significant. It shows the urgency felt by the WTO members for more transparency in the creation and functioning of RTAs. By July 2007, no less than 380 RTAs had been notified to the General Agreement on Tariffs and Trade (GATT) and the WTO.³ An additional twenty RTAs were estimated to be operational, though not yet notified.⁴ From September 2005 to September 2006 alone, thirty-two RTAs were notified.⁵ According to the WTO's website, Mongolia is the only WTO member that is not party to any RTA.⁶

This surge in bilateral trade agreements is likely to continue in the foreseeable future.⁷ The rush towards a 21st-century regionalism

The Doha Development Round was launched at the WTO's Fourth Ministerial Conference in Doha, Qatar. The Ministerial Declaration of November 14, 2001 gives a mandate for negotiations on a range of subjects, including agriculture, services and WTO rules. WTO, Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002). At its meeting on July 27-28, 2006, the WTO's General Council suspended the deadlocked Doha negotiations. Press Release, WTO, General Council Supports Suspension of Trade Talks, Task Force Submits 'Aid for Trade' Recommendations (July 27-28, 2006), http://www.wto.org/english/news_e/news06_e/gc_27july06_e.htm. Later, on November 16, 2006, WTO Director-General Pascal Lamy recommended intensification of the work in the Negotiating Groups in Geneva to prepare the ground for the resumption of fully-fledged negotiations. Pascal Lamy, Director-General, WTO, Remarks at the Informal TNC (Nov. 16, 2006), http://www.wto.org/english/news_e/news06_e/tnc_dg_stat_16nov06_e.htm.

For the Doha Development Round Transparency Mechanism for Regional Trade Agreements, see Press Release, WTO, Lamy Welcomes WTO Agreement on Regional Trade Agreements (July 10, 2006), http://www.wto.org/english/news_e/news06_e/rta_july06_e.htm. For the text of the Transparency Mechanism, see Negotiating Group on Rules, *Transparency Mechanism for Regional Trade Agreements*, JOB(06)/59/Rev.5 (June 29, 2006) [hereinafter WTO Transparency Mechanism for RTAs].

2. Press Release, WTO, General Council Establishes Transparency Mechanism for Regional Trade Agreements (Dec. 15, 2006), http://www.wto.org/english/news_e/news06_e/rta_15dec06_e.htm.

3. WTO, Regional Trade Agreements, http://www.wto.org/english/tratop_e/region_e/region_e.htm (last visited Nov. 20, 2006). For the texts of the agreements and treaties that have been notified to the WTO, see links to the MS Excel tables at WTO, Regional Trade Agreements notified to the GATT/WTO and in Force, http://www.wto.org/english/tratop_e/region_e/region_e.htm (last visited Nov. 20, 2006).

4. See WTO, Regional Trade Agreements, *supra* note 3.

5. See WTO, Regional Trade Agreements Notified to the GATT/WTO and in Force: Basic Table, http://www.wto.org/english/tratop_e/region_e/summary_e.xls (last visited Nov. 2, 2007).

6. WTO, Regionalism: Friends or Rivals, http://www.wto.org/english/thewto_e/whatis_e/tif_e/bey1_e.htm (last visited Nov. 20, 2006).

7. International trade economist Richard E. Baldwin speaks about the "domino effect" of regionalism. See generally Richard E. Baldwin, *A Domino Theory of Regionalism*, in

in Asia has filled hundreds of pages in the recent academic literature.⁸ At the same time, older hands at regionalism have been announcing renewed efforts in the negotiation of RTAs. Following the suspension of the Doha Development Round in July 2006, the European Community (EC) Trade Commissioner Peter Mandelson declared that he would pursue targeted bilateral trade agreements as a part of a wider competitiveness strategy.⁹ In December 2006, the European Commission formally proposed the start of negotiations for the creation of free trade agreements with India, South Korea, the Association of Southeast Asian Nations (ASEAN), Central America and the Andean Community.¹⁰ The European Commission stated that the “bilateral approach would allow the European Union (EU) to liberalize tariffs further, to take non-tariff measures better into account and to restore a level playing field with our main competitors on major markets.”¹¹ United States Trade Representative Susan C. Schwab equally underlined that she would pursue an “ambitious agenda for bilateral and regional agreements that will broaden and deepen trade relations with key, like-minded countries.”¹² In fact, “[i]n the last five years, [the United States] Congress has approved free trade agreements with 12 countries[;] . . . [a]greements with

EXPANDING MEMBERSHIP OF THE EU 25 (Richard E. Baldwin, Pertti Haaparanta & Jaakko Kiander eds., 1996).

8. See generally NAKO MUNAKATA, *TRANSFORMING EAST ASIA: THE EVOLUTION OF REGIONAL ECONOMIC INTEGRATION* (2006); *BEYOND JAPAN: THE DYNAMICS OF EAST ASIAN REGIONALISM* (Peter J. Katzenstein & Takashi Shiraishi eds., 2006); Gary Clyde Hufbauer & Yee Wong, *Prospects for Regional Free Trade in Asia* (Inst. for Int'l Econ., Working Paper No. 05-12, 2005); EDWARD J. LINCOLN, *EAST ASIAN ECONOMIC REGIONALISM* (2004); *ASIAN REGIONAL GOVERNANCE* (Kanishka Jayasuriya ed., 2004); *NEW ASIAN REGIONALISM: RESPONSES TO GLOBALISATION AND CRISES* (Tran Van Hoa & Charles Harvie eds., 2004).

9. Peter Mandelson, EU Trade Comm'r, Speech at the London School of Economics: Bilateral Agreements in EU Trade Policy 2 (Oct. 9, 2006) (transcript available at European Commission Speech/06/574).

10. Press Release, European Commission, European Commission Requests Negotiating Mandates for Bilateral Trade Agreements with India, South Korea, ASEAN (Dec. 6, 2006), http://ec.europa.eu/trade/issues/bilateral/regions/asem/pr061206_en.htm; Press Release, European Commission, Central America & Andean Community: Commission proposes negotiating directives for Association Agreements (Dec. 6, 2006), http://ec.europa.eu/trade/issues/bilateral/regions/central_america/pr061206_en.htm.

11. European Commission, *Annex to Global Europe: Competing in the World. A Contribution to the EU's Growth and Jobs Strategy*, at 16, COM (2006) 567 final (Oct. 4, 2006).

12. Susan C. Schwab, U.S. Trade Representative-Designate, Opening Statement to the U.S. Senate Committee on Finance 11 (May 16, 2006) (transcript available at Office of the United States Trade Representative, Document Library, http://www.ustr.gov/assets/Document_Library/USTR_Testimony/2006/asset_upload_file533_9447.pdf).

Oman, Peru and Colombia are pending, and agreements with 11 more countries are in negotiation.”¹³

The parties to RTAs have generally emphasized that their meticulously constructed and ambitious bilateral agreements reinforce the WTO system rather than undermine it.¹⁴ Since 1947, GATT has stated explicitly that the “contracting parties recognize the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration between the economies of the countries parties to such agreements.”¹⁵ At the same time, the multilateral trade regime also imposes certain conditions on such RTAs. Those conditions can be found in three different WTO sources: (1) In the area of trade in goods, RTAs are subject to GATT Article XXIV, complemented by an Understanding on its interpretation that was negotiated during the Uruguay Round;¹⁶ (2) in the area of trade in services, the legal foundation for RTAs is found in Article V of the General Agreement on Trade in Services (GATS);¹⁷ and (3) RTAs concluded among developing countries benefit from particular rules contained in paragraph 2(c) of the Decision on Differential and more Favorable Treatment, Reciprocity and Fuller Participation of Developing Countries, also called the Enabling Clause.¹⁸

As argued by John H. Jackson, the leading legal scholar in the field, the WTO must be regarded as the constitutional charter governing world trade.¹⁹ It is a constitution that “imposes different levels of constraint on the policy options available to public and private leaders.”²⁰ In this context, the rules of GATT Article XXIV, GATS Article V and the Enabling Clause could be interpreted as setting the multilateral constitutional limits within which RTAs can

13. *Id.* at 12.

14. *See, e.g.*, Mandelson, *supra* note 9, at 4, 6.

15. GATT 1947, *supra* note 1, art. XXIV:4.

16. Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments – Result of the Uruguay Round, 33 I.L.M. 1125, 1161-63 (1994) [hereinafter Understanding on Article XXIV].

17. GATS, *supra* note 1, art. V.

18. Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries ¶ 2(c) (Nov. 28, 1979), GATT B.I.S.D. (26th Supp.) at 203 (1980) [hereinafter Enabling Clause].

19. JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* 339 (1998).

20. *Id.*

maneuver. Thomas Cottier and Marina Foltea formulate this theoretical starting point as follows: “WTO principles and rules . . . assume the role of overriding, constitutional disciplines which structure the shape and contents of preferential agreements—all with a view to supporting trade creation, as building blocks to trade regulation and liberalization, while at the same time avoiding unnecessary trade distortions and diversions.”²¹ While the WTO’s constitutional structure “has potential value for creating greater predictability, redressing unfair power imbalances, and preventing escalating international tensions,” Jackson admits that there remain considerable reasons to be discontented with the “trade constitution” as it exists today.²² One of the areas of discontent is precisely the relationship between the WTO and the RTAs.²³ The WTO provisions on RTAs have, indeed, proved to be ill-equipped to deal efficiently with the realities of RTAs. The WTO Committee on Regional Trade Agreements (CRTA), which is entrusted with the task of verifying the WTO compliance of RTAs notified under GATT Article XXIV and GATS Article V, has proved to be practically non-functional.²⁴ Only once has there been a consensus on WTO consistency of the RTAs that have been notified.²⁵ This dismal performance casts a doubt on the WTO’s constitutional role in international trade relations. The WTO’s practical inability to come to a consensus on the compatibility of RTAs with the multilateral rules is an indicator

21. Thomas Cottier & Marina Foltea, *Constitutional Functions of the WTO and Regional Trade Agreements*, in REGIONAL TRADE AGREEMENTS AND THE WTO LEGAL SYSTEM 43, 44 (Lorand Bartels & Federico Ortino eds., 2006).

22. JACKSON, *supra* note 19, at 340.

23. *Id.* at 344. Among trade lawyers and economists, there seems to be a consensus that the WTO/GATT rules on RTAs have proved to be “a failure, if not a fiasco.” KENNETH W. DAM, *THE GATT: LAW AND INTERNATIONAL ECONOMIC ORGANIZATION* 275 (1970). See also Sungjoon Cho, *Breaking the Barrier Between Regionalism and Multilateralism: A New Perspective on Trade Regionalism*, 42 HARV. INT’L L.J. 419 (2001); Petros C. Mavroidis, *Do Not Ask Too Many Questions: the Institutional Arrangements for Accommodating Regional Integration within the WTO*, in 2 HANDBOOK OF INTERNATIONAL TRADE 239 (E. Kwan Choi & James C. Hartigan eds., 2005); Colin B. Picker, *Regional Trade Agreements v. the WTO: A Proposal for Reform of Article XXIV to Counter this Institutional Threat*, 26 U. PA. J. INT’L ECON. L. 267 (2005). For a prominent voice among economists, see JAGDISH BHAGWATI, *THE WORLD TRADING SYSTEM AT RISK* 76-79 (1991); Jagdish Bhagwati, *Regionalism and Multilateralism: An Overview*, in NEW DIMENSIONS OF REGIONAL INTEGRATION 44 (Jaime de Melo & Arvind Panagariya eds., 1993).

24. Negotiating Group on Rules, *Compendium of Issues Related to Regional Trade Agreements*, ¶¶ 13-21, TN/RL/W/8/Rev.1 (Aug. 1, 2002).

25. See Press Release, WTO, Lamy Welcomes WTO Agreement on Regional Trade Agreements, *supra* note 1.

of a major credibility gap existing between the organization's expectations expressed in constitutional theory and its actual capabilities in monitoring RTAs.²⁶ This is particularly serious in light of the current proliferation of RTAs.²⁷ As a remedy for the current lack of effectiveness in the WTO's surveillance of RTAs, leading scholars such as Cottier and Foltea have proposed a reinforcement of the principle of primacy of WTO law by adopting "an explicit constitutional approach of regulating preferential agreements by and through the disciplines of WTO law."²⁸ By clearly establishing the supremacy of WTO law over RTAs, preferential agreements that are incompatible with WTO law would either be declared null and void *ab initio* or unlawful under international law, which would trigger state responsibility.²⁹ While elegant from an international law perspective, such proposals suffer from "constitutional overstretch" and therefore threaten to further widen the credibility gap between the WTO's real capabilities and the constitutional expectations.³⁰

In order to fix the WTO's credibility gap with regard to the monitoring of RTAs, this article takes a pragmatic view that is based on three basic considerations. *First*, the rich literature on compliance with international legal norms underlines that the *substantive characteristics of treaty obligations* are among the most important predicting factors affecting effective implementation.³¹ General and

26. The expressions "credibility gap" and "capability – expectations gap" have been successful tools in the analysis of the European Union's common foreign and security policy. In an influential article, Christopher Hill predicted that the announcement of a "common" European foreign policy by the Treaty of Maastricht (1992) would exacerbate an emerging "capabilities-expectations gap" by raising expectations that the European Union was simply incapable of fulfilling. The gap was seen as potentially dangerous because the exaggerated expectations in the European Union's institutional possibilities were likely to produce disproportionate degree of disillusion and resentment with the European Union itself when hopes would inevitably be dashed. Christopher Hill, *The Capability-Expectations Gap, or Conceptualizing Europe's International Role*, 31 J. COMMON MARKET STUD. 305 (1993); Christopher Hill, *Closing the Capabilities-Expectations Gap?*, in A COMMON FOREIGN POLICY FOR EUROPE? 18 (John Peterson & Helene Sjursen eds., 1998).

27. *See infra* Part II.

28. Cottier & Foltea, *supra* note 21, at 67.

29. *Id.* at 68.

30. The concept of "overstretch" is frequently used in the analysis of foreign policy. Overstretch emerges when an actor's commitments go beyond its actual grasp. *See* WALTER LIPPMANN, U.S. FOREIGN POLICY: SHIELD OF THE REPUBLIC 9 (1943); *see generally* Samuel P. Huntington, *Coping with the Lippmann Gap*, 66 FOREIGN AFF. 453 (1988).

31. *See, e.g.*, ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS (1995); MARKUS BURGSTALLER, THEORIES OF COMPLIANCE WITH INTERNATIONAL LAW (2005); ENGAGING COUNTRIES: STRENGTHENING COMPLIANCE WITH INTERNATIONAL ENVIRONMENTAL

imprecise duties that leave a large margin of interpretation are much less likely to be correctly implemented and complied with than precise obligations that are tested on their simplicity in implementation.³² Therefore, the first order of business for the WTO is to clarify and simplify the vague criteria that currently apply to RTAs. As long as the substantive criteria remain deficient, it will hardly be possible to determine with a sufficient degree of legitimacy whether or not RTAs are WTO-compatible. In this context, Part IV of this article will assess the substantive WTO law governing RTAs with a view of suggesting pragmatic solutions to the major problem points.

Second, such leading scholars in the field of compliance with international agreements as Abram and Antonia Chayes have emphasized that “the fundamental instrument for maintaining compliance with treaties” is not the threat of sanctioning, but “an iterative process of discourse among the parties, the treaty organization, and the wider public.”³³ In this process, the instruments of active compliance management include *transparency, reporting, data collection, verification, monitoring, strategic review and assessment* in addition to capacity-building and assistance for those who lack capacity.³⁴ Within this context, it is important that the procedural aspects of the WTO’s monitoring process with regard to RTAs are further streamlined. As Part V of this article will make clear, the Doha Round Transparency Mechanism for RTAs constitutes a positive step in this direction but needs to be followed up with a proper system for the permanent review of RTAs throughout their lifetime.

Third, it is only when the substantive rules have been sufficiently clarified and a permanent surveillance framework is established that the actual *enforcement* of the WTO’s disciplines in the field of RTAs stands a chance. These two prerequisites to effective enforcement are not currently fulfilled with respect to RTAs. In view of the vague wording of the WTO provisions on RTAs and the need to preserve

ACCORDS (Edith Brown Weiss & Harold K. Jacobson eds., 1998); THE IMPACT OF INTERNATIONAL LAW ON INTERNATIONAL COOPERATION: THEORETICAL PERSPECTIVES (Eyal Benvenisti & Moshe Hirsch eds., 2004).

32. Harold K. Jacobson & Edith Brown Weiss, *Strengthening Compliance with International Environmental Accords: Preliminary Observations from a Collaborative Project*, in INTERNATIONAL LAW: CLASSIC AND CONTEMPORARY READING 179, 185 (Charlotte Ku & Paul F. Diehl eds., 1st ed. 1998).

33. CHAYES & CHAYES, *supra* note 31, at 25.

34. *See id.* at 197.

the institutional balance on which the WTO rests, the in-depth analysis of the justiciability of the WTO disciplines on RTAs, described in Part VI, leads to the conclusion that a distinction must be made between the enforcement of concrete trade policy “measures” and judging the overall legality of RTAs. Following the logic of the Panel in the Turkey-Textiles case, concrete trade policy measures should be subject of strict surveillance and sanctioning, notably via WTO dispute settlement. However, in contrast with the reasoning of the WTO’s Appellate Body, it would be counterproductive for the credibility of the WTO and for the long-term effectiveness of the multilateral trade disciplines if the WTO dispute settlement organs were to get into questions of the overall legality of specific regional arrangements.³⁵ Rather, the overall compatibility of regional arrangements with WTO rules should be the subject of improved transparency and diplomatic peer review on the basis of the strengthened benchmarks proposed in Part IV.

Before tackling the core issues described above, Part I will start with a factual state-of-play of trade regionalism today, and Part II will put the current WTO framework for RTAs in its historical and legal context.

I. REGIONAL TRADE AGREEMENTS: AN OVERVIEW

In the evolution of regionalism since the end of World War II, three phases can be distinguished.

A. The European Era of Regionalism

The *first phase* is the *European era* of regionalism.³⁶ It started with the Treaty of Rome’s entry into force in 1958, which established the European Economic Community (EEC).³⁷ As a customs union

35. Both cases will be analyzed throughout this article. For the Reports, see Panel Report, *Turkey – Restrictions on Imports of Textile and Clothing Products*, WT/DS34/R (May 31, 1999) [hereinafter *Panel Report on Turkey-Textiles*] and Appellate Body Report, *Turkey – Restrictions on Imports of Textile and Clothing Products*, ¶ 58, WT/DS43/AB/R (Oct. 22, 1999) [hereinafter *Appellate Body Report on Turkey-Textiles*].

36. While European developments were dominant during this period, it must be noted that, in 1965, New Zealand and Australia concluded their own bilateral Free Trade Agreement. The 1960s also saw the conclusion of numerous RTAs between developing countries. However, most of these agreements were never fully implemented.

37. Treaty of Rome Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter *EEC Treaty*]. The EEC builds upon the experience of the European Coal and Steel Community. Treaty of Paris Establishing the European Coal and Steel Community, Apr. 18, 1951, 261 U.N.T.S. 140 [hereinafter *ECSC Treaty*]. The EEC Treaty has

with a common commercial policy, the EEC quickly became a leading player in international trade relations.³⁸ The western and northern European countries that were not part of the EEC came together in the European Free Trade Agreement (EFTA).³⁹ During the 1970s, the EEC expanded its influence through an impressive set of bilateral preferential trade areas with the neighboring EFTA countries, the Mediterranean countries, and the former colonies in Africa, the Caribbean and the Pacific (ACP).⁴⁰ Since then, the EEC has continued to be actively engaged in the negotiation of new preferential trade agreements.⁴¹

been amended on several occasions. The most important change took place through the Treaty of Maastricht on European Union, signed on February 7, 1992, 1992 O.J. (C 224) 1, 31 I.L.M. 247 [hereinafter EU Treaty]. The EU Treaty changed the name of the EEC to European Community (EC). The EC is one of the three pillars of the European Union. As of January 1, 2007, the EU has twenty-seven member states and a population of 492.8 million inhabitants. The European Union is the world's largest trading bloc with a combined GDP of 10,948 billion Euros. See Press Release, European Commission, EU and Euro Area Enlargement on 1 January 2007: The New EU of 27 and Euro Area of 13 (Dec. 19, 2006), <http://europa.eu/rapid/pressReleasesAction.do?reference=STAT/06/167&format=HTML&aged=1&language=EN&guiLanguage=en>.

38. The European Community's common commercial policy is based on Article 133 of the EC Treaty. Treaty Establishing the European Community, Nov. 10, 1997, 1997 O.J. (C 340) art. 133 [hereinafter EC Treaty].

39. The European Free Trade Association (EFTA) was established by the Stockholm Convention signed on January 4, 1960. The main objective of the Stockholm Convention was to provide a framework for the liberalization of trade in goods amongst its Member States. See EFTA, EFTA Convention Texts, <http://secretariat.efta.int/Web/EFTAConvention/EFTAConventionTexts/EFTAConventionText> (last visited Sept. 29, 2007). At this stage, EFTA has only four members left: Iceland, Liechtenstein, Norway and Switzerland.

40. In addition to the Lomé Convention with the African, the Caribbean and the Pacific countries, Council Regulation 199/76, 1976 O.J. (L 25) 1, the EC's framework of RTAs of the 1970s included bilateral free trade agreements with Switzerland, Council Regulation 2840/72, 1972, O.J. (L 300) 188, Iceland, Council Regulation 2842/72, 1972, O.J. (L 301) 1, Norway, Council Regulation 1691/73, 1973, O.J. (L 171) 1, Austria, Council Regulation 2836/72, 1972, O.J. (L 300) 1, Finland, Council Regulation 1508/74, 1974, O.J. (L 163) 1, Sweden, Council Regulation 2838/72, 1972, O.J. (L 300) 96, Spain, Council Regulation 1524/70, 1970, O.J. (L 182) 1, Portugal, Council Regulation 2844/72, 1972, O.J. (L 301) 164, and preferential trade agreements with Morocco, Council Regulation 2211/78, 1978, O.J. (L 264) 1, Tunisia, Council Regulation 2212/78, 1978, O.J. (L 265) 1, Algeria, Council Regulation 2210/78, 1978, O.J. (L 263) 1, Egypt, Council Regulation 2213/78, 1978, O.J. (L 266) 1, Jordan, Council Regulation 2215/78, 1978, O.J. (L 268) 1, Lebanon, Council Regulation 2214/78, 1978, O.J. (L 267) 1, Syria, Council Regulation 2216/78, 1978, O.J. (L 269) 1, and Israel, Council Regulation 1274/75, 1975, O.J. (L 136) 1.

41. See European Commission, Bilateral Trade Relations, http://ec.europa.eu/trade/issues/bilateral/index_en.htm (last visited Jan. 12, 2007).

B. The American Era of Regionalism

The *second phase* is the *American era of regionalism*. While the United States had traditionally been wary of RTAs, its attitude changed in the late 1980s.⁴² The conclusion of the bilateral free trade deal between Canada and the United States in 1988 opened the door for the North American Free Trade Agreement (NAFTA) in 1992.⁴³ The United States has also propagated such RTA initiatives as the Free Trade Area of the Americas (FTAA) and the development of free trade within the Asia Pacific Economic Cooperation (APEC) framework.⁴⁴ In addition, the United States has either concluded or is in the process of negotiating bilateral free trade agreements with such countries as Australia, Bahrain, Chile, Colombia, Israel, Jordan, Malaysia, Morocco, Oman, Panama, Peru and Singapore.⁴⁵

At the same time, several other American RTAs came into being or were revitalized: the Caribbean Community (CARICOM) in 1989, the Andean Community of Nations (ACN) in 1990, and the Central American Common Market (CACM) in 1993.⁴⁶ More significantly, in

42. See generally FREE TRADE AREAS AND U.S. TRADE POLICY (Jeffrey J. Schott ed., 1989); BILATERALISM, MULTILATERALISM AND CANADA IN U.S. TRADE POLICY (William Diebold, Jr. ed., 1988); Charles Pearson & James Riedel, *United States Trade Policy: From Multilateralism to Bilateralism?*, in THE NEW PROTECTIONIST WAVE 100 (Enzo Grilli & Enrico Sassoon eds., 1990).

43. North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993). On NAFTA, see GARY CLYDE HUFBAUER & JEFFREY J. SCHOTT, NAFTA: AN ASSESSMENT (1993); GARY CLYDE HUFBAUER & JEFFREY J. SCHOTT, NAFTA REVISITED: ACHIEVEMENTS AND CHALLENGES (2005).

44. The FTAA and the APEC free trade area have not yet entered into force. On the FTAA, see ANTONI ESTEVADEORDAL ET AL., INTEGRATING THE AMERICAS: FTAA AND BEYOND (2004); FREE TRADE OF THE AMERICAS? THE UNITED STATES' PUSH FOR THE FTAA AGREEMENT (Paulo Vizentini & Marianne Wiesebron eds., 2004); P. J. Patterson et al., *The Free Trade Area of the Americas and Smaller Economies*, 27 FORDHAM INT'L L.J. 899 (2004); Roberto Echandi, *Regional Trade Integration in the Americas during the 1990s: Reflections of Some Trends and their Implication for the Multilateral Trade System*, 4 J. INT'L ECON. L. 367 (2001). On APEC, see JOHN RAVENHILL, APEC AND THE CONSTRUCTION OF PACIFIC RIM REGIONALISM (2001); APEC IN THE 21ST CENTURY (Ryiana Miranti & Denis Hew eds., 2005); CHARLES E. MORRISON ET AL., AN APEC TRADE AGENDA? THE POLITICAL ECONOMY OF A FREE TRADE AREA OF THE ASIA PACIFIC (2005); C. Fred Bergsten, *APEC after Osaka: Toward Free Trade by 2010/2020* (Inst. for Int'l Econ., Working Paper No. 96-1, 1996).

45. Office of the United States Trade Representative, Trade Agreements, http://www.ustr.gov/Trade_Agreements/Section_Index.html (last visited Jan. 20, 2007).

46. Wendy Grenade, *An Overview of Regional Governance Arrangements within the Caribbean Community (CARICOM)*, in THE EUROPEAN UNION AND REGIONAL INTEGRATION: A COMPARATIVE PERSPECTIVE AND LESSONS FOR THE AMERICAS 167 (Joaquín Roy & Roberto Dominguez eds., 2005); Henry S. Gill, *CARICOM: Origen, Objetivos y Perspectivos de Integración en el Caribe*, 18 INTEGRACIÓN LATINOAMERICANA 37 (1993);

1991, Argentina, Brazil, Uruguay and Paraguay created their own customs union, named MERCOSUR.⁴⁷ In subsequent years, Bolivia, Chile, Columbia, Ecuador, Peru and Venezuela have become associate partners of MERCOSUR. The Accession Protocol with Venezuela was signed in 2006.⁴⁸

C. The Global Era of Regionalism

The *third phase*, characterizing the first decade of the 21st century, has been labeled the “noodle bowl,” referring to the multiplicity of Asian RTAs.⁴⁹ More accurately, it should be labeled *the global era of regionalism*. The third phase has three characteristics.

1. *The Boom in Asian RTAs*. Asia is a late-comer in the politics of regionalism. In the early 1990s, the limited results of ASEAN led to the launching of more ambitious plans for an ASEAN Free Trade Area (AFTA). AFTA became effective in 1994 and is aiming at reducing tariffs and non-tariff barriers among ASEAN members on a large range of products.⁵⁰ However, the real spark that

Elsa Cardozo de Da Silva, *La Comunidad Andina de Naciones: MERCOSUR y ALCA*, in *RETOS E INTERRELACIONES DE LA INTEGRACIÓN REGIONAL: EUROPA Y AMÉRICA* (Joaquín Roy et al. eds., 2003); Fernando Rueda-Junquera, *Prospects for the Central American Customs Union*, in *THE EUROPEAN UNION AND REGIONAL INTEGRATION*, *supra*, at 113; Eric Jacobstein, *The Politics of the Central American Free Trade Agreement (CAFTA)*, in *THE EUROPEAN UNION AND REGIONAL INTEGRATION*, *supra*, at 135.

47. Treaty of Asunción, Mar. 26, 1991, 30 I.L.M. 1041. See generally MERCOSUR: BETWEEN INTEGRATION AND DEMOCRACY (Marcos Guedes & Francisco Dominguez eds., 2004); NICOLA PHILLIPS, *THE SOUTHERN CONE MODEL: THE POLITICAL ECONOMY OF REGIONAL CAPITALIST DEVELOPMENT IN LATIN AMERICA* (2004); John A. E. Vervaele, *Mercosur and Regional Integration in South America*, 54 INT'L & COMP. L.Q. 387 (2005); G. Philippidis & A. I. Sanjuán, *An Analysis of Mercosur's Regional Trading Arrangements*, 30 WORLD ECON. 504 (2007).

48. INSTRUMENTOS FUNDACIONALES DEL MERCOSUR 5 (Secretaría del Mercosur, 2007), available at <http://www.mercosur.int/msweb/porta1%20intermediario/es/index.htm> (last visited on Feb. 19, 2008).

49. Richard E. Baldwin, *Managing the Noodle Bowl: The Fragility of East Asian Regionalism 2* (Ctr. for Econ. Policy Research, Discussion Paper No. 5561, 2006).

50. Ludo Cuyvers, Philippe De Lombaerde & Stijn Verherstraeten, *From AFTA towards an ASEAN Economic Community... and Beyond 4* (Centre for ASEAN Studies, CAS Discussion Paper No 46, 2005), available at <http://webh01.ua.ac.be/cas/PDF/CAS46.pdf> (visited on Feb. 19, 2008). See also ROADMAP TO AN ASEAN ECONOMIC COMMUNITY (Denis Hew Wei-Yen ed., 2005); AFTA IN THE CHANGING INTERNATIONAL ECONOMY (Mohammed Ariff et al. eds., 1996); Gautam Jaggi, *Association of Southeast Asian Nations and ASEAN Free Trade Area* (Inst. for Int'l Econ., Working Paper No. 95-4, 1995); Markus Hund, *From 'Neighbourhood Watch Group' to Community?: The Case of ASEAN Institutions and the Pooling of Sovereignty*, 56 AUSTL. J. INT'L AFF. 99 (2002).

set off the current surge of RTAs in Asia was China's initiative in 2000 for a free trade agreement with ASEAN.⁵¹ The ASEAN-China framework agreement laying out the free trade plan was concluded in 2003, and it is scheduled to eliminate tariffs by 2010.⁵² The Chinese initiative resulted in an "East Asian domino effect."⁵³ In response to China's project, India also signed a framework agreement with ASEAN in 2003.⁵⁴ However, progress towards its implementation has been stalled.⁵⁵ As Japan and South Korea did not want to stay behind, they decided to start their own talks for RTAs.⁵⁶ In 2006, Japan managed to conclude free trade economic partnership agreements with Indonesia, Malaysia, and the Philippines.⁵⁷ Also in 2006, discussions between South Korea and ASEAN resulted in a free trade agreement. Furthermore, there are ongoing negotiations between Japan and ASEAN, Japan and the individual ASEAN countries, and Japan and South Korea.⁵⁸

At the same time, Singapore successfully negotiated RTAs with countries outside ASEAN: New Zealand (2000), Japan (2002),

51. Richard E. Baldwin, *Multilateralising Regionalism: Spaghetti Bowls as Building Blocks on the Path to Global Free Trade*, 29 *WORLD ECON.* 1451, 1491 (2006). See also Rosemary Foot, *China's Regional Activism: Leadership, Leverage, and Protection*, 17 *GLOBAL CHANGE, PEACE & SECURITY* 141 (2005); Vincent Wang Wei-Cheng, *The Logic of China-ASEAN FTA: Economic Statecraft of Peaceful Ascendancy*, in *CHINA AND SOUTHEAST ASIA: GLOBAL CHALLENGES AND REGIONAL CHALLENGES* 17, 18 (Ho Khai Leon & Samuel C.Y. Ku eds., 2005); Daojong Zha, *The Politics of China-ASEAN Economic Relations: Assessing the Move towards a Free Trade Area*, in *ASIAN REGIONAL GOVERNANCE*, *supra* note 8, at 232; Jing Men, *The Construction of the China-ASEAN Free Trade Area: A Study of China's Active Involvement*, 21 *GLOBAL SOC'Y* 249, 253 (2007).

52. Jiangyu Wang, *China's Regional Trade Agreements: The Law, Geopolitics, and Impact on the Multilateral Trading System*, 8 *SING. J. INT'L & COMP. L.* 119, 124-25 (2004); M. Ulric Killion, *Chinese Regionalism and the 2004 ASEAN-China Accord: the WTO and Legalized Trade Distortion*, 31 *N.C. J. INT'L L. & COM. REG.* 1, 4 (2005). See generally, *ASEAN-CHINA ECONOMIC RELATIONS* (Saw Swee-Hock ed., 2006).

53. Baldwin, *supra* note 51, at 1491.

54. India-ASEAN Framework Agreement, Oct. 8, 2003, http://www.bilaterals.org/IMG/pdf/India-ASEAN_framework_agreement_2003_.pdf.

55. *INDIA-ASEAN ECONOMIC RELATIONS: MEETING THE CHALLENGES OF GLOBALIZATION 2* (Nagesh Kumar & Rahul Sen eds., 2006). See generally Rahul Sen, 'New Regionalism' in Asia: A Comparative Analysis of Emerging Regional and Bilateral Trading Agreements involving ASEAN, China and India, 40 *J. WORLD TRADE* 553 (2006).

56. Hadi Soesastro, *Regional Integration in East Asia: Achievements and Future Prospects*, 1 *ASIAN ECON. POL'Y REV.* 215, 225, 227 (2006); Razeen Sally, *Free Trade Agreements and the Prospects for Regional Integration in East Asia*, 1 *ASIAN ECON. POL'Y REV.* 306, 314-15 (2006).

57. For the text of these agreements, see Ministry of Foreign Affairs of Japan, Free Trade Agreement (FTA) and Economic Partnership Agreement (EPA), <http://www.mofa.go.jp/policy/economy/fta/index.html> (last visited Jan. 11, 2007).

58. Baldwin, *supra* note 51, at 1491.

Australia (2003), the United States (2003), and South Korea (2006).⁵⁹ The RTAs negotiated by Singapore, in turn, “energised and raised the urgency for the other ASEAN countries to become more proactive in open trading activities.”⁶⁰ The response from other ASEAN countries, such as Malaysia and Thailand “was to seek their own [R]TAs to match the record number of [R]TAs signed by Singapore.”⁶¹ The Asian RTA wave has been labeled an example of “competitive liberalisation.”⁶²

2. *The Creation of Interregional RTAs.* The negotiation of interregional RTAs has received a particular push from the European Community.⁶³ Negotiations for a free trade agreement between the EC and Mercosur are well underway.⁶⁴ Similarly, the EC has opened negotiations for the conclusion of a free trade deal with the Gulf Cooperation Council.⁶⁵ In the context of the reform of its trade relations with the ACP countries, the EC is currently negotiating Economic Partnership Agreements, including reciprocal free trade, with West Africa, Central Africa, Eastern and Southern Africa, the Southern African Development Community, the Caribbean, and the Pacific.⁶⁶ In addition, the European Commission has set for itself the

59. Ramkishan S. Rajan, Rahul Sen & Reza Siregar, *Singapore and the New Regionalism: Bilateral Trade Linkages with Japan and the US*, 26 *WORLD ECON.* 1325, 1327 (2003). For the text of these agreements, see WorldTradeLaw.net, Bilateral and Regional Trade Agreements Notified to the WTO, <http://www.worldtradelaw.net/fta/ftadatabase/ftas.asp> (last visited Sept. 30, 2007).

60. S.M. Thangavelu & Mun-Heng Toh, *Bilateral 'WTO-Plus' Free Trade Agreements: The WTO Trade Policy Review of Singapore 2004*, 28 *WORLD ECON.* 1211, 1215 (2005).

61. *Id.*

62. *Id.* at 1217; Hadi Soesastro, *Dynamics of Competitive Liberalization in RTA Negotiations: East Asian Perspective* (Apr. 22-23, 2003) (paper presented at the Pacific Economic Cooperation Council Trade Forum, Washington, D.C.), available at http://www.pecc.org/publications/papers/trade-papers/1_SII/7-soesastro.pdf.

63. See generally INTERREGIONALISM AND INTERNATIONAL RELATIONS (Heiner Hänggi, Ralf Roloff & Jürgen Rüländ eds., 2005); Michael Reiterer, *Interregionalism as a New Diplomatic Tool: the EU and East Asia*, 11 *EUR. FOREIGN AFF. REV.* 223 (2006).

64. See generally HELIO JAGUARIBE & ALVARO DE VASCONCELOS, *THE EUROPEAN UNION, MERCOSUR, AND THE NEW WORLD ORDER* (2003); *MERCOSUR-UNIÓN EUROPEA* (Roberto Ruiz Díaz Labrano ed., 2001).

65. Gerd Nonneman, *EU-GCC Relations: Dynamics, Patterns and Perspectives*, 41 *INT'L SPECTATOR* 59, 61 (2006).

66. Melaku Geboye Desta, *EC-ACP Economic Partnership Agreements and WTO Compatibility: An Experiment in North-South Interregional Agreements*, 43 *COMMON MARKET. L. REV.* 1343, 1360 (2006); Axel Borrmann et al., *EU/ACP Economic Partnership Agreements: Impact, Options and Prerequisites*, 40 *INTERECONOMICS* 169, 171 (2005).

goal to start discussions towards free trade agreements with the Andean Community, Central America and ASEAN.⁶⁷

3. *Preferential Trade Arrangements Among Geographically Distant Partners.* As the interregional negotiations indicate, preferential arrangements are no longer confined to a particular geographical region. Trade relations in the 21st century are characterized by a proliferation of RTAs concluded between countries that are geographically far apart. In addition to its intraregional deals, the European Community has concluded bilateral free trade deals with geographically distant countries such as South Africa (1999), Mexico (2000) and Chile (2002) and has announced its intention to start negotiations with India.⁶⁸ Likewise, Japan has successfully negotiated intercontinental free trade agreements with Mexico (2004) and Chile (2006).⁶⁹ The United States has recently concluded free trade agreements with geographically distant countries such as Jordan (2001), Bahrain (2004), and Morocco (2006) and is pursuing negotiations with Malaysia, South Korea and Thailand.⁷⁰

II. THE HISTORICAL AND LEGAL CONTEXT OF THE WTO'S RTA PROVISIONS

For a proper understanding of the relationship between the increasing number of RTAs and today's multilateral trade regime, a brief historical introduction to the WTO's provisions on RTAs is necessary. GATT started functioning on January 1, 1948, on the basis of the Protocol of Provisional Application to the Havana Charter of 1948 establishing the International Trade Organization (ITO).⁷¹ The Protocol was signed in Geneva on October 13, 1947, following the Geneva Round of reciprocal tariff negotiations.⁷² GATT included

67. See Press Release, European Commission, Central America & Andean Community: Commission proposes negotiating directives for Association Agreements (Dec. 6, 2006), http://ec.europa.eu/trade/issues/bilateral/regions/central_america/pr061206_en.htm.

68. European Commission, *supra* note 41.

69. Ministry of Foreign Affairs of Japan, *supra* note 57.

70. At the same time, the United States also pursued free trade deals with countries in the Americas. Agreements were signed with Chile (2002), Colombia (2006), Panama (2006), and Peru (2006). See Office of the United States Trade Representative, Bilateral Trade Agreements, http://www.ustr.gov/Trade_Agreements/Bilateral/Section_Index.html (last visited Dec. 8, 2007).

71. Protocol of Provisional Application, *supra* note 1.

72. *Id.*

relatively few clauses, mainly relating to tariff obligations. Their main function was to enable the swift implementation of tariff reductions while awaiting the coming into existence of the ITO. However, because the ITO was never ratified, GATT gradually assumed the role of the major multilateral trade forum.⁷³

GATT contains two general concepts that are essential to understanding the discussion on regionalism in international trade: schedules of tariff concessions and unconditional most-favored-nation (MFN) treatment. GATT Article II introduces the concept of a “*schedule of concessions*,” where each contracting party lists detailed item-by-item tariff concessions negotiated during GATT rounds of tariff negotiations.⁷⁴ In accordance with Article II, GATT contracting parties undertake the commitment to levy no more than the tariffs listed in the schedule. Article II has been called GATT’s “central obligation” since it ensures the solidity of the tariff-reducing agreements concluded during the negotiating round.⁷⁵ Therefore, it also fosters the likelihood of the contracting parties making credible initial commitments.

The WTO’s GATS contains a similar provision.⁷⁶ Each WTO member is required to have a schedule of specific commitments which “identifies the services for which members guarantee market access and national treatment and any limitations that may be attached.”⁷⁷ Schedules must specify: (1) the terms, limitations and conditions on market access; (2) the conditions and qualifications on national treatment; (3) the undertakings relating to additional commitments and, where appropriate, the time-frame for implementation of such commitments; and (4) the date of entry into force of such commitments.⁷⁸ GATS Article XVI stipulates that “each Member [must] accord services and service suppliers of any other Member

73. See DAM, *supra* note 23, at 11; JACKSON, *supra* note 19, at 41; see also JOHN H. JACKSON, WORLD TRADE AND THE LAW OF GATT: A LEGAL ANALYSIS OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE 51 (1969) [hereinafter JACKSON, WORLD TRADE].

74. ANWARUL HODA, TARIFF NEGOTIATIONS AND RENEGOTIATIONS UNDER THE GATT AND THE WTO: PROCEDURES AND PRACTICES 111 (2001); JACKSON, *supra* note 19, at 142; PETROS C. MAVROIDIS, THE GENERAL AGREEMENT ON TARIFFS AND TRADE: A COMMENTARY 53-54 (2005).

75. JOHN H. JACKSON, WILLIAM J. DAVEY & ALAN O. SYKES, LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 384 (1995).

76. World Trade Organization, The General Agreement on Trade in Services (GATS): Objectives, Coverage and Disciplines, Question 8, http://www.wto.org/english/tratop_e/serv_e/gatsqa_e.htm (last visited Jan. 12, 2007) [hereinafter GATS Objectives].

77. *Id.*

78. GATS, *supra* note 1, art. XX:1.

treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its [commitment] schedule.”⁷⁹

GATT Article I contains the *most-favored nation (MFN)* obligation. It holds that, with respect to customs duties and all other rules in connection with importation and exportation, “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.”⁸⁰ The unconditional MFN-norm thus implies non-discriminatory treatment in importation and exportation among GATT contracting parties.⁸¹ In principle, the contracting parties are forbidden to grant special trade preferences or privileges to only one or a few other contracting parties. In GATS, a comparable principle can be found. Members are held to extend immediately and unconditionally to services or service suppliers of all other members “treatment no less favourable than that it accords to like services and service suppliers of any other country.”⁸²

In spite of its unconditional MFN principle, from the start, GATT tolerated the formation of *customs unions and free trade areas*.⁸³ Both concepts are defined in greater detail in Part IV. In short, customs unions aim to liberalize trade barriers between its members and create a common customs tariff and trade policy in relation with non-member countries. Free trade areas share the internal component with customs unions, but do not create a unified external trade and customs policy towards third countries.⁸⁴ As such, both customs unions and free trade areas constitute exceptions to the MFN principle. Viewed in the context of the general elimination of

79. *Id.* art. XVI:1.

80. GATT 1947, *supra* note 1, art. I:1.

81. For clear explanations of the GATT MFN principle, see JACKSON, *supra* note 19, at 157; JACKSON, DAVEY & SYKES, *supra* note 75, at 444-56; PETER VAN DEN BOSSCHE, *THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION* 310 (2005); MAVROIDIS, *supra* note 74, at 112; MITSUO MATSUSHITA, THOMAS J. SCHOENBAUM & PETROS C. MAVROIDIS, *THE WORLD TRADE ORGANIZATION: LAW, PRACTICE, AND POLICY* 205 (2006).

82. GATS, *supra* note 1, art. II:1. In contrast with GATT 1994, GATS allows for derogations to the MFN-principle in the form of so-called Article II-exemptions. Members were allowed to request such exemptions before GATS entered into force or at their time of accession. Exemptions should not in principle last longer than 10 years. GATS Objectives, *supra* note 76, Question 7; VAN DEN BOSSCHE, *supra* note 81, at 325.

83. GATT 1947, *supra* note 1, art. XXIV.

84. *Id.* art. XXIV:4.

trade preferences which the United States was seeking to forward in its Proposals for Expansion of World Trade and Employment (1945) and the Suggested Charter for International Trade Organization (1946), the exception for customs unions and free trade areas deserves an explanation.⁸⁵ Initially, the United States was aiming for a provision that authorized *customs unions*, but not free trade areas.⁸⁶ The customs union exception had been generally accepted during the inter-war period. As the League of Nations' Economic Committee stated in 1929: "Customs Unions constitute exceptions, recognized by tradition, to the principle of most-favored-nation treatment."⁸⁷ During the negotiation of the GATT, the United States did not question this reasoning. According to Clair Wilcox, then-Director of the Department of State's Office of International Trade Policy, America's acceptance of customs unions and refusal of other preferential arrangements had an economic reason:

A customs union creates a wider trading area, removes obstacles to competition, makes possible a more economic allocation of resources, and thus operates to increase production and raise planes of living. A preferential system, on the other hand, retains internal barriers, obstructs economy in production, and restrains the growth of income and demand. It is set up for the purpose of conferring a privilege on producers within the system and imposing a handicap on external competitors.⁸⁸

In summary, Wilcox said, "[a] customs union is conducive to the expansion of trade on a basis of multilateralism and non-discrimination; a preferential system is not."⁸⁹ After former Secretary of State George Marshall's famous "Marshall Plan" speech on June 5,

85. JAMES H. MATHIS, REGIONAL TRADE AGREEMENTS IN THE GATT/WTO: ARTICLE XXIV AND THE INTERNAL TRADE REQUIREMENT 33-34 (2002); Kerry A. Chase, *Multilateralism Compromised: the Mysterious Origins of GATT Article XXIV*, 5 WORLD TRADE REV. 1, 6-7 (2006); Richard H. Snape, *History and Economics of GATT's Article XXIV*, in REGIONAL INTEGRATION AND THE GLOBAL TRADING SYSTEM 273, 281 (Kym Anderson & Richard Blackhurst eds., 1993); JACKSON, WORLD TRADE, *supra* note 73, at 576-77; GATT Secretariat, *Note on Article XXIV of the General Agreement*, MTN.GNG/NG7/W/13 (Aug. 11, 1987).

86. JACKSON, WORLD TRADE, *supra* note 73, at 576-77.

87. U.N. DEP'T OF ECON. AFFAIRS, CUSTOMS UNIONS: A LEAGUE OF NATIONS CONTRIBUTION TO THE STUDY OF CUSTOMS UNION PROBLEMS at 31, U.N. Sales No. 1948.II.D.3 (1947). Although the United States was not a member of the League of Nations, it had accepted the customs union exception during the inter-war period. See The Policy of the United States with Respect to Customs Unions and Regional Preferential Trade Arrangements (U.S. Department of State Advisory Committee on Post-War Foreign Policy, Trade Barriers Subcommittee, 1943). On the interwar preference practice, see MATHIS, *supra* note 85, at 13-20.

88. CLAIR WILCOX, A CHARTER FOR WORLD TRADE 70-71 (1949).

89. *Id.* at 71.

1947,⁹⁰ the unification of Western Europe became one of Washington's central foreign policy goals.⁹¹ As a result, banning customs unions became inconceivable since they were regarded as an adequate means to obtain European integration.⁹²

At the start of the negotiations that led to the GATT, it was not foreseen that Article XXIV would also authorize *free trade areas*, i.e. RTAs aiming to abolish trade barriers between its members, but without establishing a common tariff and common commercial policy.⁹³ The free trade area provisions are the result of secret negotiations between the United States and Canada for the establishment of a bilateral trade agreement.⁹⁴ The treaty initially envisaged by the American and Canadian negotiators was, however, limited to the removal of restrictions on their bilateral trade,⁹⁵ which would not meet the customs union test. As a result, the American delegation was instructed to find wording in the GATT that would accommodate the bilateral treaty with Canada.⁹⁶ At the same time, the developing countries from Latin America and the Middle East had expressed dissatisfaction with the heavy conditions imposed on customs unions.⁹⁷ While their request for permission to form preferential trading zones was rejected, free trade areas were added as a compromise formula.⁹⁸ On the one hand, free trade areas were "easier" to achieve than customs unions as they did not require the creation of a unified external commercial and tariff policy among their members. On the other hand, free trade areas still obliged the liberalization of substantially all trade between the constituent

90. George C. Marshall, Secretary of State, Remarks at Harvard University (June 5, 1947), reprinted in 3 FOREIGN REL. U.S. 1947, at 237 (1972).

91. MICHAEL J. HOGAN, THE MARSHALL PLAN. AMERICA, BRITAIN, AND THE RECONSTRUCTION OF WESTERN EUROPE, 1947-1952, at 26 (1987); GEIR LUNDESTAD, "EMPIRE" BY INTEGRATION. THE UNITED STATES AND EUROPEAN INTEGRATION, 1945-1947, at 29 (1997); ALAN S. MILWARD, THE RECONSTRUCTION OF WESTERN EUROPE 1945-51, at 61 (1984).

92. HOGAN, *supra* note 91, at 57-60; MILWARD, *supra* note 91, at 58-61, 232.

93. See Chase, *supra* note 85, at 1-6.

94. *Id.* at 12-14.

95. *Id.* at 13. The free trade treaty between Canada and the United States that was envisaged in 1947 never entered into force. *Id.* at 19.

96. See *id.* at 14.

97. See MATHIS, *supra* note 85, at 37-40; F. A. Haight, *Customs Unions and Free-Trade Areas under GATT: A Reappraisal*, 6 J. WORLD TRADE L. 391, 394-97 (1972).

98. GERARD CURZON, MULTILATERAL COMMERCIAL DIPLOMACY: THE GENERAL AGREEMENT ON TARIFFS AND TRADE AND ITS IMPACT ON NATIONAL COMMERCIAL POLICIES AND TECHNIQUES 261 (1965).

parties, thus avoiding the trade-diverting effects of preferential agreements limited to a few economic sectors.

In 1956, during the negotiations for the creation of the European Economic Community, the United States maintained its support for the creation of customs unions and free trade areas. In his instructions to diplomatic missions abroad, the then-Secretary of State, John Foster Dulles, stated American policy in the following terms:

The United States has generally opposed preferential arrangements in international trade because of the discrimination against the trade of third countries which they involve. The United States has taken a different and generally favorable attitude, however, toward customs unions and free-trade areas, since both involve, in addition to discrimination against the trade of third countries, the elimination of restrictions on substantially all of the trade among the participating countries, thereby making possible the more efficient allocation of economic resources among the participating countries with a consequent over-all expansion of international trade.⁹⁹

In subsequent years, the GATT/WTO rules authorizing RTAs were extended by the Tokyo and Uruguay Rounds. In November 1979, as part of the Tokyo Round, the GATT contracting parties adopted the Decision on Differential and More Favorable Treatment, Reciprocity and Fuller Participation of Developing Countries, known as the “Enabling Clause.”¹⁰⁰ It allows developing countries to grant trade preferences to each other without having to extend them to other WTO members.¹⁰¹ Following the conclusion of the Uruguay Round, GATS Article V authorizes the WTO members to be a party to an economic integration agreement liberalizing trade in services between or among the parties. The Uruguay Round negotiators also succeeded in agreeing on an understanding (the “Uruguay Round Understanding” or the “Understanding”) on the interpretation of GATT Article XXIV.¹⁰²

99. See Circular Airgram from the Secretary of State to Certain Diplomatic Missions (July 13, 1956), reprinted in 4 FOREIGN REL. U.S. 1955-1957, at 450 (1986).

100. Enabling Clause, *supra* note 18.

101. See *id.* ¶ 2(b).

102. Understanding on Article XXIV, *supra* note 16.

III. THE WTO'S SUBSTANTIVE STANDARDS FOR RTAS: ANALYSIS AND PROPOSALS FOR CHANGE

While the new Transparency Mechanism is an essential component for the restoration of the WTO's supervisory role on the trade policies pursued by RTAs, the impact of the Mechanism is necessarily limited by a number of non-procedural factors.¹⁰³ One of the current stumbling blocks to the WTO's effectiveness in dealing with RTAs is the lack of agreement on the interpretation of the substantive WTO criteria.¹⁰⁴ Under GATT 1947, the Working Groups in charge of the examination of RTAs were generally unable to resolve basic methodological issues.¹⁰⁵ As a consequence, the reports submitted by the Working Groups to the GATT Council did, in most cases, merely list the divergent views expressed by the contracting parties.¹⁰⁶ In fact, the WTO Committee on Regional Trade Agreements (CRTA) has not been more productive than the old GATT Working Parties.¹⁰⁷ The paragraphs below provide an explanation for the problems in the interpretation and application of the main substantive requirements for RTAs.

The substantive rules relating to RTAs for goods are contained in paragraphs 4 through 10 of GATT Article XXIV, as clarified in the Uruguay Round.¹⁰⁸ This Article includes both internal and external requirements applicable to the creation of free trade areas and customs unions.¹⁰⁹ Internal requirements deal with the legal relationship among the constituent parties to customs unions and free trade areas.¹¹⁰ The external requirements concern the relationship between an RTA and the "outsiders."¹¹¹ Much like GATT Article XXIV, GATS Article V puts internal and external conditions on such RTAs that cover trade in services.¹¹² As its terminology is close to that of GATT Article XXIV, GATS Article V suffers from many of

103. *See infra* Part V.

104. *See infra* Part IV.

105. *See* 2 GUIDE TO GATT LAW AND PRACTICE: ANALYTICAL INDEX 759-62 (1994) [hereinafter GUIDE TO GATT].

106. *See id.* at 761.

107. *See supra* notes 24-25.

108. GATT 1947, *supra* note 1, art. XXIV; Understanding on Article XXIV, *supra* note 16.

109. GATT 1947, *supra* note 1, art. XXIV.

110. *See infra* Part IV.A.

111. *See infra* Part IV.B.

112. GATS, *supra* note 1, art. V.

the same problems that plague RTAs covering trade in goods.¹¹³ Practice with GATS Article V is, however, significantly less developed than with GATT Article XXIV, which has existed since 1947.¹¹⁴

A. The WTO's Internal Requirements for RTAs

1. *The Membership of RTAs.* The internal requirements are found in paragraphs 5, 8 and 5(c) of Article XXIV. The first internal requirement concerns the membership of the RTAs. Paragraph 5 states that the provisions of the Agreement “shall not prevent, *as between the territories of contracting parties*, the formation of a customs union or of a free-trade area or the adoption of an interim agreement necessary for the formation of a customs union or a free-trade area[.]”¹¹⁵ It has been debated whether paragraph 5 is also applicable to agreements with countries that are not contracting parties to GATT.¹¹⁶ As early as 1960, the reports of the Working Parties on the European Free Trade Association (EFTA) and on the Latin American Free Trade Area (LAFTA) recorded divergent views as to whether paragraph 5 is applicable to agreements with countries that are not contracting parties.¹¹⁷ The orthodox view is that a customs union or free trade with a country that is not a contracting party would need to be approved by a two-thirds majority in accordance with GATT Article XXIV:10.¹¹⁸ This position was defended by the United States in the framework of the GATT dispute settlement procedure on “EC-Tariff Treatment on Imports of Citrus Products from Certain Countries in the Mediterranean Region.”¹¹⁹ The United States contended

that the procedures of Article XXIV:7(b) applied only to interim agreements among contracting parties and hence not to the agreements concluded with [countries] which were not contracting parties [to the GATT]. These agreements were rather subject to

113. Compare GUIDE TO GATT, *supra* note 105, at 790-94, with GATS, *supra* note 1, art V.

114. *Id.*

115. GATT 1947, *supra* note 1, art. XXIV:5 (emphasis added).

116. Won-Mog Choi, *Legal Problems of Making Regional Trade Agreements with Non-WTO-Member States*, 8 J. INT'L ECON. L. 825, 826 (2005).

117. GUIDE TO GATT, *supra* note 105, at 798.

118. *See id.* at 798-99.

119. Report of the Panel, *EC-Tariff Treatment on Imports of Citrus Products from Certain Countries in the Mediterranean Region*, L/5776 (Feb. 7, 1985) (unadopted).

the procedures of Article XXIV:10 which required a two-thirds majority approval.¹²⁰

The opposite argument was advanced by the European Community during the examination of its Association Agreements with Tunisia and Morocco.¹²¹ As Tunisia and Morocco were, at that time, not yet contracting parties, some delegations referred to the need for a waiver according to Article XXIV:10.¹²² The EC, however, recalled that in previous cases of EFTA and LAFTA, some participants in those free trade areas were not at the time contracting parties to the GATT 1947 either.¹²³ On that basis, the EC claimed that it had been shown in practice that the term “territories of Contracting Parties” was not to be interpreted as restricting the applicability of paragraph 5.¹²⁴

The issue has never been formally settled. At this stage, the CRTA has several RTAs under examination that have been concluded between a WTO member and a non-member. Armenia, Georgia, and the Kyrgyz Republic each notified RTAs with non-members, such as the Russian Federation, Kazakhstan and Ukraine.¹²⁵ The EC concluded Euro-Mediterranean free trade agreements with non-members Algeria, Lebanon and Syria.¹²⁶ In practice, the political and economic imperatives that drive RTAs have been stronger than the controversial WTO membership prerequisite.¹²⁷ As the number of WTO members continues to grow, the long-run issue is likely to become less problematic.¹²⁸

120. *Id.* ¶ 3.14.

121. *EEC-Agreements of Association with Tunisia and Morocco*, ¶ 16, L/3379 (Apr. 7, 1970), GATT B.I.S.D. (18th Supp.) at 149, 154 (1970).

122. *Id.*

123. *Id.*

124. *Id.*

125. With one exception, these agreements were concluded before Armenia, Georgia and the Kyrgyz Republic became WTO members. Armenia notified RTAs with non-members the Russian Federation (1993), Ukraine (1996), Turkmenistan (1996) and Kazakhstan (2001). Georgia notified RTAs with the Russian Federation (1994), Ukraine (1996), Azerbaijan (1996), Kazakhstan (1999) and Turkmenistan (2000). The Kyrgyz Republic notified RTAs with the Russian Federation (1993), Kazakhstan (1995), Ukraine (1998) and Uzbekistan (1998). WTO, Regional Trade Agreements notified to the GATT/WTO and in Force, http://www.wto.org/english/tratop_e/region_e/region_e.htm (last visited Mar. 2, 2007).

126. European Commission, *supra* note 41.

127. *See infra* Part VI.

128. GATT 1947 originally had twenty-three contracting parties. WTO, The GATT Years: From Havana to Marrakesh, http://www.wto.org/English/thewto_e/whatis_e/tif_e/fact4_e.htm (last visited Oct. 2, 2007). The WTO currently has 149 members. WTO, Understanding the

Proposal: From a constitutional perspective, the continuing confusion on the interpretation of the WTO membership requirement is a factor that feeds the WTO's credibility gap. In this context, an authoritative interpretation of GATT Article XXIV:5 is required. This interpretation should consist of two elements. First, as a matter of principle, the interpretation should confirm that GATT intended RTAs to be concluded between its contracting parties. Second, it should recognize that the CRTA has several RTAs under consideration that involve non-WTO members. Where WTO members find it necessary to conclude RTAs with non-members, two additional requirements should be imposed. The WTO members of such RTAs should (a) be required to provide the CRTA with a full explanation on the reasons for concluding the RTA with the non-member; and (b) be required to take the responsibility of providing technical assistance to the non-member with a view of bringing that country towards WTO membership. As such, RTAs between WTO members and non-members would effectively become learning tools for the non-members.¹²⁹

2. *The Degree of Trade Liberalization: the "Substantially All" Requirement.* The second internal requirement focuses on trade coverage. GATT Article XXIV:8(a)(i) provides that customs union shall be understood to mean "the substitution of a single customs territory for two or more customs territories," so that duties and other restrictive regulations of commerce are eliminated with respect to "substantially all the trade between the constituent territories of the union."¹³⁰ The precise definition of "substantially all" has troubled the assessment of RTAs from the start. The matter is of particular relevance for the RTAs that fail to fully liberalize trade in all economic sectors, such as agriculture.

The "substantially all the trade" requirement was initiated by the United States because of its bilateral trade discussions with Canada, which coincided with the negotiations that created the GATT in

WTO: The Organization, Members and Observers, http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited Nov. 20, 2006).

129. For example, when the EC and EFTA each concluded bilateral free trade agreements with Bulgaria in 1993, the latter was not yet a GATT contracting party. Bulgaria's Europe Association Agreement with the EC paved the way for integration into the EC's common commercial policy and thereby led to WTO membership. Bulgaria became a WTO member in 1996. On Bulgaria and the WTO, see WTO, Bulgaria and the WTO, http://www.wto.org/english/thewto_e/countries_e/bulgaria_e.htm (last visited Sept. 18, 2007).

130. GATT 1947, *supra* note 1, art. XXIV:8(a)(i) (emphasis added).

1947.¹³¹ The American negotiators in the multilateral framework were therefore instructed to insist on language that did not require total free trade between the parties to a RTA.¹³² While aiming for a bilateral RTA with Canada, the United States was not planning to give up its agricultural quotas for wheat and wheat flour and its seasonal quotas on many fruits and vegetables.¹³³ Antidumping and countervailing duties against Canadian products were also to remain in force.¹³⁴ In this context, the American negotiators invented the “substantially all” concept.¹³⁵

During the examination of the European Economic Community in 1957, its member states proposed that “a free-trade area should be considered as having been achieved for substantially all the trade when the volume of liberalized trade reached 80 per cent [sic] of total trade.”¹³⁶ Many other members of the Working Party examining the EEC refused this proposal, as they held that it was “inappropriate to fix a general figure of the percentage of trade” as a requirement to meet the “substantially all” criterion.¹³⁷

An attempt at clarifying the matter during the Working Party on EFTA in 1960 was far from conclusive. The Working Party report simply noted the view by several delegations that “the phrase ‘substantially all the trade’ had a qualitative as well as quantitative aspect and that it should not be taken as allowing the exclusion of a major sector of economic activity. For this reason, the percentage of trade covered, even if it were established to be 90 per cent [sic], was not considered to be the only factor to be taken into account.”¹³⁸ This issue was later touched upon in the preamble of the Uruguay Round Understanding. While it did not formulate a key to the legal interpretation of the “substantially all” criterion, the Understanding “recogniz[ed]” in general political terms that the positive trade contribution of RTAs “is increased if the elimination between constituent territories of duties and other restrictive regulations of

131. Chase, *supra* note 85, at 13-15.

132. *Id.* at 14-15.

133. *Id.* at 17.

134. *Id.*

135. *See id.*

136. GATT, *Report Submitted by the Committee on Treaty of Rome to the Contracting Parties on 29 November 1957*, Annex IV ¶ 30, L/778 (Nov. 29, 1957).

137. *Id.* Annex IV ¶ 34.

138. GATT, *Report of the Working Party on the European Free Trade Association*, ¶ 48, L/1235 (June 4, 1960).

commerce extends to all trade, and diminished if any major sector of trade is excluded[.]”¹³⁹

The state of agreement on the interpretation of this crucial paragraph has hardly progressed with the entry into force of the WTO.¹⁴⁰ In the Turkey-Textiles case of 1999, the WTO dispute settlement Panel and the Appellate Body did not proceed much beyond the Working Party’s assessment.¹⁴¹ The Panel acknowledged that neither the GATT contracting parties nor the WTO members have ever reached agreement on the interpretation of the provision’s “substantially all” term.¹⁴² In an attempt to nevertheless clarify the matter, the Panel held that “[t]he ordinary meaning of the term ‘substantially’ in the context of sub-paragraph 8(a) appears to provide for both qualitative and quantitative components.”¹⁴³ The Appellate Body confirmed this finding,¹⁴⁴ and further agreed with the Panel that the “terms of sub-paragraph 8(a)(i) offer ‘some flexibility’ to the constituent members of a customs union when liberalizing their internal trade.”¹⁴⁵

It is clear that an effective WTO monitoring process of RTAs requires a consensus on the interpretation of the term “substantially all,” and discussion has continued in the framework of the Doha

139. Understanding on Article XXIV, *supra* note 16, pmb1.

140. See WTO, WTO ANALYTICAL INDEX: GUIDE TO WTO LAW AND PRACTICE, GATT 1994, Part III, Article XXIV, ¶ 631 (2007), http://www.wto.org/english/res_e/booksp_e/analytic_index_e/gatt1994_09_e.htm#article24 [hereinafter WTO ANALYTICAL INDEX].

141. See generally *Panel Report on Turkey – Textiles*, *supra* note 35; *Appellate Body Report on Turkey – Textiles*, *supra* note 35. For a comment on these reports, see James H. Mathis, *WTO, Turkey – Restrictions on Imports of Textile and Clothing Products*, 27 LEGAL ISSUES OF ECON. INTEGRATION 103 (2000); Joel P. Trachtman, *Decisions of the Appellate Body of the World Trade Organization*, 11 EUR. J. INT’L L. 217 (2000); Gabrielle Marceau & Cornelis Reiman, *When and How Is a Regional Trade Agreement Compatible with the WTO?*, 28 LEGAL ISSUES ECON. INTEGRATION 297 (2001); Peter Hilpold, *Regional Integration According to Article XXIV GATT – Between Law and Politics*, 7 MAX PLANCK Y.B. U.N. L. 219 (2003).

142. *Panel Report on Turkey – Textiles*, *supra* note 35, ¶ 9.148.

143. *Id.*

144. *Appellate Body Report on Turkey – Textiles*, *supra* note 35, ¶ 49. According to Thomas Cottier and Mathias Oesch, the current state of the law can be summarized as follows: for an RTA to be consistent with Article XXIV, “the term ‘substantially all the trade’ requires *cumulatively* that a certain percentage of trade is liberalized *and* no major sector of a national economy is excluded.” See THOMAS COTTIER & MATHIAS OESCH, INTERNATIONAL TRADE REGULATION: LAW AND POLICY IN THE WTO, THE EUROPEAN UNION AND SWITZERLAND 378 (2005); Thomas Cottier, *The Legal Framework for Free Trade Areas & Customs Unions in WTO Law*, in MULTILATERALISM AND BILATERALISM AFTER CANCUN: CHALLENGES AND OPPORTUNITIES OF REGIONALISM 107, 109 (Martin Godel & Jonathan Gage eds., 2004).

145. *Appellate Body Report on Turkey – Textiles*, *supra* note 35, ¶ 48.

Round.¹⁴⁶ A number of delegations have limited themselves to repeating the well-known position that “substantially all” cannot be simplified into a mere mathematical formula, as it also contains qualitative aspects.¹⁴⁷ Among those looking for a solution, some participants expressed that they were in favor of a definition based on trade benchmarks.¹⁴⁸ Others have argued for “a definition setting minimum percentages for both duty-free tariff lines and trade flows, referring in that context to the need for an adequate approach for evaluating the exclusion of major sectors from the RTA coverage.”¹⁴⁹

The most elaborate proposal on the interpretation of the “substantially all” criterion was formulated by Australia in 2005.¹⁵⁰ The Australian submission recognizes that statistics on actual trade flows between RTA partners cannot take into account the dynamics of the economic integration process, and starts from the premise that such figures are of limited use in the “substantially all” debate.¹⁵¹ Instead, Australia proposes to define the “substantially all” criterion in terms of the tariff lines listed in the Harmonized Commodity Description and Coding System (HS).¹⁵² According to the Australian proposal, RTAs would—upon their entry into force—need to eliminate duties and other restrictions to trade on at least seventy percent of tariff lines at the HS six-digit level.¹⁵³ Within a ten-year transition period, this figure would need to increase to ninety-five percent and the exclusion of “highly traded products” would be

146. See Negotiating Group on Rules, *Summary Report of the Meeting Held on 8 & 10 July 2002*, ¶ 19, TN/RL/M/3 (Aug. 1, 2002).

147. Negotiating Group on Rules, *Summary Report of the Meeting Held on 11 June 2003*, ¶ 20, TN/RL/M/9 (July 10, 2003).

148. Negotiating Group on Rules, *Summary Report of the Meeting Held on 17-18 May 2005*, ¶ 4, TN/RL/M/27 (June 30, 2005).

149. *Id.* ¶ 9.

150. See generally Negotiating Group on Rules, *Submission on Regional Trade Agreements by Australia*, TN/RL/W/173/Rev1 (Mar. 3, 2005) [hereinafter *Submission by Australia (March)*] (outlining Australia’s proposal); Negotiating Group on Rules, *Submission on Regional Trade Agreements by Australia*, TN/RL/W/180 (May 13, 2005) [hereinafter *Submission by Australia (May)*] (responding to comments on its previous submission); Edwini Kessie, Counsellor, Presentation of the Council and Trade Negotiation Committee, Negotiations on Regional Trade Agreements 21-31 (June 12-13, 2006) (presentation available at the U.N. Institute for Training and Research, <http://www.unitar.org/mm/File/RTA%20negotiations.pdf>).

151. Kessie, *supra* note 150, at 21.

152. *Submission by Australia (May)*, *supra* note 150, ¶ 13. For more on the Harmonized System, see HODA, *supra* note 74, at 124; MAVROIDIS, *supra* note 74, at 56.

153. *Submission by Australia (March)*, *supra* note 150, ¶ 13.

prohibited.¹⁵⁴ While it has the advantage of being easily verifiable and avoiding complicated economic analysis, the Australian proposal does not yet hold a consensus.¹⁵⁵ Japan, in particular, has argued that a tariff line-based test alone is deficient as it does not reflect the actual trade volume.¹⁵⁶

Much like GATT Article XXIV, GATS Article V also stipulates that RTAs covering trade in services must have “substantial sectoral coverage.”¹⁵⁷ In addition, RTAs should provide for the absence or elimination of “substantially all” discrimination between and among the parties in the sectors covered.¹⁵⁸ This can be achieved through elimination of discriminatory measures and/or prohibition of new or more discriminatory measures, “at the entry into force of that agreement or on the basis of a reasonable time-frame, except for measures permitted under Articles XI, XII, XIV and XIV *bis*.”¹⁵⁹ Substantial sectoral coverage is defined as a condition “understood in terms of number of sectors, volume of trade affected and modes of supply. In order to meet this condition, [the] agreement[] should not provide for the *a priori* exclusion of any mode of supply.”¹⁶⁰ This means that RTAs for trade in services should, in principle, be applicable to:

- (1) cross-frontier supplies not involving any movement of persons;
- (2) consumption abroad, which entails the movement of the consumer into the territory of the WTO member country in which the supplier is established;
- (3) commercial presence, i.e. the presence of a subsidiary or branch in the territory of the WTO member country in which the service is to be rendered; and
- (4) the presence of natural persons from a WTO member country, enabling a supplier from one member country to supply services within the territory of any other member country.¹⁶¹

154. *Id.* ¶¶ 5-6. Such “highly traded products” would be defined either as those products for which the value of a member’s imports in any single HS six-digit line as a proportion of their total imports from the RTA partner exceeds 0.2% or the top fifty imports of each RTA party at HS six-digit level. *Submission by Australia (May)*, *supra* note 150, ¶ 14.

155. Kessie, *supra* note 150, at 23. *See generally id.* at 32-104 (outlining other members’ proposals).

156. *See Submission on Regional Trade Agreements*, Sec. III ¶¶ 1-3, TN/RL/W/190 (Oct. 28, 2005) (Japan’s submission); *Discussion Paper on Regional Trading Arrangements*, ¶ 6, TN/RL/W/114 (June 6, 2003) (India’s Discussion Paper).

157. GATS, *supra* note 1, art. V:1(a).

158. *Id.* art. V:1(b).

159. *Id.*

160. *Id.* art. V:1(a) n.1.

161. Case 1/94, Opinion pursuant to Article 228(6) of the EC Treaty, ¶ 43, 1994 E.C.R. I-5267.

In order to evaluate whether the conditions have been met, consideration must “be given to the relationship of the agreement to a wider process of economic integration or trade liberalization among the countries concerned.”¹⁶² In spite of the guidance provided by GATS Article V, the concrete interpretation of the required sectoral coverage is a matter of discussion. One view is that RTAs should not necessarily cover *all* sectors.¹⁶³ Another view is that the flexibility provided by the word “substantial” does not allow for the exclusion of a sector from an RTA.¹⁶⁴ The precise extent of liberalization needed for an RTA to meet the “substantial sectoral coverage” test thus remains to be resolved.¹⁶⁵

Proposal: The long-lasting inability of GATT/WTO to agree on a definition of the “substantially all trade” criterion is a major contributor to the WTO’s constitutional credibility gap with respect to RTAs. If the WTO is to play a meaningful role with respect to the assessment of RTAs, it should find a solution to the deadlock. First, it is necessary to reaffirm the reasons for the “substantially all” requirement, which is to avoid preferential agreements that provide for the liberalization of only a few products.¹⁶⁶ The idea behind this is to discourage predominantly trade-diverting arrangements and to avoid a repetition of the devastating disintegration of the world economy that characterized the 1930s. Second, as it seems useful to maintain the “substantially all” criterion, a workable definition needs to be agreed upon. Definitions based on trade flows are problematic. As Sungjoon Cho has underlined, “the measurement of ‘liberalized’ trade volume would hardly be accurate in reality because such measurement is generally based on *ex ante* forecasts of unrealized transactions”¹⁶⁷ WTO practice has, indeed, shown that it is hardly possible to accurately measure the impact of RTAs on actual

162. GATS, *supra* note 1, art. V:2.

163. See Negotiating Group on Rules, *supra* note 24, ¶¶ 67-68.

164. *Id.*

165. *See id.*

166. See generally Hilpold, *supra* note 141, at 231 (explaining that partially integrated RTAs can be trade-diverting agreements). In this context, Hilpold quotes Robert E. Hudec: “once governments are allowed to select some products and not others, political forces will inevitably exert enormous pressure to choose trade-diverting preferences first. Trade-diverting preferences are the ones that result in the greatest net political gain for governments; the political gains arise from pleasing local producers who displace third-country producers, while political losses are entirely avoided because third-country producers do not vote.” Robert E. Hudec, *GATT’s Influence on Regional Arrangements*, in *NEW DIMENSIONS IN REGIONAL INTEGRATION* 151, 155 (Jaime Melo & Arvind Panagariua eds., 1993).

167. Cho, *supra* note 23, at 443.

trade flows that are dynamic and shift over time.¹⁶⁸ Definitions based on the non-exclusion of economic sectors are equally problematic. On the one hand, members disagree on the definition of “economic sector.”¹⁶⁹ On the other hand, considering the many RTAs that fail to fully liberalize trade in agriculture, it is unrealistic to expect a consensus on an all-sector-inclusive-obligation for RTAs.

In light of these two problems, the Australian proposal of 2005 offers the most constructive solution. The “substantially all” discussion should be based on the tariff lines in the schedules of concession at the HS six-digit level, which is internationally recognized and can hardly pose problems. RTAs that do not reach the required liberalization percentages of seventy percent at the start and ninety-five percent after a ten-year transition period should be obliged to present a plan that details the manner in which barriers to trade would be eliminated as regards additional tariff lines in the schedules of concession. While the recommended plan might lack sophistication, it would avoid unnecessary methodological discussions on measuring trade volumes or defining economic sectors.¹⁷⁰

3. *The Reciprocity of Trade Liberalization.* The third criterion concerns the *reciprocity of liberalization between the parties* in free trade areas and customs unions. Under GATT 1947, several one-way free trade areas had been notified.¹⁷¹ Whether the Article XXIV:8 requirement to liberalize “substantially all the trade” implied that such liberalization needed to be fully reciprocal was the subject of debate and disagreement.¹⁷² As pointed out by Australia during the examination of its Trade and Commercial Relations Agreement with Papua New Guinea, “Article XXIV did not contain any specific provision with respect to reverse preferences.”¹⁷³ As a result, Australia claimed that the non-reciprocity of the agreement did not

168. See *infra* notes 222-28.

169. See sources cited *supra* notes 136-38.

170. As it is argued by Jeffrey J. Schott, such definitional problems clouded many of the earlier proposals to set a numerical target for the “substantially all” criterion. See Jeffrey J. Schott, *Free Trade Agreements: Boon or Bane of the World Trading System?*, in *FREE TRADE AGREEMENTS: US STRATEGIES AND PRIORITIES* 3, 18 (Jeffrey J. Schott ed., 2004).

171. See *GUIDE TO GATT*, *supra* note 105, at 826.

172. See *id.* at 826-27.

173. *Id.* (quoting *Report of the Working Party on the Australia/Papua New Guinea Trade and Commercial Relations Agreement*, ¶ 7, L/4571 (Nov. 11, 1977)).

affect the free-trade area status.¹⁷⁴ Other contracting parties disagreed. They

expressed doubts about the conformity of the Agreement with the provisions of Article XXIV, since it appeared that no reciprocal reduction of duties or elimination of other restrictive regulations of commerce by Papua New Guinea had been required. . . . One member . . . stated that he did not share the view expressed by the representative of Australia that, in light of the fact that Article XXIV made no mention of reverse preferences, reciprocity was not required between the parties to free-trade area agreements.¹⁷⁵

Similar disagreements emerged following the notification by the European Community of its Lomé Conventions with the African, Caribbean and Pacific (ACP) countries.¹⁷⁶ None of these Conventions obliged the associated countries to grant reverse preferences.¹⁷⁷

The reciprocity issue increased in significance during the long-lasting dispute on the EC's trade regime for bananas under the Lomé Convention. The EC maintained that the requirement of Article XXIV:8(b), according to which free trade areas must cover substantially all the trade between the constituent territories, did not apply in respect of arrangements between developed contracting parties and developing countries.¹⁷⁸ Because of the principle of non-reciprocity set out in GATT Part IV, the EC claimed that its one-way free trade regime for the ACP countries was fully compatible with the GATT.¹⁷⁹ The GATT dispute settlement panels disagreed, holding that GATT Part IV did not permit contracting parties to accord preferences to a selected group of developing countries and that doing so was inconsistent with the MFN-principle of GATT Article

174. *Id.*

175. *Id.* at 827.

176. See *Report of the Working Party on the ACP-EEC Convention of Lomé*, ¶¶ 10-14, L/4369 (July 15, 1976), GATT B.I.S.D. (23rd Supp.) at 46 (1977); *Report of the Working Party on the Second ACP-EEC Convention of Lomé*, ¶ 17, L/5292 (Mar. 31, 1982), GATT B.I.S.D. (29th Supp.) at 119 (1983); *Report of the Working Party on the Third ACP-EEC Convention of Lomé*, ¶¶ 12, 19, L/6382 (Sept. 22, 1988), GATT B.I.S.D. (35th Supp.) at 321 (1989). For the history of the Lomé Conventions, see European Commission, *From Lomé I to IV bis*, http://ec.europa.eu/development/Geographical/Cotonou/LomeGen/LomeItoIV_en.cfm (last visited Jan. 27, 2008).

177. See Jürgen Huber, *The Past, Present and Future ACP-EC Trade Regime and the WTO*, 11 EUR. J. INT'L L. 427, 428-30 (2000); GUIDE TO GATT, *supra* note 105, at 826-27.

178. Report of the Panel, *EEC – Member States' Import Regimes for Bananas*, ¶ 364, DS32/R (June 3, 1993) (not adopted) [hereinafter *Panel Report Bananas I*]; see Report of the Panel, *EEC – Import Regimes for Bananas*, ¶¶ 159-61, DS38/R (Feb. 11, 1994) (not adopted) [hereinafter *Panel Report Bananas II*].

179. *Panel Report Bananas II*, *supra* note 178, ¶ 156.

I.¹⁸⁰ Thus, the panels found that the Article XXIV reciprocity requirements were not modified by the provisions of Part IV.¹⁸¹ Furthermore, the Bananas II Panel held that the use of the plural in the phrases of GATT Article XXIV “between the constituent territories” and “originating in such territories” made clear that only reciprocal agreements, “providing for an obligation to liberalize the trade in products originating in *all* of the constituent territories could be considered to establish a free-trade area within the meaning of Article XXIV:8(b).”¹⁸² As a consequence, the EC was required to request a formal waiver to keep its preferential trade regime for the ACP countries in conformity with the GATT/WTO.¹⁸³ In an attempt to bring its relations with the ACP countries in line with the reciprocity requirement of GATT Article XXIV, the EC began negotiating Economic Partnership Agreements, aiming for reciprocal free trade, with West Africa, Central Africa, Eastern and Southern Africa, the Southern African Development Community, the Caribbean, and the Pacific.¹⁸⁴ Several authors have tried to examine the impact of the change from non-reciprocal to reciprocal free trade in EU-ACP relations.¹⁸⁵ While the precise effect does not always seem clear, some Non-Governmental Organizations underline the negative impact of reciprocal free trade on the local farmers,

180. See *Panel Report Bananas I*, *supra* note 178, ¶¶ 369-72; *Panel Report Bananas II*, *supra* note 178, ¶¶ 160-64.

181. See *Panel Report Bananas I*, *supra* note 178, ¶¶ 369-72; *Panel Report Bananas II*, *supra* note 178, ¶¶ 160-64.

182. *Panel Report Bananas II*, *supra* note 178, ¶ 159 (emphasis added).

183. See *Panel Report Bananas I*, *supra* note 178, ¶ 241. The first GATT waiver for the Lomé Conventions was granted on December 9, 1994. *Fourth ACP-EEC Convention of Lomé - Decision of 9 December 1994*, ¶ 1, L/7604 (Dec. 9, 1994). On October 14, 1996 the waiver was extended by the WTO. *Fourth ACP-EEC Convention of Lomé Extension of Waiver - Decision of 14 October 1996*, ¶ 1, WT/L/186 (Oct. 14, 1996). On November 14, 2001 the Doha Ministerial Conference provided a further waiver to the Cotonou Agreement, which is the successor to the Lomé Conventions, limited to December 31, 2007. WTO, Ministerial Decision of 14 November 2001, WT/MIN(01)/15.

184. Desta, *supra* note 66; Borrmann et al., *supra* note 66.

185. See generally Stephen Karungi et al., *Economic and Welfare Impacts of the EU-Africa Economic Partnership Agreements* (U.N. Econ. Comm'n for Africa, Africa Economic Policy Centre Work in Progress No. 10, 2005); Christopher Stevens & Jane Kennan, *EU-ACP Economic Partnership Agreements: The Effects of Reciprocity* (May 2005) (unpublished Briefing Paper of the Institute of Development Studies); Lawrence E. Hinkle & Maurice Schiff, *Economic Partnership Agreements between Sub-Saharan Africa and the EU: a Development Perspective*, 27 *WORLD ECON.* 1321 (2004); Matthew McQueen, *ACP-EU Trade Cooperation after 2000: An Assessment of Reciprocal Trade Preferences*, 36 *J. MOD. AFRICAN STUD.* 669 (1998).

employment, tax revenues, and even political stability in the ACP countries.¹⁸⁶

The requirement for reciprocal liberalization in free trade areas goes to the heart of the economic development problem. GATS Article V explicitly states that, in interpreting the “substantially all” provision, flexibility is provided where developing countries are parties to RTAs.¹⁸⁷ In contrast with GATS Article V, GATT Article XXIV does not include an explicit authorization for “flexibility” regarding RTAs involving developing countries. However, some authors continue to argue that the Enabling Clause constitutes a sufficient basis for such flexibility.¹⁸⁸ In the view of Jacques Berthelot, to say that the Enabling Clause merely authorizes regional arrangements amongst less-developed countries would be “totally redundant” as GATT Article XXIV already allows such RTAs.¹⁸⁹ Instead, Berthelot pleads for an integrated reading of paragraphs 1 and 2 of the Enabling Clause.¹⁹⁰ The wording in paragraph 1 strongly suggests that the contracting parties are developed, not developing, as it stipulates that “Contracting Parties may accord differential and more favourable treatment to developing countries.”¹⁹¹ Paragraph 2(c) authorizes regional arrangements amongst less-developed countries. The Enabling Clause makes clear that the provisions of paragraph 1 apply to what is provided for in paragraph 2.¹⁹² According to this logic, contracting parties would be authorized to accord differential and more favorable treatment to developing countries in regional arrangements. It is clear, however, that the current state of WTO law, as applied by the GATT Panels, does not reflect Berthelot’s reasoning.

186. Matt Griffith & Liz Stuart, Catholic Agency For Overseas Development, *The Wrong Ointment: Why the EU’s Proposals for Free Trade with Africa will Not Heal its Scar of Poverty* (2004), available at <http://www.cafod.org.uk/var/storage/original/application/php7ywMCg.pdf>; Cosmas Ochieng & Tom Sharman, Action Aid, *Trade Traps: Why EU-ACP Economic Partnership Agreements Pose a Threat to Africa’s Development* (2004), available at http://www.actionaid.org.uk/_content/documents/Trade%20traps_782006_122739.pdf.

187. GATS, *supra* note 1, art. V:3(a).

188. Jacques Berthelot, Solidarité, *David and Goliath: Argument against the Economic Partnership Agreements (EPAs) between the European Union and the African, Caribbean and Pacific Countries* 12-14 (2006), available at http://www.acp-eu-trade.org/library/files/Berthelot_EN_191206_Solidarite_David-Goliath-argument-against-the-EPAs.pdf.

189. *Id.* at 13.

190. *Id.*

191. *Id.*

192. Enabling Clause, *supra* note 18, ¶ 2.

Proposal: The reciprocity issue could have important implications for developing countries. Current studies on the economic impact of reciprocal RTAs between developing and developed countries are not leading to generally agreed conclusions. To provide a more solid basis for decision-making in the framework of the Doha Development Round (Doha Round or Round), a comprehensive impact study should be jointly commissioned by WTO and the United Nations Conference on Trade and Development (UNCTAD) to determine the economic and social consequences of changing non-reciprocal benefits for regional groups of developing countries into reciprocal free trade.

Furthermore, in view of the development focus of the Doha Round, the members should be ready “to redress the imbalance between [special and differential treatment] in Article V of GATS and its absence in the Article XXIV of GATT.”¹⁹³ Such a step would be in full respect for the Round’s mandate which states explicitly that negotiations on rules for RTAs “shall take into account the developmental aspects of regional trade agreements.”¹⁹⁴ In their interesting study on this issue, Axel Borrmann, Harald Grossmann and Georg Koopmann have explained that the concept of special and differential treatment for developing countries in the context of Article XXIV can take the form of flexibility as regards the breadth, the depth, and the speed of liberalization.¹⁹⁵ Flexibility regarding the breadth of liberalization would allow the developing countries to apply less demanding levels of final trade coverage under the RTA.¹⁹⁶ Flexibility as to the depth of liberalization would permit developing countries to take temporary protective measures, in particular to protect infant industries.¹⁹⁷ Flexibility as to the speed of liberalization would provide developing countries with a possibility for asymmetry

193. Stephen N. Karingi & Rémi Lang, Presentation by the United Nations Economic Commission for Africa for the retreat of African Ambassadors and Negotiators based in Geneva on Development Benchmarks for the Hong Kong Ministerial, Lausanne: Negotiations on Rules with regard to Regional Trade Agreements 1 (Nov. 5-6, 2005). *See generally* Rémi Lang, *Renegotiating GATT Article XXIV: a Priority for African Countries Engaged in North-South Trade Agreements* (U.N. Econ. Comm’n for Africa, Africa Trade Pol’y Ctr. Work in Progress No. 33, 2006).

194. WTO, Ministerial Declaration of 14 November 2001, *supra* note 1, ¶ 29.

195. AXEL BORRMANN, HARALD GROSSMANN & GEORG KOOPMANN, FED. MINISTRY FOR ECON. COOPERATION AND DEV., *THE WTO COMPATIBILITY OF THE ECONOMIC PARTNERSHIP AGREEMENT BETWEEN THE EU AND THE ACP STATES* 34 (2005) (F.R.G.).

196. *See id.* at 35.

197. *Id.*

in tariff removal and the right to enjoy a lengthy transitional period for the entry into force of the RTA.¹⁹⁸ The precise scope of the flexibility would need to be defined in function of the results of the joint WTO-UNCTAD study.

4. *The Specific Requirement for Customs Unions.* The fourth internal requirement deals specifically with customs unions. GATT Article XXIV:8(a)(ii) contains the requirement that the parties to customs unions must apply “*substantially the same duties and other regulations of commerce*” in relation to third parties.¹⁹⁹ According to the Appellate Body in the Turkey-Textiles case, this provision implies that the “constituent members of a customs union are . . . required to apply a common external trade regime.”²⁰⁰ The Appellate Body adds that the term “substantially the same” offers a “certain degree of flexibility.” However, it cautioned that this flexibility is limited: “It must not be forgotten that the word ‘substantially’ qualifies the words ‘the same’. Therefore, in our view, something closely approximating ‘sameness’ is required by Article XXIV:8(a)(ii).”²⁰¹

5. *The Period of Implementation.* The fifth internal requirement deals with the time period within which the RTA is to be formed. GATT Article XXIV:5(c) states that “any interim agreement . . . shall include a plan and schedule for formation of . . . customs union or . . . free trade area *within the reasonable period of time.*”²⁰² The Understanding on the Interpretation of Article XXIV of GATT 1994 clarifies that the “reasonable period of time” referred to in paragraph 5(c) should be ten years and should only exceed this period of time in exceptional cases. Where the parties believe that they need more time, the Understanding stipulates that they shall provide a full explanation to the Council for Trade in Goods.²⁰³

Proposal: In order to avoid needless discussions and possible abuse, terms such as “reasonable” should be avoided in a constitutional text. In this context, it would be appropriate to clarify that the ten-year principle included in the Uruguay Round

198. *Id.*

199. GATT 1947, *supra* note 1, art. XXIV: 8(a)(ii) (emphasis added).

200. *Appellate Body Report on Turkey-Textiles*, *supra* note 35, ¶ 49; *see also* COTTIER & OESCH, *supra* note 144, at 379.

201. *Appellate Body Report on Turkey-Textiles*, *supra* note 35, ¶ 50.

202. GATT 1947, *supra* note 1, art. XXIV:5(c) (emphasis added).

203. Understanding on Article XXIV, *supra* note 16, ¶ 3.

Understanding is the rule: “[T]he right to depart from the general rule of ten years should be reserved for developing countries and [Least Developed Countries].”²⁰⁴

B. The WTO’s External Requirements for RTAs

1. *The General Principle.* GATT Article XXIV:4 starts by stating that

[t]he contracting parties recognize the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration between the economies of the countries parties to such agreements. They also recognize that the purpose of a customs union or of a free-trade area should be to facilitate trade between the constituent territories and not to raise barriers to trade of other contracting parties with such territories.²⁰⁵

Already in the GATT 1947 era, the question arose of whether paragraph 4 creates a separate operational obligation on RTAs.²⁰⁶ While the parties to RTAs have generally held the view that paragraph 4 can be seen as a purposive preamble without additional legal consequences, third countries have tended to interpret it as creating a separate obligation to be complied with by the RTA parties, independent of other Article XXIV provisions.²⁰⁷ The issue was first discussed in depth during the examination of the Treaty of Rome establishing the European Economic Community in 1957.²⁰⁸ The Community’s representatives held that the paragraph was merely laying down a “general principle” that was translated into legal requirements in paragraphs 5 to 9.²⁰⁹ However, “[m]ost members of the Sub-Group were not prepared to accept this interpretation” and argued that consistency with paragraph 4 was something to be checked separately.²¹⁰

204. BORRMANN, GROSSMANN & KOOPMANN, *supra* note 195, at 35.

205. GATT 1947, *supra* note 1, art. XXIV:4.

206. *See* GUIDE TO GATT, *supra* note 105, at 796-98.

207. Edwini Kessie, Counsellor, Presentation of the Council and Trade Negotiation Committee, WTO Rules on Regional Trade Agreements 20 (Dec. 4-8, 2006) (presentation available at the U.N. Institute for Training and Research, <http://www.unitar.org/mm/File/RTA-Rules.pdf>).

208. GUIDE TO GATT, *supra* note 105, at 796.

209. *Id.* at 797.

210. GATT, *Report Submitted by the Committee on Treaty of Rome to the Contracting Parties on 29 November 1957*, *supra* note 136, Annex I ¶ 3.

The Community's position that "Article XXIV:4 did not constitute an obligation but an objective . . ." ²¹¹ has in the meantime been endorsed by the WTO's Appellate Body. In the Turkey-Textiles case it held, "Paragraph 4 contains purposive, and not operative language. It does not set forth a separate obligation itself but, rather, sets forth the overriding and pervasive purpose for Article XXIV which is manifested in operative language in the specific obligations that are found elsewhere in Article XXIV." ²¹² The Appellate Body also concluded that "the purpose set forth in paragraph 4 informs the other relevant paragraphs of Article XXIV" and that these other paragraphs "must be interpreted in the light of the purpose . . . set forth in paragraph 4." ²¹³

2. *The External Trade Consequences of RTAs.* In addition to its internal requirements that focus on the relationship between the parties to an RTA, GATT Article XXIV also contains external obligations that deal with the RTAs legal relationship with non-members. A crucial provision in this context states that the "*duties and other regulations of commerce*" imposed by a customs union or free-trade area in respect of contracting parties not parties to such union or free-trade area "*shall not on the whole be higher or more restrictive than the general incidence of the duties and regulations of commerce applicable in the constituent territories prior to the formation of such [a customs] union . . . [or] free-trade area.*" ²¹⁴

During the Uruguay Round, the European Community argued that the purpose of the examination under GATT Article XXIV:5 was to discuss the consequences of the customs union or free trade area "by looking at the total trade of the member States with the other contracting parties taken collectively." ²¹⁵ Japan, however, strongly opposed an approach that would simply be based on a comparison of the average overall tariff rates before and after the formation of a customs union or free trade area. "[T]o ensure that particular industries and non-member contracting parties would not be disproportionately affected by [a new] customs union [or a free

211. GATT, *Report of the Working Party on Accession of Portugal and Spain to the European Communities*, ¶ 22, L/6405 (Oct. 5, 1988).

212. *Appellate Body Report on Turkey-Textiles*, *supra* note 35, ¶ 57.

213. *Id.*

214. GATT 1947, *supra* note 1, art. XXIV:5 (emphasis added).

215. Youri Devuyt, *GATT Customs Union Provisions and the Uruguay Round: The European Community Experience*, 26 J. WORLD TRADE 15, 29 (1992).

trade area], the approach favoured by the Japanese delegation [suggested taking] into account the specific product-by-product effects... on individual non-members.” The EC rejected the Japanese proposal as being in total opposition to its well-established views.²¹⁶ In the end, the Uruguay Round Understanding clarified that evaluations in application of Article XXIV:5 would have to “be based upon an overall assessment of weighed average tariff rates and of customs duties collected.”²¹⁷ Settling the debate as to whether one should consider, when applying the test of Article XXIV:5, the bound rates or the applied rates of duty, the Understanding clarified that “the duties and charges to be taken into consideration shall be the applied rates of duty.”²¹⁸ With respect to the “overall assessment of the incidence of other regulations of commerce for which quantification and aggregation are difficult,” the Uruguay Round Understanding recognized that “the examination of individual measures, regulations, products covered and trade flows affected may be required.”²¹⁹ The Appellate Body in the Turkey-Textiles case confirmed this recognition by stating that “for the purpose of the overall assessment of the incidence of other regulations of commerce for which quantification and aggregation are difficult, the examination of individual measures, regulations, products covered and trade flows affected may be required.”²²⁰

In general, the Appellate Body in the Turkey-Textiles case held that the test for assessing whether a specific customs union is compatible with GATT Article XXIV:5 is an “economic” one.²²¹

216. *Id.* at 28-29.

217. The Understanding stipulates that “[t]his assessment shall be based on import statistics for a previous representative period to be supplied by the customs union, on a tariff-line basis and in values and quantities, broken down by WTO country of origin. The Secretariat shall compute the weighed average tariff rates and customs duties collected in accordance with the methodology used in the assessment of tariff offers in the Uruguay Round.” Understanding on Article XXIV, *supra* note 16, ¶ 2.

218. *Id.*

219. *Id.*

220. *Id.*; *Appellate Body Report on Turkey-Textiles*, *supra* note 35, ¶ 54.

221. *Appellate Body Report on Turkey-Textiles*, *supra* note 35, ¶ 55. See also WTO ANALYTICAL INDEX, *supra* note 140, ¶ 623. Following Jacob Viner’s seminal work on customs unions, JACOB VINER, THE CUSTOMS UNION ISSUE 41-81 (1950), some lawyers have proposed to reformulate the wording of GATT Article XXIV to underline that RTAs should serve trade creation and not trade diversion. Trade creation occurs when the establishment of an RTA stimulates a member country to replace goods previously produced at home (at a relatively higher cost) with goods imported from another member (at relatively lower costs). Trade creation may also be the result of the economic growth that is induced by an RTA and results in higher amounts of imports from the outside world. Trade diversion takes place when goods

However, both practitioners and academics have argued that such economic tests suffer from three important shortcomings. First, the Uruguay Round compromise related to the calculation of the “general incidence of duties and other regulations of commerce” and did not foster agreement on the final conclusion to be drawn from such economic tests in specific cases. The Understanding still provides

sufficient room for members . . . to express diverging opinions on the relative weight to be attached to the overall assessment versus a product-specific or country-specific assessment. Moreover, even if attention goes mainly to the overall assessment of a customs union’s global tariff schedule, past Article XXIV:5 exercises have shown that an evaluation of weighted average tariff rates on the one hand and of customs duties collected on the other hand does not necessarily lead to a similar conclusion.²²²

Second, among expert economists, there is no agreement on the methodology to be used for measuring the impact of an RTA: “empirical studies [on the economic impact of RTAs] yield diverse conclusions according to the particular methodological assumptions and limitations of the economic models they employ.”²²³ Some have even argued that it is simply impossible to arrive at any sound result on the basis of economic analysis. Ambassador Ernest H. Preeg, a U.S. foreign service officer with twenty-five years of experience in trade diplomacy, has come to the conclusion that “the actual trade impact of regional free trade arrangements . . . cannot be measured with precision.”²²⁴ Likewise, for Frederick M. Abbott, “the passage of

previously imported from the outside world are replaced, after the formation of an RTA, by higher-cost production from within the RTA. *See DAM, supra* note 23, at 291-95.

222. Devuyt, *supra* note 215, at 29.

223. Cho, *supra* note 23, at 434. On the basis of a major review of the empirical literature on RTAs, Chantal Pohl Nielsen concludes “that the quantitative assessments of PTAs are almost as disparate in their conclusions as the theories underlying them.” CHANTAL POHL NIELSEN, REGIONAL AND PREFERENTIAL TRADE AGREEMENTS: A LITERATURE REVIEW AND IDENTIFICATION OF FUTURE STEPS 109 (Danish Research Inst. Food Econ., Report No. 155, 2003).

224. Ernest H. Preeg, *The Compatibility of Regional Economic Blocs and the GATT*, 526 ANNALS AM. ACAD. POL. & SOC. SCI. 164, 167 (1993). A similar conclusion was reached when numerous U.S. agencies tried to foresee the economic consequences of the EC’s Internal Market project in 1988-1992. The most comprehensive American report on this topic found that “customs union theory . . . cannot predict whether trade with non-member countries will increase or decrease.” U.S. INT’L TRADE COMM’N, PUBL’N NO. 2204, THE EFFECTS OF GREATER ECONOMIC INTEGRATION WITHIN THE EUROPEAN COMMUNITY ON THE UNITED STATES, at vi (1989). On the one hand, “the internal liberalization . . . will . . . tend to increase trade among EC countries at the expense of existing trade with more efficient producers in the

time [has given] rise to the sanguine conclusion that the trade creation/trade diversion effects of RTAs are *a priori* indeterminate under the current state of the economic art.”²²⁵ Jürgen Huber agrees: “*ex ante* – and that is when the [GATT has] to decide about the compliance with Art. XXIV – there is just no way to predict the impact that can be expected from [an RTA].”²²⁶ The third problem is that globalization of investment and production has increasingly undermined the relevance of such concepts as trade creation and diversion because they were intended to judge the effects of RTAs on geographically defined national economies.²²⁷ According to Augusto de la Torre and Margaret R. Kelly of the International Monetary Fund, the assessment of RTAs should take into account that “the gains from trade creation would also accrue to firms of non-member countries with a physical presence (branches or subsidiaries) in the region or with other forms of linkage to firms in the region (licensing agreements, cross-shareholding arrangements, strategic alliances, and so on).”²²⁸

Proposal: As the previous paragraph has made clear, economists, lawyers, and practitioners alike agree that there is simply no way to predict in mathematical terms and with any degree of precision and consensus what the overall impact of an RTA is going to be. Therefore, as Frederick M. Abbott has written, this type of exercise is “not the appropriate end of inquiry.”²²⁹ Frieder Roessler, the former Director of GATT’s Legal Service, agrees with this conclusion. In his view, the legal status of RTAs should not be made dependent on calculated, but necessarily shaky, predictions of their economic

United States and other nonmember countries.” *Id.* On the other hand, “[p]roducers in nonmember countries will benefit if the EC 1992 program boosts growth in the EC.” *Id.*

225. Frederick M. Abbott, *GATT and the European Community: A Formula for Peaceful Coexistence*, 12 MICH. J. INT’L L. 1, 7 n.16 (1990).

226. Jürgen Huber, *The Practice of GATT in Examining Regional Arrangements under Article XXIV*, 19 J. COMMON MARKET STUD. 281, 295 (1981). Along similar lines, see generally Daniella Markheim, *A Note on Predicting the Trade Effects of Economic Integration and Other Preferential Trade Agreements: An Assessment*, 32 J. COMMON MARKET STUD. 103 (1994); Martin Wolf, *Is there a Case for Free Trade Areas?: Comments*, in FREE TRADE AREAS AND U.S. TRADE POLICY, *supra* note 42, at 90.

227. See AUGUSTO DE LA TORRE & MARGARET R. KELLY, INT’L MONETARY FUND, REGIONAL TRADE ARRANGEMENTS 5 (1992).

228. *Id.*

229. Abbott, *supra* note 225, at 7 n.16.

impact.²³⁰ In other words, “general incidence” calculations could – at most – have an indicative value. They should not determine the WTO’s final stance towards RTAs. Instead, the WTO’s assessment of RTAs should increasingly focus on the continuing evaluation of its concrete trade policy measures. According to economists Alexis Jacquemin and André Sapir, RTAs can be beneficial to world trade, but only provided that their external trade policy is geared toward a cooperative and welfare creating game with other regions and countries.²³¹ This cannot be measured or estimated in advance, but rather, requires the examination of the RTA’s external trade policy instruments on a sectoral basis.²³² In other words, an effective assessment of RTAs “requires an understanding of the detail” of their commercial policy, as it evolves over time.²³³ This point underscores the importance of a functioning and permanent monitoring system for RTAs, as recommended in Part IV.E of this article. The current CRTA reviews do not, however, include such a concrete and permanent analysis of RTA trade policy measures.

3. *The Specific Requirement for Customs Unions: Compensatory Adjustment.* The second external requirement on RTAs concerns the common customs duties that are adopted by the members of a customs union. If, in the creation of a customs union, a WTO member increases a rate of duty inconsistently with what is listed in its schedule of concessions, the customs union is obliged to enter into *compensatory adjustment negotiations* with the “outside” contracting parties.²³⁴ According to GATT Article XXIV:6, the members of a customs union must thus offer compensatory adjustment when bound tariffs have been raised following the

230. See Frieder Roessler, *The Relationship between Regional Integration Agreements and the Multilateral Trade Order*, in REGIONAL INTEGRATION AND THE GLOBAL TRADING SYSTEM 311, 313 (Kym Anderson & Richard Blackhurst eds., 1993).

231. Alexis Jacquemin & André Sapir, *Europe Post-1992: Internal and External Liberalization*, 81 AM. ECON. REV. 166, 169-70 (1991).

232. André Sapir, *Regional Integration in Europe*, 102 ECON. J. 1491, 1494-99 (1992).

233. Stephen Woolcock, *The European Acquis and Multilateral Trade Rules: Are they Compatible?*, 31 J. COMMON MARKET STUD. 539, 545 (1993).

234. See GATT 1947, *supra* note 1, art. XXIV:6. Since free trade areas do not lead the establishment of a common external trade policy and a common customs tariff, the creation of a free trade area does not involve the unbinding of tariff schedules vis-à-vis third countries. As a result, free trade areas do not need to go through the compensatory adjustment exercise under GATT Article XXIV:6.

formation or the enlargement of the union.²³⁵ Compensatory adjustment negotiations following the formation of a customs union are a logical consequence of the GATT system itself. As was explained in Part II, under GATT Article II, the contracting parties undertake the commitment to levy no more than the tariffs bound in their schedule of concessions.²³⁶ If the formation of a customs union leads to an increase in bound tariffs, the other contracting parties should, according to the GATT logic, be compensated. In the wording of GATT Article XXVIII, the aim is “to maintain a general level of reciprocal and mutually advantageous concessions.”²³⁷ In practice, the contracting parties “forming a customs union must indicate the bound tariffs which they intend to modify or withdraw in the establishment of the common customs tariff as well as the compensatory adjustment which they are prepared to offer.”²³⁸ Those contracting parties “with which the withdrawn tariff concessions were initially negotiated or which have a principal supplying interest may claim compensation for a breach of bindings.”²³⁹ If no negotiated agreement can be reached on the correct amount of compensation required, Article XXVIII:3 allows the parties to the customs union to move ahead with the modification of their concessions.²⁴⁰ However, in such a case, the parties claiming compensation as initial negotiator or principal supplier are equally free to withdraw substantially equivalent concessions within a six-month period.²⁴¹

In the pre-Uruguay Round era, the main problem during the bilateral Article XXIV:6 negotiations was related to the so-called credit-debit debate.²⁴² While calculating the amount of compensatory adjustment that was due to the non-members following the formation of a customs union’s common customs tariff, the customs union often claimed credits for tariff reductions in order to offset the debits resulting from the increase of bound duties. Customs union requests

235. *See id.*; *see also* GATS, *supra* note 1, art. V:5 (“If, in the conclusion, enlargement or any significant modification of any [RTA in services], a Member intends to withdraw or modify a specific commitment inconsistently with the terms and conditions set out in its Schedule, it shall provide at least 90 days advance notice of such modification or withdrawal and the procedure set forth in paragraphs 2, 3 and 4 of Article XXI shall apply”).

236. *See* sources cited *supra* notes 74-75.

237. GATT 1947, *supra* note 1, art. XXVIII:2.

238. Devuyst, *supra* note 215, at 21.

239. *Id.*

240. GATT 1947, *supra* note 1, art. XXVIII:3(a).

241. *Id.*

242. *See* Devuyst, *supra* note 215, at 23-25.

for *internal credits* that have been within one tariff-line have generally been “relatively uncontested” by the contracting parties.²⁴³ However, customs union requests for *external credits* and for *reverse compensation* have proved controversial.²⁴⁴ Requests for external credits by the parties to a customs union transgress a single tariff-line. But the outsiders to customs unions have traditionally aimed for product-specific compensation, and consequently, tended to reject requests for external credits.²⁴⁵ In the Article XXIV:6 negotiations with the United States following the creation of the European Economic Community, the EC’s request for the acceptance of external credits formed a major problem.²⁴⁶ Referring to specific U.S. industries that would be injured by the creation of the common customs tariff, the chairman of the U.S. delegation argued that there was “no means of compensating such industries [as the automobile sector] by credits accruing from the concessions to other industries [such as the chemical sector].”²⁴⁷ On occasion, the EC has gone beyond requests for external credits by claiming reverse compensation.²⁴⁸ This means that the EC requested compensation from its major trading partners because it deemed that—following an enlargement with new member states—the general incidence of the duties of those new EC member states decreased substantially in comparison with the tariffs applied before the accession.²⁴⁹ Such demands have been categorically dismissed by the “outsiders” as being “without foundation” in the GATT.²⁵⁰

During the Uruguay Round, the negotiators agreed that there is no obligation on third parties to accept requests for reverse compensation.²⁵¹ Regarding external credits, the Uruguay Round Understanding on the interpretation of Article XXIV recognizes that

243. *Id.* at 23. The Uruguay Round Understanding on Article XXIV recognizes internal credits by stating that the calculation of compensation must take “due account shall be taken of reductions of duties on the same tariff line made by other constituents of the customs union upon its formation.” Understanding on Article XXIV, *supra* note 16, ¶ 5.

244. *See* Devuyt, *supra* note 215, at 23-25.

245. *Id.* at 24.

246. *Id.*

247. European Commission, Article XXIV:6 Tariff Negotiations U.S./EEC, GATT 422/61, 4 (Feb. 10, 1961).

248. This was notably the case following the EC’s enlargement with Greece in 1981. *See generally* European Commission, U.S. Position in GATT on Greece’s Accession to the EEC (July 9, 1982).

249. Devuyt, *supra* note 215, at 24-25.

250. *Id.* at 25.

251. Understanding on Article XXIV, *supra* note 16, ¶ 6.

a customs union may “offer compensation, which may take the form of reductions of duties on other tariff lines. Such an offer shall be taken into consideration by the members having negotiating rights in the binding being modified or withdrawn.”²⁵² The Uruguay Round clarification has been helpful during the concrete GATT Article XXIV:6 negotiations. During the EEC’s creation and subsequent enlargements in the pre-Uruguay Round years, compensatory adjustment negotiations invariably resulted in trade disputes with the United States.²⁵³ As a result of the clarification on the credits that can be requested, the GATT Article XXIV:6 deals following the EC’s enlargements of 1995 and 2004 have been concluded without major drama.²⁵⁴

IV. THE WTO’S PROCEDURAL STANDARDS FOR ASSESSING RTAS: ANALYSIS OF THE DOHA ROUND’S TRANSPARENCY MECHANISM AND PROPOSALS FOR CHANGE

Transparency is an essential concept in the WTO: “Members recognize the inherent value of domestic transparency of government decision-making on trade policy matters for both Members’ economies and the multilateral trading system, and agree to encourage and promote greater transparency”²⁵⁵ Transparency is

252. *Id.* ¶ 5.

253. Devuyt, *supra* note 215, at 25. *See generally* Vera Erdmann-Keefer, *The Corn War: A Euro-American Trade Dispute*, in *THE EVOLUTION OF AN INTERNATIONAL ACTOR* 241 (Reinhardt Rummel ed., 1990); George N. Yannopoulos, *United States Trade Interests and EC Enlargement*, 21 *J. WORLD TRADE L.* 49 (1987).

254. For the agreement under GATT art. XXIV:6 between the EC and the United States following the EC’s enlargement to include Austria, Finland and Sweden in 1995, see U.S. Trade Compliance Center, European Union Enlargement Compensation Agreement (July 22, 1996), http://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/exp_002819.asp. A similar agreement was reached following the EC’s enlargement to include Estonia, Latvia, Lithuania, Poland, Slovakia, the Czech Republic, Slovenia, Hungary, Cyprus and Malta in 2004. *See* Press Release, U.S. Trade Representative, United States and European Communities Reach Agreement on Enlargement Compensation Package (Nov. 30, 2005), http://www.ustr.gov/Document_Library/Press_Releases/2005/November/United_States_European_Communities_R_each_Agreement_on_Enlargement_Compensation_Package.html.

255. WTO, *Annex 3: Trade Policy Review Mechanism*, in *THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS* 380, 380 (1999) [hereinafter *TPRM*]; *see also* Meinhard Hilf, *Power, Rules and Principles – Which Orientation for WTO/GATT Law?*, 4 *J. INT’L ECON. L.* 111, 119 (2001); K. G. Anthony Hill, former Ambassador from Jamaica to the U.N., Remarks at the WTO Public Symposium – WTO after 10 Years: Global Problems and Multilateral Solutions: Transparency and Participation in the National Trade Policy Process (Apr. 20, 2005), www.wto.org/english/news_e/events_e/symp05_e/hill5_e.doc; MAVROIDIS, *supra* note 74, at 270; *see generally* Sylvia Ostry, *China and*

of particular importance with respect to RTAs as they are an exception to the key MFN-principle. In Article XXIV:7(a), GATT 1947 provides that contracting parties should “promptly notify [their Agreement to] the contracting parties and shall make available to them such information regarding the proposed union or area as will enable them to make such reports and recommendations to contracting parties as they may deem appropriate.”²⁵⁶ GATS Article V:7(a) stipulates that members which are parties to any RTA covering trade in services shall promptly notify such agreement, enlargement or modification of that agreement. Members that are parties to an RTA that is implemented on the basis of a time-frame shall report periodically on its implementation.²⁵⁷ The Enabling Clause provides in paragraph 4 that “[a]ny contracting party taking action to introduce an arrangement . . . or subsequently taking action to introduce modification or withdrawal of the differential and more favourable treatment so provided shall: (a) notify the contracting parties and furnish them with all the information they deem appropriate relating to such action. . . .”²⁵⁸

As noted in the introduction, the WTO assessment of RTAs has not been successful. None of the RTAs notified to the WTO have been formally approved. When WTO members agreed at the Doha Ministerial Conference to launch negotiations in the area of the WTO rules, provisions applying to regional trade agreements were included in the mandate.²⁵⁹ Taking developmental aspects into account, the WTO members agreed to start negotiations that would improve disciplines and procedures under the existing WTO provisions applying to RTAs. The negotiations took place in the Negotiation Group on Rules (NGR) that reports to the Trade Negotiations Committee (TNC). “Several delegations . . . stressed the need to improve the transparency of RTAs and the efficiency of the

the WTO: The Transparency Issue, 3 UCLA J. INT’L L. & FOREIGN AFF. 1 (1998); Carl-Sebastian Zoellner, Note, *Transparency: an Analysis of an Evolving Fundamental Principle in International Economic Law*, 27 MICH. J. INT’L L. 579 (2006).

256. GATT 1947, *supra* note 1, art. XXIV:7(a).

257. GATS, *supra* note 1, art. V:7(b).

258. Enabling Clause, *supra* note 18, at 204; WTO, TECHNICAL COOPERATION HANDBOOK ON NOTIFICATION REQUIREMENTS: REGIONAL TRADE AGREEMENTS at 2, WT/TC/NOTIF/REG/1 (1996) [hereinafter WTO TECHNICAL COOPERATION HANDBOOK].

259. WTO, Ministerial Declaration of 14 November 2001, *supra* note 1, ¶ 29 (“We also agree to negotiations aimed at clarifying and improving disciplines and procedures under the existing WTO provisions applying to regional trade agreements. The negotiations shall take into account the developmental aspects of regional trade agreements.”).

procedures related to the examination of RTAs, noting that the CRTA [Committee on Regional Trade Agreements] ha[s] been unable to adequately fulfill its mandate of reviewing RTAs and overseeing their implementation.”²⁶⁰ At the meeting of November 25-27, 2002, Turkey submitted a paper to the NGR which “indicated that [the] basic transparency requirements such as notification, scope of information to be submitted, periodical reporting, examination process and determining the legal status of the examination reports of the [CRTA] appeared” to be subjects where agreement would be possible and, therefore, could be “a good starting-point for the negotiations.”²⁶¹ Other members submitted constructive proposals on the theme.²⁶² On July 10, 2006, after long process of discussing and negotiating, the NGR formally approved a new Transparency Mechanism for all RTAs, and decided to let the new transparency mechanism enter into force on a provisional basis.²⁶³ The following paragraphs will detail the features of the Transparency Mechanism against the background of the WTO’s practice over the last decades.

A. The Competent Body for the Examination of RTAs

In the old days of GATT 1947, examination of RTAs was conducted by individual working parties.²⁶⁴ Often, several working parties co-existed, each assessing different RTAs. This fragmented approach neither contributed to coherence, nor to an orderly discussion of systemic issues which are common to RTAs. To remedy these problems, the WTO General Council established the Committee on Regional Trade Agreements (CRTA) in February 1996.²⁶⁵ The CRTA’s role is to carry out the examination of RTAs; to consider and make appropriate recommendations on the requirement for biennial reporting on their operation; to develop procedures to facilitate and improve the examination process; and to consider the

260. Negotiating Group on Rules, *Summary Report of the Meeting Held on 6 & 8 May 2002*, ¶ 40, TN/RL/M/2 (June 11, 2002).

261. Negotiating Group on Rules, *Summary Report of the Meeting Held on 25-27 November 2002*, ¶ 26, TN/RL/M/5 (Jan. 8, 2003); Negotiating Group on Rules, *Submission on Regional Trade Agreements by Turkey*, at 2, TN/RL/W/32 (Nov. 25, 2002).

262. *See generally* Negotiating Group on Rules, *Joint Communication from Australia; Chile; Hong Kong, China; Korea and New Zealand, Submission on Regional Trade Agreements*, TN/RL/W/117 (June 11, 2003) (suggesting changes to RTAs).

263. General Council, *Meeting of 14-15 December 2006*, at 3, WT/GC/M/106 (Mar. 1, 2007).

264. GUIDE TO GATT, *supra* note 105, at 814-15.

265. General Council, *Decision of 6 February 1996*, WT/L/127 (Feb. 7, 1996).

systemic implications of such agreements and regional initiatives for the multilateral trading system and the relationship between them.²⁶⁶

In WTO practice, RTAs falling under GATT Article XXIV are notified to the Council for Trade in Goods (CTG) which is in charge of adopting the terms of reference and of transferring the agreement to the CRTA for examination.²⁶⁷ RTAs covering trade in services concluded by any WTO members, whether developed or developing, are notified to the Council for Trade in Services (CTS) which is free to decide whether to pass the agreement to the CRTA for examination.²⁶⁸ Unlike mandatory examinations of RTAs notified under GATT Article XXIV, these examinations are optional.²⁶⁹ The notification of RTAs falling under the Enabling Clause is made to the Committee on Trade and Development (CTD). The agreement is, then, placed on the agenda of the CTD meeting where a debate is held. Generally, however, no in-depth examination in the CRTA is requested.²⁷⁰

During the course of the Doha Round, one of the issues debated was whether all RTAs should be notified to one single body or whether RTAs under the GATT 1994 and the GATS should be reviewed separately from the RTAs concluded under the Enabling Clause.²⁷¹ For the Group of African and Least Developed Countries (LDC), bringing “Enabling Clause RTAs” under CRTA review was “contrary to the spirit of the WTO framework and of the Doha Ministerial Declaration.” They contended that these RTAs should continue to be notified to the Committee on Trade and Development (CTD).²⁷² The final version of the Transparency Mechanism gave satisfaction to the LDC on this point. The bodies entrusted with the implementation of the transparency mechanism continue to be the CRTA for RTAs falling under GATT Article XXIV and GATS Article V and the CTD for RTAs falling under paragraph 2(c) of the Enabling Clause. For purposes of performing the functions

266. *Id.* ¶ I.

267. Work of the Committee on Regional Trade Agreements (CRTA), http://www.wto.org/english/tratop_e/region_e/regcom_e.htm (last visited Nov. 20, 2006).

268. *Id.*

269. *Id.*

270. *Id.*

271. See Negotiating Group on Rules, *supra* note 260, ¶ 36.

272. Negotiating Group on Rules, *supra* note 148, ¶ 12.

established under the Transparency Mechanism, the CTD shall convene in dedicated session.²⁷³

B. The Information to be Provided

The examination of notified RTAs is conducted on the basis of information provided by the parties. GATT Article XXIV:7(a) requires WTO members to provide information on a proposed free trade area or customs union as they deem appropriate. It does not lay down any specific notification format to be followed by countries wishing to form a regional trading arrangement.²⁷⁴ GATS Article V:7(a) provides without further instructions that any member entering into an agreement shall make relevant information available to the Council for Trade in Services as the latter may request it.²⁷⁵ Paragraph 4(a) of the Enabling Clause states that any member taking action to introduce an arrangement shall provide other contracting parties with all information, as the former considers appropriate. However, the Enabling Clause “does not lay down any specific format to be followed by developing countries wishing to grant preferences to each other.”²⁷⁶

In an attempt to clarify matters, the WTO’s Technical Cooperation Handbook on Notification Requirements of 1996 specifies that “the notification is expected to indicate the parties to the arrangement, the coverage of the agreement, whether it is a free-trade area or a customs union or an interim agreement.”²⁷⁷ In the case of an interim agreement, the transitional period must be stated. A copy of the Treaty or Agreement between the parties must be annexed to the Notification.²⁷⁸ Also in 1996, the Chairman of the CRTA worked out a Standard Format for Information on Regional Trade Agreements. While extensive in scope, the Standard Format “should be viewed as Guidelines by the Chairman as to basic information that could be provided by parties notifying regional trade agreements to the

273. WTO Transparency Mechanism for RTAs, *supra* note 1, ¶ 18.

274. *See* GATT 1947, *supra* note 1, art. XXIV:7(a)

275. *See* GATS, *supra* note 1, art. V:7(a)

276. WTO TECHNICAL COOPERATION HANDBOOK, *supra* note 258, at 2; *see also* Enabling Clause, *supra* note 18, at 204.

277. WTO TECHNICAL COOPERATION HANDBOOK, *supra* note 258, at 3.

278. *Id.*

WTO.”²⁷⁹ In other words, the parties could adhere to the Standard Format on a voluntary basis, but they were not obliged to do so.²⁸⁰

The clarifications of 1996 did not resolve the discussions between the members on the quantitative and qualitative nature of the statistics that had to be submitted by the parties. Some members insisted that a maximum possible amount of statistics was very important for assessing the conformity of RTAs with WTO rules and to understand how the economies of parties to RTAs were adjusting to the evolution of trade patterns.²⁸¹ Others argued that detailed statistics were not only hard to obtain, but often misleading.²⁸² The Doha Round Transparency Mechanism hardly contributes to settling the matter. The Transparency Mechanism’s inventory of data that the RTA parties are expected to make available is less comprehensive than the Standard Format of 1996.²⁸³ Furthermore, as it is staying at a high level of generality, the Transparency Mechanism is unlikely to bring an end to the long-lasting discussions on the level of sophistication that is required of the statistical information to be submitted.

C. The Role of the WTO Secretariat

With respect to the concrete examination of RTAs by the CRTA and the CTD, the Doha Round Transparency Mechanism contains an important novelty. In the past, the WTO Secretariat played only a marginal role in the assessment of RTAs. Under the Transparency Mechanism, “the WTO Secretariat, on its own responsibility and in full consultation with the parties, shall prepare a factual presentation of the RTA.”²⁸⁴ This procedure seems comparable to what exists under the Trade Policy Review Mechanism (TPRM).²⁸⁵ In preparing the factual presentation, the WTO Secretariat must refrain from any

279. Committee on Regional Trade Agreements, *Standard Format for Information on Regional Trade Agreements*, at 1, WT/REG/W/6 (Aug. 15, 1996).

280. *See id.*

281. Committee on Regional Trade Agreements, *Synopsis of “Systematic” Issues Related to Regional Trade Agreements*, ¶ 18(a), WT/REG/W/37 (Mar. 2, 2000).

282. *Id.* ¶ 18(b).

283. *See* WTO Transparency Mechanism for RTAs, *supra* note 1, Annex paras. 2-4.

284. *Id.* ¶ 7.

285. For information regarding TPRM, see generally Asif H. Qureshi, *The New GATT Trade Policy Review Mechanism: An Exercise in Transparency or “Enforcement”?*, 24 J. WORLD TRADE 147 (1990); Victoria Curzon-Price, *GATT’s New Trade Policy Review Mechanism*, 14 WORLD ECON. 227 (1991); Petros C. Mavroidis, *Surveillance Schemes: The GATT’s New Trade Policy Review Mechanism*, 13 MICH. J. INT’L L. 374 (1992).

value judgment. The presentation shall be primarily based on the information provided by the parties. “[I]f necessary, the WTO Secretariat may also use data available from other sources, taking into account the views of the parties in furtherance of factual accuracy.”²⁸⁶ Contrary to what had been suggested in the academic literature, the Transparency Mechanism leaves no doubt that the WTO Secretariat’s factual presentation shall not be used as a basis for dispute settlement procedures or to create new rights and obligations for members.²⁸⁷ If the TPRM may serve as precedent, the WTO Secretariat’s reporting duty is likely to bring coherence and consistency to the assessment process. Furthermore, it will provide an objective starting point for the examination. As such, it constitutes a major improvement in the surveillance process.²⁸⁸

The WTO Secretariat’s factual presentation, as well as any additional information submitted by the parties, shall be circulated in all WTO official languages not less than eight weeks in advance of the meeting devoted to the consideration of the RTA.

As a rule, a single formal meeting will be devoted to consider each notified RTA; any additional exchange of information should take place in written form.²⁸⁹

In a further push for transparency, the Doha Round Mechanism states that:

the WTO Secretariat shall establish and maintain an updated electronic database on individual RTAs. This database shall include relevant tariff and trade-related information, and give access to all written material related to announced or notified RTAs available at the WTO. The RTA database should be structured so as to be easily accessible to the public.²⁹⁰

D. The Timing of the Notification

1. Early Announcement. As to the timing of the assessment exercise, some delegations expressed support for early notification. Australia and Hong Kong, for example, interpreted the term “shall promptly notify” to mean that the notification and submission of information should take place before the entry into force of the

286. WTO Transparency Mechanism for RTAs, *supra* note 1, ¶ 9.

287. *But see* Cottier & Foltea, *supra* note 21, at 71 (advocating a stronger monitoring role for the WTO Secretariat).

288. *See* sources cited *supra* note 285.

289. WTO Transparency Mechanism for RTAs, *supra* note 1, ¶¶ 11-12.

290. *Id.* ¶ 21.

agreement.²⁹¹ However, members frequently participating in RTAs refused an obligation to formally notify their agreements before the entry into force.²⁹² Instead, the Doha negotiators agreed on a two-stage process.²⁹³

The first phase is called the “early announcement.” Without affecting the substance and the timing of the notification required under GATT Article XXIV, GATS Article V or the Enabling Clause, nor affecting members’ rights and obligations under the WTO agreements in any way, the Doha Round negotiators agreed on the usefulness of an “early announcement” of pending RTAs. This implies that members participating in negotiations aimed at the conclusion of an RTA

. . . shall endeavour to so inform the WTO.

Members parties to a newly signed RTA shall convey to the WTO, in so far as and when it is publicly available, information on the RTA, including its official name, scope and date of signature, any foreseen timetable for its entry into force or provisional application, relevant contact points and/or website addresses, and any other relevant unrestricted information.²⁹⁴

This information will be posted on the WTO website.²⁹⁵

2. *Notification in the Strict Sense.* The second phase covers the notification in the strict sense. The Transparency Mechanism stipulates that notification “shall take place as early as possible. As a rule, it will occur no later than directly following the parties’ ratification of the RTA or any party’s decision on application of the relevant parts of an agreement, and before the application of preferential treatment between the parties.”²⁹⁶ The Mechanism adds that the WTO consideration of a notified RTA “shall be normally concluded in a period not exceeding one year after the date of notification.”²⁹⁷ The submission of the required information should, normally, “not exceed ten weeks— or 20 weeks in the case of RTAs

291. Committee on Regional Trade Agreements, *supra* note 281, ¶ 13(a).

292. See Negotiating Group on Rules, *Summary Report of the Meeting Held on 8-10 July 2002*, at 7, TN/RL/M/3 (Aug. 1, 2002).

293. Negotiating Group on Rules, *supra* note 147, ¶ 16.

294. WTO Transparency Mechanism for RTAs, *supra* note 1, ¶ 1.

295. *Id.* ¶ 2.

296. *Id.* ¶ 3.

297. *Id.* ¶ 6.

involving only developing countries— after the date of notification of the agreement.”²⁹⁸

To fight non-notification, the Doha Round agreed that “[a]ny Member may, at any time, bring to the attention of the relevant WTO body information on any RTA that it considers ought to have been submitted to Members in the framework of th[e] Transparency Mechanism.”²⁹⁹

3. *The Subsequent Notification and Reporting of Changes to RTAs.* GATS Article V:7(a) makes clear that parties to any RTA covering trade in services shall also notify the enlargement or modification of that agreement. Moreover, under GATS, parties to an RTA that is implemented on the basis of a time-frame are obliged to report periodically on its implementation.³⁰⁰ GATT Article XXIV does not include explicit provisions on the notification or reporting of modifications or extensions of existing customs unions or free trade areas. By way of the Uruguay Round Understanding on the interpretation of Article XXIV, it was nevertheless agreed that parties to an interim agreement should notify substantial changes in an RTA’s plan and schedule to the Council on Trade in Goods.³⁰¹ If requested, the Council will examine the changes.³⁰² Customs unions and constituents of free-trade areas shall, furthermore, report periodically to the Council on Trade in Goods on the operation of the relevant agreement. Any significant changes and/or developments in the agreement should be reported as they occur.³⁰³ In practice, little progress has been achieved with the implementation of this instruction.

The Doha Round Transparency Mechanism goes only slightly beyond these existing provisions. It adds that the required notification of changes affecting the implementation of an RTA, or the operation of an already implemented RTA, shall take place “as soon as possible after the changes occur.”³⁰⁴ The Transparency Mechanism clarifies that the

298. *Id.* ¶ 8.

299. *Id.* ¶ 20.

300. GATS, *supra* note 1, art. V:7(a)-(b).

301. Understanding on Article XXIV, *supra* note 16, ¶ 9.

302. *Id.*

303. *Id.* ¶ 11.

304. WTO Transparency Mechanism for RTAs, *supra* note 1, ¶ 14.

[c]hanges to be notified include, *inter alia*, modifications to the preferential treatment between the parties and to the RTA's disciplines. The parties shall provide a summary of the changes made, as well as any related texts, schedules, annexes and protocols, in one of the WTO official languages and, if available, in electronically exploitable format.³⁰⁵

It is also specified that the parties to an RTA shall—at the end of the RTA's implementation period—“submit to the WTO a short written report on the realization of the liberalization commitments in the RTA as originally notified. Upon request, the relevant WTO body shall provide an adequate opportunity for an exchange of views on the communications submitted.”³⁰⁶

E. The Lack of Effective Monitoring After the Formative Stage of RTAs

The Doha Round Transparency Mechanism for RTAs includes a number of useful clarifications. The most significant innovation is the WTO Secretariat in the examination of RTAs. Practice in the WTO's TPRM has indicated that the involvement of the WTO Secretariat brings coherence, professionalism and objectivity to the assessment of the trade policies of the members.³⁰⁷ Furthermore, the literature on the compliance with international legal commitments underlines that the involvement of the international secretariat to a treaty organization in the reporting process is generally beneficial because the secretariat often fulfils an educational role in guiding the parties with respect to the techniques that have been or can be used to fulfill their obligations.³⁰⁸ It is likely that the Secretariat's role in the examination of RTAs will fulfill a similar role.

The most important shortcoming of the Transparency Mechanism concerns the monitoring of RTAs after their formal notification. This is important. The practical effect of RTAs on the multilateral trade system can hardly be studied upon their formation.³⁰⁹ As RTAs are dynamic structures, a proper surveillance regime requires a permanent monitoring system, also after their formative stage. As Jeffrey J. Schott has argued,

305. *Id.*

306. *Id.* ¶¶ 15-16.

307. *See generally* ASIF H. QURESHI, *THE WORLD TRADE ORGANIZATION: IMPLEMENTING INTERNATIONAL TRADE NORMS*, ch. 8 (1996); DONALD B. KEESING, *IMPROVING TRADE POLICY REVIEWS IN THE WORLD TRADE ORGANIZATION* (1998).

308. Jacobson & Weiss, *supra* note 32, at 199.

309. *See* Cho, *supra* note 23, at 421.

the WTO should undertake more active surveillance after pacts enter into force. Most of the time, when it does take place, WTO monitoring of regional pacts examines only what was negotiated and whether it comports with GATT and GATS obligations. However, what is really important is how the agreements are implemented and what effects they have on international trade and investment. That requires *ex post* analysis.³¹⁰

Even skeptical observers such as Richard Blackhurst and David Henderson conclude that “knowledge that there will be such surveillance is very likely to have an *a priori* impact on the contents of the agreement.”³¹¹

In spite of the importance given to “subsequent notification and reporting” in the literature, the Transparency Mechanism’s provisions do not constitute a significant step forward in comparison with the pre-Doha regime for RTAs. Already under the pre-Doha rules, the CRTA could, in theory, have fulfilled a permanent review function. In 2001, the CRTA adopted a timetable for the submission of biennial RTA reports.³¹² In practice, the planned biennial reporting did not work well. It was regularly postponed, notably because of the late submission of the required information by the parties concerned and because of the already burdensome workload of delegations in the context of the Doha Round.³¹³

In addition to the possible monitoring of RTAs by the CRTA, the Uruguay Round texts on the TPRM foresaw “the review of entities having a common external policy.”³¹⁴ The TPRM is the successful multilateral peer review system designed to provide a collective appreciation and understanding of the full range of members’ trade policies and practices and their impact on the multilateral trading system.³¹⁵ All WTO members are reviewed by the

310. Schott, *supra* note 170, at 18.

311. Richard Blackhurst & David Henderson, *Regional Integration Agreements, World Integration and the GATT*, in REGIONAL INTEGRATION AND THE GLOBAL TRADING SYSTEM 408, 428 (Kym Anderson & Richard Blackhurst eds., 1993).

312. WTO, *Report (2002) of the Committee on Regional Trade Agreements to the General Council*, Attachment 3, WT/REG/11 (Nov. 25, 2002).

313. *Id.* ¶¶ 6, 8.

314. *TPRM*, *supra* note 255, at 381.

315. As it has been successful, activists have tried to link their special interest subjects to the TPRM. See generally Barbara Evers, GAPRESEARCH.ORG, *Linking Trade and Poverty: Reinventing the Trade Policy Review Mechanism* (2003), <http://www.gapresearch.org/governance/Evers-TPRM-WEB-31july03.pdf>; Barbara Evers, GAPRESEARCH.ORG, *Gender, International Trade and the Trade Policy Review Mechanism: Conceptual Reference Points for UNCTAD* (2002), <http://www.gapresearch.org/governance/BE%20evers%20unctad%20paper1.pdf>; Int’l Labour Org., *Reviewing Labour Rights Through the Trade Policy Review*

Trade Policy Review Body (TPRB), the frequency of each country's review varying according to its share of world trade.³¹⁶ TPRM monitoring is conducted on the basis of a policy statement by the member under review and a report prepared by the WTO Secretariat. The TPRB's debate is stimulated by two discussants, selected beforehand for this purpose.³¹⁷ While it had the possibility to include RTAs with a common trade policy on its review list, in practice there has been little inclination by the TPRB to include RTAs in its examination schedule. In a note dated December 13, 1995, the TPRB Chairperson stated that "it should be stressed that individual reviews must remain the basis of the TPRM. There is room for consideration of grouping of reviews, where possible; however, at this stage there is no support for reviews of regional entities other than the EU."³¹⁸ As a WTO member, the EU has been subject to TPRM reviews in 1995, 1997, 2000, 2002, 2004 and 2007.³¹⁹ As regards the other RTAs, only the South African Customs Union (in 1998 and 2003) and the WTO members of the Organization of East Caribbean States have been subject to TPRM review.³²⁰

Proposal: With respect to the monitoring of RTAs after their creation, the Doha Round Transparency Mechanism suffers from two important shortcomings. First, the initiative for "subsequent notification and reporting of changes" to RTAs essentially remains with the parties to regional agreements. Without regularity in the *timing* of the submission of information and without a detailed reporting format, "subsequent notification and reporting" risks remaining without practical effect. The WTO should therefore strive for the creation of a regular reporting and updating requirement for all RTAs, for instance on a five-year basis.³²¹ Such a requirement would help to bring discipline into the permanent monitoring system.

Mechanism, http://www.ilo.org/dyn/idea/ideasheet.display?p_idea_id=57 (last visited Nov. 5, 2006).

316. See WTO, *Overseeing National Trade Policies: the TPRM*, http://www.wto.org/english/tratop_e/tpr_e/tp_int_e.htm (last visited Mar. 2, 2007).

317. *Id.*

318. WTO, *WTO ANALYTICAL INDEX: GUIDE TO WTO LAW AND PRACTICE*, Trade Policy Review Mechanism pt III.B.2 ¶ 13 (2007), available at http://www.wto.org/english/res_e/booksp_e/analytic_index_e/tprm_e.htm.

319. See WTO, *Trade Policy Reviews: The Reviews*, http://www.wto.org/english/tratop_e/tpr_e/tp_rep_e.htm#chronologically (last visited Mar. 2, 2007).

320. *See id.*

321. The five-year rule is in line with the proposal by Schott. Schott, *supra* note 170, at 18.

This should be coupled with a standard reporting format.³²² Second, the Doha Round Transparency Mechanism fails to set up a proper *institutional framework* for the permanent monitoring of RTAs. Practice has shown that, under the currently applicable procedures, neither the CRTA nor the TPRB are inclined to devote much time to the permanent review of RTAs. Giving a practical meaning to “subsequent notification and reporting,” implies the creation of an appropriate institutional mechanism. This could take the form of a subcommittee for the permanent review of RTAs within the CRTA. The subcommittee should elect its own chairperson and be equipped with its own staff. Much like the TPRM, permanent review of RTAs should be conducted on the basis of a policy statement by the RTA that is under review and a report prepared by the WTO Secretariat. The review debate should be stimulated by two discussants, selected beforehand for this purpose.³²³

V. THE ENFORCEMENT OF THE WTO’S RTA DISCIPLINES: AVOIDING “CONSTITUTIONAL OVERSTRETCH”

In addition to the discussions on the substantive and procedural requirements that must be met by RTAs, questions persist on two key topics related to the enforcement of WTO disciplines on RTAs. The first question concerns the legal consequences that should result from a WTO finding of incompatibility. The second question deals with the justiciability of WTO disciplines on RTAs. Both issues will be discussed below.

A. The WTO as the “Partial” Constitutional Supervisor of RTAs

In a leading contribution, Thomas Cottier and Marina Foltea have underlined the importance of clearly establishing the supremacy of WTO law over RTAs.³²⁴ They propose “an explicit constitutional approach of regulating preferential agreements by and through the disciplines of WTO law.”³²⁵ Under this approach, regional trade agreements that are incompatible with WTO law would either be declared null and void *ab initio* or unlawful under international law,

322. An adequate format exists on a voluntary basis. See Comm. on Reg'l Trade Agreements, *Note by the Chairman: Standard Format for Information on Regional Trade Agreements*, WT/REG/W/6 (Aug. 15, 1996).

323. This would be like the Trade Policy Review Mechanism. See WTO, *supra* note 316.

324. Cottier & Foltea, *supra* note 21, at 44.

325. *Id.* at 67.

triggering state responsibility.³²⁶ However, while elegant from an international law perspective, such proposals fail to appreciate the limited nature of the WTO. Although the WTO framework might be labeled a constitution, it is only a weak and partial constitution. On the one hand, the WTO is largely confined to trade law and policy and is far from a comprehensive legal structure that reflects the variety of issues covered by RTAs. On the other hand, the WTO is partial in the sense of being biased in favor of liberal trade values, to the detriment of broader societal norms that are often expressed in regional agreements. Failing to properly take these two limitations into account might lead to proposals suffering from “constitutional overstretch,” thus widening the credibility gap between the WTO’s real capabilities and the constitutional expectations.

While the WTO does have a number of rules on topics that are not exclusively trade issues, such as intellectual property rights and health and safety measures, its scope of action is roughly limited to trade policy.³²⁷ The principal mandate of the WTO is, indeed, to provide the institutional framework “for the conduct of *trade relations* among its members.”³²⁸ RTAs, however, often have broad geopolitical, developmental, macroeconomic, social and environmental goals, going well beyond trade policy.³²⁹ The European Community’s vast network of RTAs, for instance, is inspired by a combination of geopolitical, developmental and commercial objectives.³³⁰ The RTAs concluded by the EC can be divided into five categories:

- Free trade deals as part of association agreements that are designed to support political and economic reform in the

326. *Id.* at 68.

327. Jeffrey L. Dunoff, *Constitutional Conceits: The WTO’s ‘Constitution’ and the Discipline of International Law*, 17 EUR. J. INT’L L. 647, 666 (2006). For a comprehensive treatment of the WTO’s scope, see generally Steve Charnovitz, *Triangulating the World Trade Organization*, 96 AM. J. INT’L L. 28 (2002). See also COTTIER & OESCH, *supra* note 144, at 83; VAN DEN BOSSCHE, *supra* note 81, at 86.

328. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 108 Stat. 4809, 1869 U.N.T.S. 183, art. II, available at http://www.wto.org/english/docs_e/legal_e/04-wto_e.htm [hereinafter WTO agreement].

329. See generally Louise Fawcett, *Regionalism in Historical Perspective*, in REGIONALISM IN WORLD POLITICS, REGIONAL ORGANIZATION AND INTERNATIONAL ORDER 9 (Louise Fawcett & Andrew Hurrell eds., 1995); THE POLITICAL IMPORTANCE OF REGIONAL TRADING BLOCS (Bart Kerremans & Bob Switky eds., 2000).

330. For an extensive study of the various dimensions of the RTAs concluded by the EC, see generally Marc Maresceau, *Bilateral Agreements concluded by the European Community*, 309 RECUEIL DES COURS 125 (2004).

post-Cold War countries of Central and Eastern Europe after the fall of the Soviet system and to assist them on the way to EU membership in areas such as environmental policy, consumer protection and social security;³³¹

- Free trade deals as part of association agreements that are designed to support peace and stability in ex-Yugoslavia, foster political and economic reform in the associated countries, and assist them on the way to potential EU membership;³³²
- Free trade deals as part of association agreements that are designed to foster close and stable political and economic relations with immediate neighboring countries in Europe, North Africa and the Middle East;³³³
- Preferential access as an instrument of economic development of the African, Caribbean and Pacific (ACP) countries;³³⁴
- Free trade deals as an instrument of mutually beneficial, reciprocal market opening with third countries outside the

331. See the Europe Association Agreements concluded during the 1990s with the Central and Eastern European countries (Poland, Hungary, Czech Republic, Slovak Republic, Slovenia, Estonia, Latvia, Lithuania, Bulgaria and Romania). These agreements are no longer in existence, as all countries listed have become EU member states. See, for instance, Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Bulgaria, of the other part, 1994 O.J. (L 358) 3. For a legal analysis of the Europe Agreements, see Marc Maresceau & Elisabetta Montaguti, *The Relations between the European Union and Central and Eastern Europe: a Legal Appraisal*, 32 COMMON MKT. L. REV. 1327 (1995).

332. See the Stability and Association Agreements concluded with Croatia and Macedonia. On the EC's Stabilization and Association process and the texts of the agreements, see Stability and Association Process-Background Documents, http://ec.europa.eu/enlargement/key_documents/sap_en.htm (last visited Oct. 2, 2007).

333. See the Free Trade Agreements of 1972 with the remaining EFTA countries and the Euro-Mediterranean Association Agreements. Association Agreements between the EU and its Mediterranean Partners are in force between the EU and Tunisia, Israel, Morocco, Jordan, Egypt and "on an interim basis with the Palestinian Authority." See The Euro-Mediterranean Partnership - Association Agreements, http://ec.europa.eu/comm/external_relations/euromed/med_ass_agreemnts.htm (last visited Jan. 12, 2007). Agreements were signed with Algeria, and Lebanon, and negotiations were concluded with Syria. *Id.*

334. See the Yaoundé and Lomé Conventions and Cotonou Agreement with the ACP countries. For the text of the currently applicable Cotonou Convention and its historical context, see The Cotonou Agreement, http://ec.europa.eu/development/body/cotonou/index_en.htm (last visited Jan. 12, 2007).

EU's traditional geographical scope, often as a reaction to or in anticipation of broader geo-economic developments.³³⁵

The EC's broad political aims in the negotiation of RTAs have recently been emphasized by EC Trade Commissioner Peter Mandelson when announcing his request to start negotiations with ASEAN, India and South Korea. One of Mandelson's priorities is to use the RTAs as a means "to encourage countries to enforce basic labor rights, such as the ILO [International Labor Organization] core conventions, along with environmental standards."³³⁶ Political, environmental, social and developmental considerations are largely beyond the WTO's strict legal scope.

The creation of RTAs is, in the first place, a political process that often involves trade-related provisions serving non-commercial goals such as international peace and human rights. In political science literature, it is frequently argued that RTAs—whether WTO compatible or not—"can be a powerful force for peace."³³⁷ The idea is that "[b]uilding interdependence between countries, creating economic incentives for peace and developing non-military means for resolving disputes . . . should help to bind countries' interests into a shared future."³³⁸ Furthermore, empirical studies have shown that "preferential trade agreements (PTAs) have come to play a significant role in governing state compliance with human rights."³³⁹

335. See the Bilateral Trade Relations with South Africa, Mexico and Chile at European Commission. EC, Bilateral Trade Relations, http://ec.europa.eu/trade/issues/bilateral/index_en.htm (last visited Jan. 12, 2007).

336. Press Release, Peter Mandelson, EU Trade Commissioner, Trade Policy and Decent Work (Dec. 5, 2006), <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/06/779&format=HTML&aged=0&language=EN&guiLanguage=fr>.

337. OLI BROWN ET AL., INT'L INST. FOR SUSTAINABLE DEV., REGIONAL TRADE AGREEMENTS: PROMOTING CONFLICT OR BUILDING PEACE? (2005), http://www.iisd.org/pdf/2005/security_rta_conflict.pdf.

338. *Id.* at 14. On the idea that RTAs can help sustain peace, see generally Edward D. Mansfield, *Preferential Peace: Why Preferential Trading Arrangements Inhibit Interstate Conflict, in ECONOMIC INTERDEPENDENCE AND INTERNATIONAL CONFLICT: NEW PERSPECTIVES ON AN ENDURING DEBATE* 222 (Edward D. Mansfield & Brian M. Pollins eds., 2003) (referring to "PTAs"); Edward D. Mansfield & Jon C. Pevehouse, *Trade Blocs, Trade Flows, and International Conflict*, 54 INT'L ORG. 775 (2000); Edward D. Mansfield & Rachel Bronson, *Alliances, Preferential Trading Arrangements, and International Trade Patterns*, 91 AM. POL. SCI. REV. 94 (1997); Yoram Z. Haftel, *Designing for Peace: Regional Integration Arrangements, Institutional Variation, and Militarized Interstate Disputes*, 61 INT'L ORG. 217 (2007); Harry Bliss & Bruce Russett, *Democracy and Trade: Ties of Interest and Community, in DEMOCRATIC PEACE FOR EUROPE: MYTH OR REALITY?* 75 (Gustaaf Geeraerts & Patrick Stouthuysen eds., 1999) (referring to international trade reducing conflict).

339. Emilie M. Hafner-Burton, *Trading Human Rights: How Preferential Trade Agreements Influence Government Repression*, 59 INT'L ORG. 593, 593 (2005).

In particular when they tie trade liberalization benefits to compliance with human rights principles, “PTAs are more effective than softer human rights agreements (HRAs) in changing repressive behaviors.”³⁴⁰ In short, when proposing WTO legality tests on RTAs, economists and trade lawyers must be conscious that “trade policy is foreign policy.”³⁴¹ The link between peace, regional integration and GATT/WTO law is not merely theoretical.

The European Coal and Steel Community (ECSC), for instance, was an explicit and successful attempt to foster the reconciliation between France and Germany after World War II.³⁴² Limited to only two economic sectors, the ECSC was inconsistent with the “substantially all the trade” provisions of GATT Article XXIV. As such, it obtained the necessary GATT waiver,³⁴³ and formed the basis for the EEC and EU. These organizations are generally credited with having made a crucial contribution to the peace in Western Europe since 1945.³⁴⁴ Arguably, the ECSC waiver illustrates the proper and flexible functioning of the GATT/WTO system. However, it is necessary to inquire whether it is appropriate to require such RTAs as the ESCS to apply for a waiver in the GATT/WTO framework.

340. *Id.* On the EC’s practice of tying the benefits of RTAs to human rights behavior, see generally Barbara Brandtner & Allan Rosas, *Trade Preferences and Human Rights*, in *THE EU AND HUMAN RIGHTS* 699 (Philip Alston, Mara Bustelo & James Heenan eds., 1999); Karen E. Smith, *The EU, Human Rights and Relations with Third Countries: “Foreign Policy” with an Ethical Dimension?*, in *ETHICS AND FOREIGN POLICY* 185 (Karen E. Smith & Margot Light eds., 2001).

341. See Richard N. Cooper, *Trade Policy Is Foreign Policy*, 9 *FOREIGN POLICY* 18, 18 (Winter 1972-1973). “[H]istorically trade issues frequently intruded into, and occasionally even dominated . . . foreign policy among countries.” *Id.* at 19. See generally Richard N. Cooper, *Trade Policy as Foreign Policy*, in *U.S. TRADE POLICIES IN A CHANGING WORLD ECONOMY* 291 (Robert M. Stern ed., 1988).

342. The ECSC was established by the Treaty of Paris (1951) in order to “substitute for historic rivalries a fusion of their essential interests.” Treaty Establishing the European Coal and Steel Community preamble, Apr. 18, 1951, 261 U.N.T.S. 140. On the ECSC, see JOHN GILLINGHAM, *COAL, STEEL AND THE REBIRTH OF EUROPE, 1945-1955: THE GERMANS AND FRENCH FROM RUHR CONFLICT TO ECONOMIC COMMUNITY* (1991); DESMOND DINAN, *EUROPE RECAST: A HISTORY OF EUROPEAN UNION* 46-57 (2004).

343. GATT, *Waiver granted in connection with the European Coal and Steel Community* (Nov. 10, 1952), GATT B.I.S.D. 1S/17 (1st Supp.) at 17-22 (1953).

344. Mette Eilstrup-Sangiovanni & Daniel Verdier, *European Integration as a Solution to War*, 11 *EUR. J. INT’L REL.* 99, 99 (2005). For the constructive impact of European integration on border conflicts, see Thomas Diez, Stephan Stetter & Mathias Albert, *The European Union and Border Conflicts: The Transformative Power of Integration*, 60 *INT’L ORG.* 563, 563-64 (2006).

Waivers are costly to those who request them.³⁴⁵ As they need to be negotiated with the other WTO members, waivers—in GATT/WTO tradition—frequently require a *quid pro quo* in terms of political or economic concessions.³⁴⁶ Thus, instead of encouraging its members to negotiate ECSC-type agreements, the WTO penalizes those parties that follow the Franco-German reconciliation model.

The limited range of competence of WTO law should lead to modesty in proposals for expanded constitutional supervisory powers over RTAs. While the WTO is the appropriate forum for the assessment of the *trade policy measures* of RTAs, it should not be burdened with the role of *overall* constitutional arbiter of the legality of RTAs. Providing the WTO with an overall constitutional supervisory role over RTAs would imply that there is a consensus to elevate the WTO's particular underlying normative values—based on the “right to trade”—to a rank that is superior to other legal norms.³⁴⁷ According to Jeffrey L. Dunoff, such a constitutional elevation of WTO law would “privilege[] economic rights as opposed to other important social interests” and “necessarily limit governments’ ability to pursue many non-economic goals, such as environmental protection and other social policies.”³⁴⁸ Or, as Robert Howse has argued, if there is a conflict of values, it is hardly legitimate to resolve these within the trading system, according to its fundamental principles.³⁴⁹ It might, for example, be considered whether other U.N. bodies are more suitable for examining the contribution that an RTA trade policy regime could make to international peace and security. A possible procedure could consist of an examination of the peace potential of RTAs by the Security Council. The resulting formal declaration by the Security Council would automatically be

345. On waivers in the WTO context, see COTTIER & OESCH, *supra* note 144, at 508; MATSUSHITA, SCHOENBAUM & MAVROIDIS, *supra* note 81, at 13.

346. Such *quid pro quo* deals are the essence of what Paul Krugman calls “GATT-think.” See Paul Krugman, *The Move Toward Free Trade Zones*, in POLICY IMPLICATIONS OF TRADE AND CURRENCY ZONES 7, 26 (1991) (discussing the economic concessions that would be made in trade negotiations, as predicted and explained by “GATT-think” principles).

347. Dunoff, *supra* note 327, at 664, 667.

348. *Id.* at 664.

349. Robert Howse, *From Politics to Technocracy – and Back Again: The Fate of the Multilateral Trading Regime*, 96 AM. J. INT’L L. 94, 105-06 (2002); see also Robert Howse & Kalypso Nicolaidis, *Legitimacy and Global Governance: Why Constitutionalizing the WTO Is a Step Too Far*, in EFFICIENCY, EQUITY, AND LEGITIMACY: THE MULTILATERAL TRADING SYSTEM AT THE MILLENNIUM 227, 229 (Roger B. Porter et al. eds., 2001) (discussing that compromises between competing trade and non-trade-related values should not be made within the rules of WTO dispute settlement but, rather, within non-WTO institutions).

transformed in a WTO waiver of the trade policy provisions indicated by the Council as peace-contributors. The precise formulation of such a mechanism could be a useful topic for further legal research.

B. The Limited Justiciability of the WTO's RTA Disciplines

While the WTO should not be put in charge of judging the overall legality of regional agreements, it is the proper framework for the supervision of the *trade policy measures* formulated by RTAs. A key question in this context is the degree of justiciability of disputes on the interpretation of the WTO rules on RTAs. Since the entry into force of the Uruguay Round Agreements, the WTO dispute settlement system is operating largely as an independent judicial branch.³⁵⁰ Under the old GATT 1947 procedure, the adoption by the GATT Council of reports produced by dispute settlement Panels required consensus. In other words, countries that were unhappy with the outcome of a case could block the adoption of a ruling.³⁵¹ In contrast with GATT 1947, reports issued by WTO dispute settlement Panels and the Appellate Body are automatically adopted unless there is an—unlikely—consensus among the members to reject a ruling.³⁵² Formally, the function of Panels and the Appellate Body is to assist the members in the WTO Dispute Settlement Body in making recommendations or in giving rulings.³⁵³ In practice, the “reverse consensus” requirement has ensured that the “judicial” organs in the dispute settlement procedure have the last word in

350. For excellent volumes on the WTO dispute settlement system, see generally REFORM AND DEVELOPMENT OF THE WTO DISPUTE SETTLEMENT SYSTEM (Dencho Georgiev & Kim Van der Borgh ed., 2006); THE WTO DISPUTE SETTLEMENT SYSTEM: 1995–2003 (Federico Ortino & Ernst-Ulrich Petersmann eds., 2004). On the judicial independence of the WTO dispute settlement system, see Steve Charnovitz, *Judicial Independence in the World Trade Organization*, in INTERNATIONAL ORGANIZATIONS AND INTERNATIONAL DISPUTE SETTLEMENT: TRENDS AND PROSPECTS 219 (Laurence Boisson de Chazournes, Cesare Romano & Ruth Mackenzie eds., 2002).

351. William J. Davey, *Dispute Settlement in GATT*, 11 FORDHAM INT'L L.J. 51, 60 (1987). On the GATT 1947 dispute settlement system, see generally Robert E. Hudec, *GATT Dispute Settlement after the Tokyo Round: An Unfinished Business*, 13 CORNELL INT'L L.J. 145 (1980); ROBERT E. HUDEC, ENFORCING INTERNATIONAL TRADE LAW: THE EVOLUTION OF THE MODERN GATT LEGAL SYSTEM (1993).

352. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2 arts. 16.4, 17.14, Legal Instruments – Result of the Uruguay Round, 33 I.L.M. 1125, 1226 (1994) [hereinafter Dispute Settlement Understanding].

353. On the “assisting” role of the Panels, see *id.* arts. 6, 11. On the role of the Dispute Settlement Body, see *id.* art. 2.

giving binding interpretations of the WTO Agreements.³⁵⁴ The permanent WTO Appellate Body, in particular, has been identified as “the dynamic force behind [WTO] constitution-building by virtue of its capacity to generate constitutional norms and structures during dispute resolution.”³⁵⁵

1. *GATT/WTO Dispute Settlement and RTAs: The State-of-Play.* In the days of the old GATT 1947, the relationship between the dispute settlement system and Article XXIV came up in two cases. In 1985, the GATT Panel in the EC Mediterranean Citrus case explicitly declined to rule on the Article XXIV compatibility of the agreements concluded between the EC and several Mediterranean countries.³⁵⁶ The Panel held that the “examination– or re-examination– of Article XXIV agreements was the responsibility of the contracting parties.”³⁵⁷ The Panel added that “it would not be appropriate to determine the conformity of an agreement with the requirements of Article XXIV on the basis of a complaint by a contracting party under Article XXIII:1(a).”³⁵⁸ It emphasized that such conformity assessments:

should be done clearly in the context of Article XXIV and not Article XXIII, as an assessment of all the duties, regulations of commerce and trade coverage as well as the interests and rights of all contracting parties were at stake . . . and not just the interests and rights of [the] . . . contracting party raising a complaint.³⁵⁹

In 1993, the GATT 1947 Panel in the Bananas case adopted a different logic.³⁶⁰ In response to the European Community’s argument that the overall consistency of regional arrangements was the subject of examination under Article XXIV:7 and could therefore not be investigated under the dispute settlement procedures of Article XXIII, the Panel replied that, “notwithstanding the issue of

354. On the judicial nature of the WTO dispute settlement process, see generally DEBORAH Z. CASS, *THE CONSTITUTIONALIZATION OF THE WORLD TRADE ORGANIZATION* (John H. Jackson ed., 2005).

355. Deborah Z. Cass, *The ‘Constitutionalization’ of International Trade Law: Judicial Norm-Generation as the Engine of Constitutional Development in International Trade*, 12 EUR. J. INT’L L. 39, 42 (2001).

356. Report of the Panel, *European Community – Tariff Treatment on Imports of Citrus Products from Certain Countries in the Mediterranean Region*, ¶ 4.15, L/5776 (Feb. 7, 1985) (not adopted), available at http://www.wto.org/gatt_docs/english/sulpdf/90080242.pdf [hereinafter Panel Report EC – Mediterranean Citrus].

357. *Id.* (emphasis removed).

358. *Id.*

359. *Id.*

360. See Panel Report *Bananas II*, *supra* note 178.

whether the procedures of Article XXIV:7 supersede those of Article XXIII:2, it would first have to examine whether the Lomé Convention is an agreement of the type to which the procedures of Article XXIV:7 apply.³⁶¹ The Panel's reasoning runs as follows:

The Panel could not accept that tariff preferences inconsistent with Article I:1 would, by notification of the preferential arrangement and invocation of Article XXIV against the objections of other contracting parties, escape any examination by a panel established under Article XXIII. If this view were endorsed a mere communication of a contracting party invoking Article XXIV could deprive all other contracting parties of their procedural rights under Article XXIII:2 and therefore also of the effective protection of their substantive rights, in particular those under Article I. The Panel concluded therefore that a panel, faced with the invocation of Article XXIV, first had to examine whether or not this provision applied to the agreement in question.³⁶²

In the framework of the Uruguay Round, the negotiators agreed to make explicit that the WTO's dispute settlement provisions "may be invoked with respect to any matters arising from the application of those provisions of Article XXIV relating to customs unions, free trade areas or interim agreements leading to the formation of a customs union or a free trade area."³⁶³ As a consequence, the WTO Appellate Body has given clear signals that the judicial organs in the dispute settlement process are capable of judging on the WTO compatibility of RTAs.³⁶⁴ In the Turkey-Textiles case, the Appellate Body explicitly referred to the absence of an assessment by the Panel on the compatibility of the EC-Turkey customs union with the requirements of Article XXIV:5(a) and 8(a).³⁶⁵ While the issue was not appealed, the Appellate Body strongly hinted that Panels are entitled to judge RTAs on their overall compatibility with Article XXIV.³⁶⁶ In the same logic, the Panel in the United States-Line Pipe case did explicitly consider that:

the information provided by the United States in these proceedings,
the information submitted by the NAFTA parties to the

361. *Id.* ¶ 158-59.

362. *Id.*

363. Final Act, *supra* note 1, ¶ 12.

364. See, e.g., Panel Report, *United States - Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, ¶ 7.144, WT/DS202/R (Oct. 29, 2001), available at http://www.wto.org/english/tratop_e/dispu_e/202r_a_e.pdf [hereinafter *Panel Report on Line Pipe*].

365. See *Appellate Body Report on Turkey-Textiles*, *supra* note 35, ¶ 60.

366. See *Kessie*, *supra* note 207.

Committee on Regional Trade Agreements ('CRTA') (which the United States has incorporated into its submission to the Panel by reference), and the absence of effective refutation by Korea establishes the *prima facie* case that NAFTA is in conformity with Article XXIV:5(b) and (c), and with Article XXIV:8(b).³⁶⁷

In fact, the Appellate Body has done more than suggesting that the conformity of RTAs can be assessed in the framework of WTO dispute settlement. In the Turkey-Textiles case, it emphasized that the demonstration by RTAs of their overall compatibility with Article XXIV constitutes an essential condition if such regional arrangements want to maintain a measure that is otherwise inconsistent with other GATT provisions.³⁶⁸ In the words of the Appellate Body:

[W]e are of the view that Article XXIV may justify a measure which is inconsistent with certain other GATT provisions. However, in a case involving the formation of a customs union, this "defence" is available only when two conditions are fulfilled. First, the party claiming the benefit of this defence must demonstrate that the measure at issue is introduced upon the formation of [the] . . . customs union that fully meets the requirements of sub-paragraphs 8(a) and 5(a) of Article XXIV. And, second, that party must demonstrate that the formation of [a] customs union would be prevented if it were not allowed to introduce the measure at issue."³⁶⁹

Knowing that the CRTA is politically paralyzed and will therefore not provide the parties with solid conclusions on the conformity of RTAs, the test imposed by the Appellate Body seems intended to strengthen the role of the dispute settlement mechanisms in controlling the compatibility of RTAs. In the absence of a political decision, it is in the dispute settlement context that RTAs will have to deliver proof of their compatibility.

According to the dispute settlement Panels, the absence of operational conclusions by the CRTA does not, in itself, constitute a definitive indication of the (in)compatibility of an RTA. In the Turkey-Textiles case, the Panel rejected the argument that the absence of recommendations by the CRTA constituted an implicit acceptance of the EC-Turkey customs union.³⁷⁰ In the United States-Line Pipe case, Korea's position was that, in the absence of CRTA

367. *Panel Report on Line Pipe*, *supra* note 364, ¶ 7.144.

368. *Appellate Body Report on Turkey-Textiles*, *supra* note 35, ¶ 58.

369. *Id.*

370. *Panel Report on Turkey-Textiles*, *supra* note 35, ¶¶ 9.172–9.174.

approval, NAFTA should be presumed as inconsistent with the WTO rules.³⁷¹ The Panel refuted the Korean argument. It held as follows:

[W]e do not consider that the fact that the CRTA has not yet issued a final decision that NAFTA is in compliance with Article XXIV:8 is sufficient to rebut the *prima facie* case established by the United States [on NAFTA's compliance]. Korea's argument is based on the premise that a regional trade arrangement is presumed inconsistent with Article XXIV until the CRTA makes a determination to the contrary. We see no basis for such a premise in the relevant provisions of the Agreement establishing the WTO.³⁷²

2. *The Justiciability of the WTO's RTA Disciplines.* It is important to analyze whether the current state of the WTO case-law constitutes an appropriate answer to the credibility gap with regards to the monitoring of RTAs. In the highly political context surrounding the creation of regional agreements, the most pertinent question concerns the justiciability of the WTO disciplines on RTAs and the possible impact of an over-legalization of the enforcement of the rules. The issue will be looked at from three related angles: the rather vague nature of the WTO provisions on RTAs; the institutional balance on which the WTO rests; and the difference between judging concrete trade policy "measures" versus the overall legality of RTAs.

a. *The Nature of the WTO's RTA Provisions.* As it is explained in the literature on compliance with international legal norms, the substantive characteristics of treaties are among the most important predicting factors affecting effective implementation.³⁷³ Duties of a general and imprecise nature that leave a large margin of interpretation are much less likely to be correctly implemented than precise obligations that are tested on their simplicity in implementation. Furthermore, the interpretation of imprecise provisions by adjudicating bodies is generally controversial.³⁷⁴ There is little doubt that WTO's current rules on RTAs are characterized by a general lack of precision.³⁷⁵ Frieder Roessler, the former Director of GATT's Legal Service, has underlined that even crucial trade policy

371. *Panel Report on Line Pipe*, *supra* note 364, Annex B-7, available at http://www.wto.org/english/tratop_e/dispu_e/202r_c_e.pdf.

372. *Panel Report on Line Pipe*, *supra* note 364, ¶ 7.144.

373. See sources cited *supra* note 31.

374. See generally Jacobson & Weiss, *supra* note 32.

375. See *supra* Part III.

aspects of RTAs have remained undefined. In his opinion, “[t]he *Contracting Parties* have deliberately never defined the degree of trade integration required by Article XXIV.”³⁷⁶ In addition, central provisions of GATT Article XXIV involve the highly disputed quantification of terms as *the general incidence of the duties and regulations of commerce* and *substantially all the trade*. Economists, lawyers and practitioners have emphasized that there is just no way to predict in mathematical terms and with any degree of precision and consensus the future economic impact of RTAs.³⁷⁷ As correctly stated by Roessler, it is inappropriate to make the legal status of RTAs dependent on such shaky provisions and controversial calculations.³⁷⁸

The Appellate Body, in the Turkey-Textiles case, has taken another course of action. With its ruling, the Appellate Body has not only given an expansive interpretation of the tasks of the WTO’s judicial bodies as regards the legality of RTAs, it is also signaling a willingness to enter into judicial lawmaking “in areas that had been the subject of diplomatic deadlock.”³⁷⁹ The position by the Appellate Body should be deplored. First, the dispute settlement system is intended to “to preserve the rights and obligations of Members under the covered agreements.”³⁸⁰ Dispute settlement recommendations and rulings “cannot add to or diminish the rights and obligations provided in the covered agreements.”³⁸¹ In combination with the structural imprecision in the wording of the WTO rules on RTAs, the prohibition for Panels and the Appellate Body to add or diminish rights and obligations of members should inspire them to great restraint. Indeed, in view of the lack of precision in the wording of the WTO provisions on RTAs, “a panel that rules on this matter would . . . be acting without any prior normative guidance.”³⁸² Second, “judicial overreaching” by the WTO Appellate Body should be discouraged as it contributes to undermine the WTO’s

376. Frieder Roessler, *The Institutional Balance between the Judicial and the Political Organs of the WTO*, in *NEW DIRECTIONS IN INTERNATIONAL ECONOMIC LAW* 332 (M. Bronckers & R. Quick eds., 2000).

377. See *supra* notes 222-28 and the accompanying text.

378. Roessler, *supra* note 376, at 313.

379. Richard H. Steinberg, *Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints*, 98 AM. J. INT’L L. 247, 251 (2004).

380. Dispute Settlement Understanding, *supra* note 352, art. 3.2.

381. *Id.*

382. Roessler, *supra* note 376, at 332.

legitimacy.³⁸³ When confronted with cases where there is a gap in the law or where the law is manifestly unclear, the Appellate Body should explicitly recognize this and abstain from pronouncing itself, rather than trying to fill the blanks.³⁸⁴

b. Preserving the WTO's Institutional Balance. An important additional reason for the restraint of the WTO judicial organs is the need to preserve the WTO's institutional balance between political and judicial bodies. According to Roessler, the framers of the WTO negotiated a complex institutional structure “under which separate judicial and political bodies” were created.³⁸⁵ Referring to the “*trias politica* of modern states,” Roessler makes a distinction between:

- The WTO's legislative branch: the membership of the WTO acting collectively under the amendment and other rule-making provisions;
- The WTO's executive branch: the political organs of the WTO taking decisions within the framework of the existing law, including the Committee on Regional Trade Agreements and the Committee on Balance-of-Payments Restrictions; and
- The WTO's judicial branch: the Panels, arbitrators and the Appellate Body.³⁸⁶

For Roessler, it is evident that “[j]ust as modern states, the WTO must ensure that its judicial organs exercise their powers with due regard to the jurisdiction assigned to the other parts of its institutional structure.”³⁸⁷ In the words of the representative of India, during the dispute on its quantitative restrictions maintained for balance-of-payments reasons, “there is a principle of institutional balance which requires panels, in determining the scope of their competence, to take into account the competence conferred upon other organs of the

383. See Howse & Nicolaidis, *supra* note 349, at 227; Steinberg, *supra* note 379, at 251; see generally Roger P. Alford, *Reflections on US-Zeroing: A Study in Judicial Overreaching by the WTO Appellate Body*, 45 COLUM. J. TRANSNAT'L L. 196 (2006).

384. See Charnovitz, *supra* note 350, at 233 (noting a “true lacuna of law might justify a holding of *non liquet*”). For the opposite view, see William J. Davey, *Has the WTO Dispute Settlement System Exceeded its Authority?*, 4 J. INT'L ECON. L. 79, 106 (2001). For a detailed comment on the possibility for WTO Panels and the Appellate Body to declare a *non liquet*, see Lorand Bartels, *The Separation of Powers in the WTO: How to Avoid Judicial Activism*, 53 INT'L & COMP. L.Q. 861, 873 (2004).

385. Roessler, *supra* note 376, at 325.

386. *Id.*

387. *Id.* at 326.

WTO.”³⁸⁸ The Panel in the Textiles-Turkey case accepted the principle of the separation of powers and did not want to enter into the politics of assessing the EC-Turkey customs union. The Panel justified its view as follows:

As to the . . . question of how far-reaching a panel’s examination should be of the regional trade agreement underlying the challenged measure, we note that the Committee on Regional Trade Agreements (CRTA) has been established, *inter alia*, to assess the GATT/WTO compatibility of regional trade agreements entered into by Members, a very complex undertaking which involves consideration by the CRTA, from the economic, legal and political perspectives of different Members, of the numerous facets of a regional trade agreement in relation to the provisions of the WTO. It appears to us that the issue regarding the GATT/WTO compatibility of a customs union, as such, is generally a matter for the CRTA since, as noted above, it involves a broad multilateral assessment of any such customs union, i.e. a matter which concerns the WTO membership as a whole.³⁸⁹

As signaled above, the Appellate Body did not agree with the Panel’s reasoning on this point.³⁹⁰ For the Appellate Body, an assessment of the overall compatibility of RTAs is entirely within the jurisdiction of the dispute settlement organs.³⁹¹ In the words of Lorand Bartels, the attitude of the Appellate Body can be summarized as a “rejection of the principle of ‘institutional balance.’”³⁹² While the Appellate Body’s ruling has been supported in the academic literature, its wisdom is highly questionable.³⁹³ First, it is doubtful whether Panels are technically equipped to make an overall assessment of the compatibility of RTAs with the WTO disciplines. In view of the paralysis of the CRTA, it is unlikely that Panels—when examining the overall compatibility of the RTA—will be able to base their rulings on clear decisions adopted by the members. Panels would thus need to rule on the overall compatibility of RTAs in line with their own assessment. It is entirely unclear how Panels would approach such a daunting task as their rulings would go well beyond

388. Appellate Body Report, *India-Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, ¶ 98, WT/DS90/AB/R (Aug. 23, 1999) (*adopted* Sept. 22, 1999), available at http://www.wto.org/english/tratop_e/dispu_e/90abr.pdf.

389. *Panel Report on Turkey-Textiles*, *supra* note 35, ¶ 9.52.

390. *Appellate Body Report on Turkey-Textiles*, *supra* note 35, ¶ 58-60.

391. See Roessler, *supra* note 376, at 337; Bartels *supra* note 384, at 879; Davey, *supra* note 384, at 87.

392. Bartels, *supra* note 384, at 878.

393. For a generally positive attitude towards the Appellate Body’s reasoning, see Davey, *supra* note 384, at 86; MATSUSHITA, SCHOENBAUM & MAVROIDIS, *supra* note 81, at 556.

the interpretation of a WTO rule in a precise case. Second, if Panels logically examine RTAs from a narrow legal perspective, they would neglect the political and economic considerations of RTAs that were correctly recognized as significant by the Panel in the Turkey-Textiles case.³⁹⁴ Third, as the WTO's substantive rules on RTAs are vague, Panels would have to pass their judgment "without having received any prior normative guidance from the WTO membership and therefore engage essentially in a legislative or political task."³⁹⁵ Fourth, there is a problem of political acceptability of dispute settlement rulings on the legality of RTAs, especially in view of the vague substantive criteria. As the African, Caribbean and Pacific states have specifically argued during the Doha Round, the jurisdiction of the CRTA to determine the WTO compatibility of RTAs should not be unduly overridden by the dispute settlement procedures and rulings.³⁹⁶ In more theoretical terms, Joost Pauwelyn has expressed the problem as follows:

[K]nowing that legalization or increased discipline unequivocally calls for more politics and expression of voice or participation, the harder law solution would only worsen, not resolve, the current deadlock in the political, rulemaking process: countries would insist even more on their veto rights. Moreover, since harder law or more discipline cannot be sustained without more political support or more politics, it is highly questionable, as things stand today, that sufficient political support – be it at the state or broader societal level – is available to make such further legalization digestible . . . It risks rather serious pressure on the exit side: . . . WTO members, especially the most powerful ones, could walk away from their obligations. This, in turn, may undermine, rather than strengthen, the legitimacy and effectiveness of the trade regime.³⁹⁷

Finally, it is entirely unclear what the consequences would be of a WTO dispute settlement ruling that effectively declares an RTA incompatible with the WTO laws. The repercussions for the global trading system, for the law produced in the framework of the RTA and for the trade policies of its member states would unquestionably be serious. In view of the arguments underlined by Pauwelyn and the high political stakes of some RTAs, it is not unlikely that members would consciously decide to disregard a dispute settlement ruling. It

394. *Panel Report on Turkey-Textiles*, *supra* note 35, ¶¶ 9.52-9.53.

395. Roessler, *supra* note 376, at 344.

396. Negotiating Group on Rules, *Submission on Regional Trade Agreements by the ACP Group of States*, ¶ 3, TN/RL/W/155 (Apr. 28, 2004).

397. Joost Pauwelyn, *The Transformation of World Trade*, 104 MICH. L. REV. 1, 51 (2005).

is interesting, in this context, to recall the experience of the American trade negotiators when examining the compatibility of the Treaty of Rome that created the European Economic Community with the GATT. According to Isaiah Frank, the Chair of the U.S. delegation during the examination, the Europeans considered the Community of such vital importance that “if the Six [member states] had to choose between renegotiating the Treaty and being formally declared in violation of the GATT, they would undoubtedly have let the GATT go.”³⁹⁸

c. Judging Concrete Trade Policy “Measures” Versus the Overall Legality of RTAs. In contrast with the Appellate Body, the Panel in the Turkey-Textiles case has taken a more modest, but more realistic and more sustainable approach in assessing complaints against the trade policy measures adopted by RTAs. The Panel underlined that its mission was to express itself on the compatibility of concrete trade policy “measures”:

[W]e understand from the wording of paragraph 12 of the WTO Understanding on Article XXIV, that panels have jurisdiction to examine “any matters ‘arising from’ the application of those provisions of Article XXIV.” For us, this confirms that a panel can examine the WTO compatibility of one or several measures “arising from” Article XXIV types of agreement Thus, we consider that a panel can assess the WTO compatibility of any *specific measure* adopted by WTO Members . . . on the occasion of the formation of a customs union As to whether panels also have the jurisdiction to assess the overall WTO compatibility of a customs union, we recall that the Appellate Body stated that the terms of reference of panels must refer explicitly to the “measures” . . . all of which could potentially be examined by panels, before, during or after . . . CRTA examination, if the requirements laid down in the DSU [Dispute Settlement Understanding] are met. However, it is arguable that a customs union (or a free-trade area) as a whole would logically not be a “measure” as such, subject to challenge under the DSU.³⁹⁹

398. ISAIAH FRANK, *THE EUROPEAN COMMON MARKET: AN ANALYSIS OF COMMERCIAL POLICY* 164 (1961). A similar statement was made by Gardner Patterson, former Deputy Director General of the GATT. He claimed that “the GATT itself probably would have been destroyed” if there had been a serious attempt to block the progress of the European Economic Community on the basis of the legal requirements of GATT Article XXIV. See GARDNER PATTERSON, *DISCRIMINATION IN INTERNATIONAL TRADE: THE POLICY ISSUES, 1945-1965*, at 263 (1966).

399. *Panel Report on Turkey-Textiles*, *supra* note 35, ¶¶ 9.50, 9.51, 9.53 (emphasis added).

As such, the Panel simply focused on whether Turkey was permitted to introduce the quantitative restrictions that were attacked by India. The Panel particularly examined whether the wording of Article XXIV authorized a departure from the obligations contained in GATT Articles XI and XIII.⁴⁰⁰ In comparison with the complex legal reasoning established by the Appellate Body, the Panel's logic is superior. The legal test set by the Panel is considerably more straightforward than the reasoning of the Appellate Body and has greater legitimacy as it is not based on elaborate judicial rule-making. Furthermore, the Panel's focus on concrete trade policy measures is more suited to the expertise and competence of dispute settlement Panels.

Proposal: Following the logic of the Panel Report in the Turkey-Textiles case, this article proposes that, during the enforcement exercise, a distinction should be made between, on the one hand, the legality of the regional arrangement as such and, on the other hand, the legality of concrete trade policy measures adopted by the RTA. The latter should be subject of strict surveillance and sanctioning, notably via WTO dispute settlement. In contrast to the line taken by the WTO's Appellate Body, it would, however, not be advisable for the WTO dispute settlement system to get into questions of the overall legality of specific regional arrangements. The overall compatibility of regional arrangements with WTO rules is better suited for diplomatic transparency and peer review exercises in the CRTA on the basis of the clarified benchmarks, as proposed in Part IV of this article.

According to Roessler, it is clear—already at this stage—that the dispute settlement process may only be invoked with respect to “specific measures” imposed by RTAs.⁴⁰¹ Following the interpretation of the Panel in the Turkey-Textiles case, he is of the opinion that the Uruguay Round Understanding on Article XXIV is sufficiently precise. The Understanding states that the WTO dispute settlement procedures may be invoked “with respect to any matters arising from the application of” the Article XXIV provisions.⁴⁰² According to Roessler, “[t]he ‘ordinary meaning’ of the term ‘application’ is ‘a specific use or purpose for which something is put’

400. *Id.* ¶ 9.134.

401. Roessler, *supra* note 376, at 330-31.

402. Final Act, *supra* note 1, ¶ 12.

and ‘applicability in a particular case.’”⁴⁰³ This, in his view, “suggests that panels can only make findings on specific measures imposed.”⁴⁰⁴ William J. Davey, another former Director of the WTO Legal Affairs Division, disagrees with Roessler’s interpretation. According to Davey, the “ordinary meaning” of the Uruguay Round Understanding “clearly demonstrates that there is a broad grant of authority to dispute settlement panels.”⁴⁰⁵ He adds the Uruguay Round Understanding was particularly “not intended to restrict the power of panels as compared to GATT practice.”⁴⁰⁶ However, “given the complexity” of the overall compatibility assessment of RTAs with the WTO disciplines, Davey nevertheless believes that “it would be preferable for panels *to avoid* that issue where possible.”⁴⁰⁷ The fact that Panel and Appellate Body have disagreed over this issue and that it also divides the most knowledgeable WTO scholars and former practitioners is an indication that the state of the law is unclear. The Uruguay Round Understanding on the interpretation of Article XXIV should therefore be amended to express with greater precision that the WTO’s dispute settlement provisions may be invoked with respect to any *specific measure* adopted by WTO members or by an RTA under the provisions of GATT Article XXIV, GATS Article V and the Enabling Clause.

CONCLUSIONS

It is hard to deny that the current WTO regime for RTAs is a failure. Since its creation in 1996, paralysis has reigned in the CRTA. In the mean time, the world outside the WTO headquarters has witnessed a proliferation in the number of RTAs. The paralysis in the WTO’s assessment of RTAs has been carried over from the GATT 1947 to the WTO. In spite of the Uruguay Round Understanding on GATT Article XXIV, the parties have failed to resolve fundamental differences in the interpretation of the multilateral RTA rules. The creation of the CRTA as the single body in charge of examining RTAs notified under GATT and GATS did not help to untangle the knot. This is not unexpected as the CRTA is

403. Roessler, *supra* note 376, at 330.

404. *Id.*

405. Davey, *supra* note 384, at 86.

406. *Id.*

407. *Id.* at 87 (emphasis added).

charged with applying rules that continue to form the subject of a bitter debate among WTO members.

During the Doha Round, the negotiators decided to focus in the first place on the improvement of the transparency procedures with respect to RTAs. The principle of transparency stands high in the hierarchy of WTO norms.⁴⁰⁸ The Doha Round Transparency Mechanism for RTAs, which was provisionally put into force in December 2006, includes a number of useful innovations, notably on the role of the WTO Secretariat in the examination of RTAs. The Transparency Mechanism is not, however, without shortcomings. Its most important flaw concerns the lack of an effective monitoring of RTAs after their formal notification. Such permanent monitoring is important as their practical effect on the multilateral trade system can hardly be studied upon their formation. Still, the Transparency Mechanism fails to set up a proper institutional framework for the continuous monitoring of RTAs. This deficiency should be rectified by incorporating an appropriate review procedure in the Transparency Mechanism along the lines of the successful TPRM practice.

The new procedural rules of the Transparency Mechanism are, however, likely to remain without much impact as long as a host of substantive legal problems continue to hinder their smooth implementation. Already in 1975, the Chairman of the GATT Working Group on the examination of the European Community's enlargement with the United Kingdom, Ireland and Denmark explicitly declared that the vagueness and ambiguities of the provisions of Article XXIV fostered methodological disagreements. While emphasizing the necessity of a formal clarification of Article XXIV's provisions, the Chairman concluded that the GATT itself was an important contributing factor to the deadlocks in the Working Groups.⁴⁰⁹ More than twenty-five years later the interpretations of essential terms such as "substantially all trade" and "other regulations of commerce" remain "the subjects of lengthy discussions . . . without any sign of consensus being reached, and without sign of . . . willingness on the part of some to engage in the exercise."⁴¹⁰ Part III of this article has tried to formulate a number of realistic, pragmatic

408. See sources cited *supra* note 255.

409. See GATT Council, *Minutes of the Meeting*, at §§ 3-5, C/M/107 (July 25, 1975).

410. Committee on Regional Trade Agreements, *Note on the Meetings of 6-7 and 10 July*, ¶ 48, WT/REG/M/18 (July 22, 1998).

solutions to the major substantive problem points. The main recommendation is that the Doha Round negotiators should abandon the unfruitful path of trying to attach legal consequences to uncertain results of overall economic assessments of RTAs, involving the quantification and aggregation of duties and other regulations of commerce. Instead, the WTO assessment of RTAs should concentrate on concrete and tangible trade policy measures and their compatibility with the WTO rules. Such a surveillance process should not be limited, however, to the first stage of RTAs, but should be pursued through their existence via the creation of an effective and permanent monitoring mechanism for RTAs.

Some legal scholars have made more sophisticated proposals to provide the WTO with an overall role in deciding the legality of RTAs as such. These proposals risk contributing to the WTO's constitutional credibility gap rather than helping resolve it. First, such suggestions make little sense without substantially clarified and simplified substantive rules for RTAs. Second, they do not sufficiently take into account the limited—or “partial”—nature of the WTO constitution. Realistic proposals on the improvement of the WTO's role with regard to the surveillance of RTAs must take into consideration that regional arrangements often have several broad objectives—including peace and security—going well beyond trade. In that context, it hardly seems appropriate to request that the WTO—as organisation based on a partial set of trade rules—assumes the role of ultimate arbiter on the overall legality of RTAs. The key issue, however, is whether the WTO, and in particular its dispute settlement system, will have the capacity to resist, what Jeffrey L. Dunoff calls, “an expansionist, perhaps even imperialist, view of the trade system.”⁴¹¹

In view of the vague wording of the WTO provisions on RTAs and the need to preserve the institutional balance on which the WTO rests, the in-depth analysis of the justiciability of the WTO disciplines on RTAs, described in Part V, leads to the conclusion that a distinction must be made between the enforcement of concrete trade policy “measures” and judging the overall legality of RTAs. Following the logic of the Panel in the Turkey-Textiles case, concrete trade policy measures should be subject to strict surveillance and sanctioning, notably via WTO dispute settlement. However, in contrast with the reasoning of the WTO's Appellate Body, it would

411. Dunoff, *supra* note 327, at 667.

be counterproductive for the credibility of the WTO and for the long-term effectiveness of the multilateral trade disciplines if the WTO dispute settlement organs were to get into questions of the overall legality of specific regional arrangements. The overall compatibility of regional arrangements with WTO rules should rather be the subject of improved transparency and diplomatic peer review on the basis of the strengthened benchmarks proposed in Part IV.