

Bilateral and Regional Trade Agreements as a Challenge to the Multilateral Trading System

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Whether bilateral or regional trade agreements are rather friends or rivals of the multilateral trading system is an evergreen question of international economic law. Recent times clearly show an ever faster increase of such agreements in numbers and their regional as well as substantial reach grows dramatically. Economic theory seems to be unclear as to the conditions under which RTAs might be useful or harmful. The rules on RTAs embedded in the WTO legal framework are far from being precisely phrased and the institutional oversight of RTAs – with an unresolved delineation of competences between political and judicial bodies – has proven completely ineffective. The new 2006 Transparency Mechanism adopted in the course of the Doha Round will not change this for the better. Some of the more intricate questions that are raised by full membership of RTAs such as the EC in the WTO have not even seriously been addressed. However, the rather nebulous and unclear rules combined with an inconclusive institutional setup may be exactly what is necessary to deal with RTAs in order to ensure the survival of the multilateral trading system. A more restricted approach to the obvious desire of WTO Members to pursue bilateral and regional trading strategies could as well turn out against the multilateral system itself, if Members were seriously confronted with the need to choose between one or the other.

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1 Introduction

Whether bilateral and regional trade agreements (RTAs)¹ are rather “friends” or “rivals”, “building blocks” or “stumbling blocks” for the international trading system embodied in the WTO/GATT, is an evergreen question of International Economic Law and has attracted academic writings ever since the conclusion of the GATT.² However, the continuing growth of the num-

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1 The notion “RTA” is common in the speak of trade experts, even though RTAs may as well be entered into between partners situated in different parts of the world, for example the European Union and Mexico, South Africa or India, or between the USA and Jordan, or Chile.
2 See only ABBOTT (1995), ABBOTT (2007), ANDERSON and BLAKEHURST (1993), BARTELS and ORTINO (2006), CHO (2001), COTTIER (1996), COTTIER and EYTIMOV (2000), DAM (1963), HAIGHT (1972), HERRMANN, WEISS and OHLER (2007), HERZSTEIN and WHITLOCK (2005), HILPOLD (2003), HUBER (1981), JACKSON (1969), LAMMERSKOTTER (2004), MATHIS (2002), MARCEAU and REIMAN (2001), MATSUSHITA, SCHOENBAUM and MAVRODIDIS (2006), PITTSCHAS (2007), SENTI (1994), SENTI (1999), STEINBERGER (1963). The subject has attracted increasing interest in recent times: The WTO for example devoted its September 2007 Online-Forum to the subject with JAGDISH BHAGWATI and GARY HUFBAUER as discussants, Internet: http://www.wto.org/english/forums_e/debates_e/debate3_e.htm, and several academic conferences address the topic (see for example the call for papers for a conference of the *Public Law Review* (St. Louis) in Spring 2008, Internet: <http://worldtradelaw.typepad.com:80/iclpblog/2007/10/call-for-papers.html> (as of 1 April 2008)).

ber of RTAs that are being notified as well as their recent tendency to go well beyond the classical customs union, covering services, intellectual property rights, investment protection, competition law, government procurement, labour rights, environmental and consumer protection, and currency matters, renders the topic ever more important in practice, a practice that is increasingly being followed around the globe and not only in Europe, where RTAs traditionally play a major role.³ As one commentator has phrased it: Regionalism is back! Arguably, it was never really absent (HILPOLD, 2003, p. 219). According to the Website of the WTO, Mongolia, as of 2005, was the only WTO Member not party to any RTA, be it a Free Trade Agreement (FTA) or a Customs Union (CU). The number of RTAs notified to the WTO Committee on Regional Trade Agreements (CRTA) has soared to almost 400 in recent times, with more than 200 of them being in force.⁴ Commentators estimate that a significant number of agreements have not even been notified.⁵ The stalemate in the Doha Round negotiations is widely perceived as further propelling this trend (FIORENTINO, VERDEJA and TOQUEBOEUF, 2006, p. 1). The European Union for example has already announced to step up its efforts to conclude further bilateral trade agreements, which have always played a significant role in the EU's trade policy as well as in its general external policy.

The growing importance of RTAs meets a complex set of WTO rules, which is overwhelmingly considered to be inadequate to discipline the proliferation of RTAs or to ensure at least that they do not undermine the global trading system and/or impair global economic welfare. However, it seems that even from a purely economic perspective – which is not necessarily best-suited or conclusive for all problems of international political economy – no clear-cut case can be made for or against RTAs with regard to their impact on welfare and multilateral institutions.⁶ Despite this uncertainty, the WTO members felt a need to clarify at least some of the substantive and procedural disciplines deriving from WTO rules. The Doha Declaration hence foresaw “negotiations aimed at clarifying and improving disciplines and procedures under the existing WTO provisions applying to regional trade agreements.”⁷ Whereas the Doha Round as such has come to another

3 On this trend see in particular HERZSTEIN and WHITLOCK (2005).

4 See FIORENTINO, VERDEJA and TOQUEBOEUF (2006). The reasons for this development, which started in the 1980s and accelerated in the 1990s, according to the WTO, are the move of the USA from strict multilateralism to bilateral trade agreements, the bleak prospects for further multilateral liberalisations and the breakdown of the COMECON and the following alignment of the CEE Countries to the European Union, see WTO (2003).

5 SUTHERLAND, BHAGWATI and BOTCHWEY (2004).

6 On this see BHAGWATI (1991), POMFRET (1997), WTO (2007).

7 *Ministerial Declaration* of 20 November 2001, WT/MIN(01)/DEC/1, para. 29.

standstill at the end of 2007, the negotiations with regard to RTAs have produced a new "Transparency Mechanism" laying down further procedural conditions for the notification and examination of RTAs.⁸ The present contribution, after a brief look at the all-too-well known debate on "Regionalism versus Multilateralism" and an overview over the existing legal framework determining the conclusion of RTAs by WTO members, tries to point to some legal questions raised by traditional RTAs as well as to intricate problems arising in connection with new-type RTAs of different kind. I will argue that the new "Transparency Mechanism" is ill-suited to deal with these problems from a legal point of view, but it may indeed be the only promising way to protect the role of the WTO as an arbiter of global trading relations between partners determined to effectively protect their sovereign policy discretion regarding preferential trade relations.

2 Regionalism and Multilateralism – Fundamentals about a Troublesome Relationship

The complex discussion about the benefits deriving from regional economic integration and about the associated threats to the system goes nowadays far beyond Viner's economic argument about "trade creating" versus "trade diverting" effects of the abolition of customs duties between the participants of an RTA. Instead, possible dynamic economic as well as political or institutional effects are taken into account.⁹ However, given the complexity of change to the overall economic and institutional framework of trade policy which RTAs bring about, it is extremely difficult to identify the specific effects they may have. Furthermore, every case will be different and must hence be assessed on its individual merits.

Proponents of regional integration usually point out that trade liberalisation will often be achieved easier in negotiations between a smaller group of trading partners that may also have a traditional, long-standing relationship or friendship amongst each other, which creates a trustful negotiating environment. Such negotiations may hence be quicker, reduce trade barriers more effectively and come to results in areas which are not (yet) on the multilateral agenda. The integration so achieved may then serve as an example of what is possible and what countries can gain thereof, as well as an ex-

⁸ *Transparency Mechanism for Regional Trade Agreements*, Decision of 14 December 2006, WT/L/671.

⁹ For this discussion in particular ABBOTT (1995), ABBOTT (2007), CHO (2001), HERZSTEIN and WHITLOCK (2005), LAMMERSKÖTTER (2004), SUTHERLAND, BHAGWATI and BOTCHWEY (2004), TREBILCOCK and HOWSE (2005), WTO (2007).

perimental ground for how deeper integration may be designed ("laboratory effect").¹⁰ Furthermore, integrated economic areas such as the European Union may be a more attractive negotiating partner for other countries, since they represent a greater market and the negotiation with one instead of 27 delegations may be more convenient and efficient. For industries located inside the RTA, the greater open market can provide economies of scale and make them more competitive also on world markets and that may lead to lesser resistance to opening the RTA globally as well.

On the other hand, as the opponents of RTAs put forward, the integration achieved regionally may reduce the impetus for the global reduction of trade barriers since the dependence on exports diminishes. The preferential reduction of tariffs causes a diversion of trade to suppliers from other RTA Members even though they may be less efficient than suppliers outside the RTA, which do not benefit from the preference. Furthermore, a "creative" design of the rules of origin applied by an FTA (in a CU, there is no need for RoO) may constitute hidden and complex obstacles to trade and a disguised way of discrimination.¹¹ By its very creation, an RTA may thus provoke new vested interests, which try to preserve their benefits by opposing trade liberalisation of the RTA vis-à-vis third countries. Furthermore, the sheer number of different RTAs with different partners, different preferences, and with different RoO ("spaghetti bowl") imposes huge transaction (compliance) costs on private traders, which can only be borne by big multinational companies, but not by smaller businesses. Lastly, it is assumed that bilateral trade agreements will not benefit the participants to the same extent, but that they will tend to favor the bigger partner (for example the United States or the EU) at the cost of the smaller partner, which will often be a developing country that has no real influence the final outcome of the "negotiations".¹²

Despite this ambiguity, WTO Members seem to have a clear preference for RTAs. Their motivation is manifold and often combines economic policy goals and other policy objectives, such as granting benefits in return for support in other policy areas (for example war on terror), to stabilise a country by promoting economic (and social) development or to prepare a country for the later joining of an even more integrated Organisation such as the European Union.¹³ From the perspective of the WTO system, the moti-

10 CHO (2001).

11 On the topic of RoO in RTAs see WTO Secretariat, *Rules of Origin Regimes in Regional Trade Agreements*, WT/REG/W/45.

12 See CHO (2001) for a discussion of this "selfish hegemon" and "hub-and-spoke" argument.

13 For an in-depth discussion of the motivations discussed in political science see CHO (2001).

vation for an RTA is irrelevant in the end, as are the potential benefits that can be reaped. If one realistically assumes that RTAs will always play a role in the global economy, arguments which are directed against any kind of RTAs can also be left aside. Regionalism then becomes a fact of life for the WTO system. The latter must only be concerned with their setup and possible negative impacts on the system, or to put it more smoothly: how to ensure that possible “stumbling blocks” become “building blocks”.¹⁴ With regard to that, three major challenges posed by RTAs must be addressed: the possible trade diversion with negative impacts on global welfare; intransparency increasing transaction costs for private traders; less commitment to multilateral negotiations because of a reduced pressure to open up markets on a global scale or an increased resistance to liberalisation inside an RTA.

3 The WTO Legal Framework for RTAs in a Nutshell

3.1 Overview

The WTO legal system reflects the ambiguity about the proper treatment of RTAs in its provisions. One of the core principles of the WTO legal order, already enshrined in Art. I GATT 1947, is the Most-Favoured-Nation (MFN) principle that prohibits WTO Member from treating other WTO Members less favourable than any of their trading partners with regard to practically all regulations of commerce.¹⁵ RTAs constitute a *per se* violation of this principle, since they – by definition – treat the countries participating in the RTA better than all other countries. Hence, RTAs require an exception to the MFN principle, which provides for the legality of RTAs and defines the conditions under which the exception applies. The GATT contains such provision in the well-known Art. XXIV:4 through Art. XXIV:8 GATT, complemented by the “Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994” (the “Understanding”) and now in the – provisionally applicable – 2006 “Transparency Mechanism for Regional Trade Agreements” (the “Transparency Mechanism”). Another exception regarding trade in goods is embodied in the so-called Enabling Clause which relaxes the conditions under which RTAs between developing countries may qualify for an exception from the MFN

¹⁴ HILPOLD (2003) and SCHAEFER (2007).

¹⁵ For the drafting history and motivation of the GATT MFN clause see JACKSON (1969) and MATHIS (2002). See also HERZSTEIN and WHITLOCK (2005) for a discussion of the arguments supporting an unconditional MFN obligation.

principle.¹⁶ Concerning trade in services, the relevant exception to the GATS-MFN clause (Art. II GATS) can be found in Art. V GATS, entitled "Economic Integration". If one broadens the perspective in order to include the "new" type of RTAs, further provisions become relevant, in particular Art. VII:2 GATS, Art. 4 (d) TRIPS, Art. 4.2 SPS and Art. 9 TBT.

Despite the far-reaching controversies about the interpretation of many of the phrases contained in particular in Art. XXIV GATT, only very limited guidance can be found in Reports of the Dispute Settlement Body (DSB) or prior GATT panel reports. In the 60 years of GATT/WTO history, only one complaint – the famous *Turkey – Textiles*¹⁷ case – concerned primarily the interpretation of Art. XXIV GATT and the Appellate Body report finally adopted by the DSB brought about only marginal clarifications of the broad wording of Art. XXIV GATT. With regard to Art. V GATS, no relevant case-law exists. The reports adopted by the *ad hoc* Working Parties that examined notified RTAs under the former GATT and the reports now to be issued¹⁸ by the CRTA, which was established in 1996, are of no interpretative help either, since – with the exception of the Czech-Slovak agreement – no agreement as to the GATT compatibility of an RTA was ever reached.¹⁹

3.2 Free Trade Agreements, Customs Unions and Interim Agreements under Art. XXIV GATT

General Desirability of RTAs

Irrespective of the growing importance of services trade in modern times, trade in goods remains the backbone of the world economy and in particular of cross-border trade. Correspondingly, the liberalisation of trade in goods is the starting point for any regional economic integration project. The first "test" an RTA therefore has to pass will always be Art. XXIV GATT. However, Art. XXIV GATT is by no means an example of good legal drafting. As JOHN JACKSON wrote in his legendary *World Trade and the Law of GATT*, "Art. XXIV GATT contains one of the most troublesome provisions of GATT" (JACKSON, 1969, p. 575). Today, it is an almost unani-

16 *Differential and more favourable treatment reciprocity and fuller participation of developing countries*, Decision of 28 November 1979, L/4903.

17 *Turkey – Restrictions on Imports of Textile and Clothing Products*, WT/DS34.

18 As of 2007, no single report has been adopted by the CRTA.

19 See GATT (1994) for a comprehensive overview of the practice of working parties under Art. XXIV GATT. For an account of the first 30 years of practice see HUBER (1981).

mously held belief that Art. XXIV GATT has totally failed in ensuring the conformity of the GATT Contracting Parties' and now WTO Members' preferential trade practices with the overall objective, spirit and the provisions of the GATT (MAVROIDIS, 2005, p. 227). The Understanding that was concluded as part of the Final Act of the Uruguay Round has not fundamentally changed this conclusion, even though some of the terms contained in Art. XXIV GATT have been clarified therein.

According to Art. XXIV:4 GATT, the "contracting parties recognise 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 recognise 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 the trade of other contracting parties with such territories." This general statement, on the one hand, expresses a positive approach of the GATT towards the existence and proliferation of RTAs. On the other hand, it reflects the two-edged character of RTAs by emphasising the purpose such agreements should have in order to fit into the multilateral trading system. As a statement of principle, Art. XXIV:4 GATT does not set forth a separate obligation of the WTO Members, but must be taken into account in interpreting the other, operative clauses of Art. XXIV GATT, as the Appellate Body held in *Turkey – Textiles*.²⁰ In accordance with this, Art. XXIV:5 GATT stipulates that "the provisions of this Agreement shall not prevent, as between the territories of contracting parties, the formation of a customs union or of a free-trade area or the adoption of an interim agreement necessary for the formation of a customs union or a free-trade area", provided that certain conditions, which are stated explicitly in Art. XXIV:5 a) through c) GATT, are met. Art. XXIV:5 GATT thus grants an exception to the provisions of the GATT that could prevent the formation of one of the three types of agreements explicitly mentioned: customs unions, free-trade areas and interim agreements. It does not contain any self-standing obligation of WTO Members, but regulates the criteria on the basis of which Members can rely on the exception in order to justify a *prima facie* violation of another obligation in the GATT. Art. XXIV:5 GATT must, furthermore, be read together with Art. XXIV:8 GATT, which defines CUs, FTAs and interim agreements for the purpose of the GATT. However, paragraph 8 goes well beyond containing mere definitions. By defining the different types of

20 *Appellate Body, Turkey – Restrictions on Imports of Textile and Clothing Products*, WT/DS34/AB/R, para. 57. Until then, the legal character of Art. XXIV:4 GATT had been controversial, GATT (1994), JACKSON (1969) and TEVINI (2006).

agreements, it provides for additional conditions to be met in order to benefit from the exception contained in paragraph 5, since only CUs, FTAs or interim agreements as defined in paragraph 8 can qualify for a departure from provisions of the GATT.²¹ From the combination of both, Art. XXIV:5 and 8 GATT the following conditions for RTAs to be permissible can be derived.

Permissibility of Customs Unions

A customs union can only justify deviations from GATT provisions, if two or more separate customs territories are substituted by a single customs territory, "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 or at least with respect to substantially all the trade in products originating in such territories, and, [...] substantially the same duties and other regulations of commerce are applied by each of the members of the union to the trade of territories not included in the union" (Art. XXIV:8 (a) GATT). Furthermore, "the duties and other regulations of commerce imposed at the institution of any such union [...] in respect of trade with [WTO Members] not parties to such union [...] shall not on the whole be higher or more restrictive than the general incidence of the duties and regulations of commerce applicable in the constituent territories prior to the formation of such union [...]" (Art. XXIV:5 (a) GATT). These internal and external criteria are very broadly and imprecisely worded. It comes hence as no surprise that the GATT contracting parties always disagreed as to the precise meaning of most of them. The Understanding provides a clarification only insofar as it makes clear how the "general incidence of the duties" shall be computed. In particular, it decided the argument, whether the bound tariffs or the duties actually applied are to be taken into consideration as the "applicable duties" prior to the formation of the CU in favour of the latter. Particular interpretative difficulties apparently occur with regard to the notions "substantially all the trade", "substantially the same duties and other regulations of commerce" and "not on the whole higher or more restrictive". When confronted with the problem how precisely the internal criterion of liberalisation of "substantially all the trade" should be understood, the Appellate Body agreed with the Panel in the case that the phrase offers "some flexibility" and came up with a rather empty finding,

21 Appellate Body, *Turkey – Restrictions on Imports of Textile and Clothing Products*, WT/DS34/AB/R, para. 47.

holding that the words "substantially all" do mean less than all, but considerably more than merely some of the trade between the constituent territories, a finding which is of course absolutely correct, but – frankly – almost completely useless.

Permissibility of Free-Trade Areas

As regards the internal criterion, the legality of an FTA requires the same as that of an CU, namely the liberalisation of "substantially all the trade" between the constituent territories (Art. XXIV:8 (b) GATT). It raises of course the same questions as do CUs. The main difference between CUs and FTAs lies in the lack of a merger of the different customs territories and the corresponding absence of a common regulation of trade with third countries. For an FTA it suffices that the duties and other regulations of commerce which are maintained by the different territories establishing the FTA are not higher than prior to the formation of the FTA.

Permissibility of Interim Agreements

Neither CUs nor FTAs will usually be achieved in a big-bang-kind-of-transformation, but are phased-in over a transitional period to enable private businesses to accommodate to the changed circumstances. This transition will often take place on the basis of an interim agreement, which may provide in more or less detail for the stepwise establishment of the envisaged CU or FTA, as the case may be. A necessary corollary is that the interim agreement itself does not qualify as a CU or FTA during the transitional period, since it does not fulfill the substantive requirements flowing from Art. XXIV:8 (a) or (b) GATT. In order to prevent interim agreements from being used to circumvent the conditions set forth for a CU and an FTA, Art. XXIV:5 (c) GATT requires that any interim agreement includes a plan and schedule for the formation of the CU or FTA "within a reasonable length of time". Until the conclusion of the Uruguay Round, it remained unclear, how long such period could be. Now, the Understanding clarifies that the period should exceed ten years only in exceptional cases.

Exceptional Permissibility for Non-compliant RTAs

According to Art. XXIV:10 GATT, the WTO members by a two-thirds majority may exceptionally approve RTA proposals which do not fully comply with the conditions described above, provided that the respective agreement is either a CU or an FTA as defined in Art. XXIV:8 GATT. It is hence not possible, by means of Art. XXIV:10 GATT, to allow preferential trade agreements which do not liberalise trade between the members with regard to "substantially all the trade", but cover only some industry sectors (preferential agreements). In such case, a waiver under Art. XXV:5 GATT, Art. IX:3 WTO Agreement must be requested.²² Art. XXIV:10 GATT is of relevance if the RTA is concluded not only by WTO Members, but also by third countries.²³

RTAs under the Enabling Clause

The "Enabling Clause" is a decision of the GATT Contracting Parties, which in 1979 replaced the earlier 10-year waiver which provided for non-reciprocal and non-discriminatory tariff preferences to be granted to developing countries. By virtue of Art. 1 (b) (iv) of GATT 1994, the Enabling Clause has become an integral and permanent part of the WTO legal order. Its paragraph 2 (c) provides for an exception from Art. I GATT, inter alia, for regional or global arrangements entered into among less-developed WTO Members for the mutual reduction or elimination of tariffs. Hence, LDCs may enter not only into FTA and CU agreements, but also into agreements that neither completely eliminate tariff duties nor do reduce or eliminate tariff duties with regard to "substantially all the trade" between the constituent territories.

The Notification Procedure

Art. XXIV:7 (a) GATT prescribes that any WTO Member deciding to enter into an RTA or an interim agreement, shall promptly notify it to the WTO and make available the information regarding the RTA, which are necessary for an examination of the envisaged (or concluded) agreement. In the past, the examination was pursued by ad-hoc working parties estab-

22 A prominent example was the European Coal and Steel Community, see STEINBERGER (1963).

23 On this problem see GATT (1994) and CHOI (2005).

lished separately in every single case of a notification. The establishment of the WTO Committee on Regional Trade Agreements (CRTA)²⁴ “institutionally consolidated” (MATSUSHITA, SCHOENBAUM and MAVROIDIS, 2006, p. 555, footnote 18) these working parties. Participation in the CRTA is open to all WTO Members, as was participation in the GATT working parties. The key task of the CRTA is to issue a report after a thorough examination of any notification of an RTA. In theory, the report could recommend changes to the notified RTA, in order to bring it in compliance with WTO rules. However, given that the CRTA takes decisions by consensus, which means that the Members that are parties to the RTA under examination have to concur with the other WTO members, it is highly unlikely that the CRTA could ever arrive at a finding of inconsistency of an RTA with the WTO agreements. In fact, such conclusion has never been drawn by a GATT working party, even though most commentators believe that – apart from the European Union – hardly any RTA in force fully meets the criteria set forth in Art. XXIV GATT. The CRTA was not even able to complete a single review of an RTA since its establishment in 1996. The opposite finding of consistency of an RTA with WTO law has also been arrived at only twice in the 60 years of history of GATT and the WTO.²⁵

This does, however, not mean that the CRTA has the right to approve a notified RTA. Neither Art. XXIV GATT nor the Understanding provide for a standstill for the execution of the RTA during the time of the examination process nor does Art. XXIV GATT make the applicability of the Art. XXIV:5 GATT exception dependent upon a positive conclusion of the CRTA nor on the notification as such. It seems hence that a WTO Member could even rely on Art. XXIV:5 GATT to justify deviations necessary for the formation of an RTA that was not notified at all. An obligation to modify the notified agreement does only exist with regard to interim agreements, in case that the CRTA makes such recommendations. However, such recommendations have also never been adopted.

The 1994 Understanding has clarified only some aspects of the notification process. Further clarifications have been achieved by the CRTA, for example a standardised format for the submission of information on the RTA under examination. However, a number of questions remained heavily disputed, in particular the question of the timing of the notification.²⁶ This

24 Decision by the WTO General Council of 7 February 1996, WT/L/127.

25 The first case was the Interim Agreement between South Africa and Southern Rhodesia (GATT, 1994), the second was the CU between the Czech and the Slovak Republic, entered into by the two countries upon the dissolution of Czechoslovakia.

26 See WTO Secretariat, *Synopsis of “Systemic” Issues Related to Regional Trade Agreements*, WT/REG/W/37.

question is now being addressed by the Transparency Mechanism that was provisionally adopted in the course of the Doha Round on 14 December 2006.²⁷ According to its paragraph 1, entitled "Early Announcement", WTO Members shall in the future endeavour to inform the WTO of any negotiations aimed at the conclusion of an RTA, in which they participate, and shall after its signature, convey to the WTO all 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." The information has to be forwarded to the WTO Secretariat and will be posted on the WTO website. The actual notification shall take place "as early as possible", which, as a rule, is understood to mean "no later than directly following the parties' ratification of the RTA or any party's decision on application of the relevant parts of the agreement, and before the application of preferential treatment between the parties" (paragraph 3 of the Transparency Mechanism). The Transparency Mechanism does also lay down a time period for the normal conclusion of the examination of the notified RTA (one year after the date of notification) and provides guidelines as to how the examination shall be undertaken. As a novelty, the Mechanism foresees a "Factual Presentation" of the RTA to be prepared by the WTO Secretariat primarily on the basis of the information provided by the parties to the RTA (paras. 7 (b) and 9). This "Factual Presentation" may, however, not be used as a basis for dispute settlement procedures or to create new rights and obligations for Members (para. 9). This phrase substantially resembles the last sentence of paragraph A (i) of the Trade Policy Review Mechanism and confirms the mere supportive role of the WTO Secretariat. Correspondingly, the Secretariat shall abstain from any value judgment, i.e. from any assessment of the WTO consistency of the RTA in question (para. 9). For the actual consideration, only one formal meeting shall normally be convened. Any other exchange of information should take place in writing (para. 11). Further disciplines are set forth regarding the subsequent notification and reporting of RTAs during their implementation or once implementation has taken place (paras. 14 through 17).

3.3 Economic Integration in the GATS

The expansion of the substantive scope of the WTO framework to trade in services, which was achieved by the Uruguay Round, made it necessary to

27 Transparency Mechanism for Regional Trade Agreements... *op. cit.*

provide also for an exception to the MFN principle as it applies to services trade, in order to permit agreements going further in liberalising trade in services than the rather rudimentary GATS. Before the conclusion of the GATS, the countries were mostly free to enter into practically any kind of discriminatory services agreement with other countries, sometimes covering only single services sectors and limited modes of supply (COTTIER and EVTIMOV, 2000, p. 491). However, as no customs duties are being imposed on trade in services, "preferential" services trade occurs in quite different clothes than duty-free trade in goods with national treatment playing a key role. This is necessarily reflected by Art. V GATS, which grants WTO Members a right to enter into "an agreement liberalising trade in services between or among the parties to such agreement", provided certain procedural and substantive provisions are met. These conditions are, similar as those set forth in Art. XXIV GATT, unclear as regards their precise meaning. As one commentator has enunciated: "Considerable confusion and lack of clarity surround the interpretation of GATS Article V conditions" (STEPHENSON, 2000, p. 509). The same commentator sees the danger that the disagreement over the meaning of the conditions becomes one of the major weaknesses of Art. V GATS.

According to Art. V GATS, an agreement must meet three substantive conditions in order to benefit from the exception to the MFN principle. Additional obligations set forth in Art. V GATS are not preconditions of a deviation from MFN, but self-standing obligations arising when a services agreement is entered into. The three main conditions resemble the criteria for the legality of a CU or an FTA under Art. XXIV GATT.²⁸ First of all, the agreement must have "substantial sectoral coverage" (Art. V:1 (a) GATS), which, according to the Footnote 1 ad Art. V GATS shall be understood in terms of number of sectors, volume of trade affected and modes of supply. According to that proviso, no mode of supply may be excluded *a priori*. This condition is clearly designed as a parallel to the "substantially all the trade" condition of Art. XXIV:8 (a) (i), (b) GATT. However, this does not mean, that one can read "substantial sectoral coverage" as meaning "substantially all services trade" (ZDOUC, 2002, p. 229, but see STEPHENSON (2000), pp. 512–514). If that had been the intention of the drafters, it would have been easy to phrase the condition "substantially all sectors" or alike. The only

28 The Economic Integration agreements addressed in Art. V GATS are not necessarily only Services FTAs. It may very well be the case that the agreement in question provides also common or harmonized rules for the provision of services by third country providers inside the territories of the constituent members. In such case, the integration agreement would come close to a CU as regards "other regulations of commerce" than customs duties (Art. XXIV:8 (a) (ii) GATT).

conclusion which can be drawn, in my view, is that the agreement must not cover just a limited number of sectors, but should apply to at least half of the sectors. Whatever the correct interpretation of the term is, any examination of a particular agreement will suffer from the difficulties associated with the measuring of services trade and the lack of meaningful data. Secondly, in the sectors covered, substantially all the discriminations in the sense of Art. XVII GATS must either be eliminated within a reasonable length of time or be absent and the new establishment then be prohibited (Art. V:1 (b) GATS). As in the case of Art. XXIV:8 GATT, some exceptions to this liberalisation obligation are explicitly mentioned, which in turn raises the question, whether the enumeration is conclusive. For the evaluation, whether an agreement complies with paragraph 1, "consideration may be given to the relationship of the agreement to a wider process of economic integration or trade liberalisation among the countries concerned" (Art. V:2 GATS). Even though the liberalisation of trade in goods in a CU or FTA is no precondition of a services integration agreement, if both occur at the same time, this coincidence can influence the evaluation of the conditions of Art. V:1 GATS. However, it remains unclear, what the exact influence would be (for example prolongation of the reasonable length of time; reduction of the necessary sectoral coverage?). Art. V:3 contains the "Enabling Clause"-equivalent, i.e. more liberal conditions for services agreements between developing countries. Besides the internal criterion provided for in Art. V:1, the overall level of barriers to services trade with third countries must not be raised by the agreement (Art. V:4 GATS).

As CUs and FTAs, agreements liberalising trade in services do have to be notified for examination. However, it seems that a considerable lack of discipline exists with regard to this obligation. Instead, many older agreements that do probably not fully comply with the conditions of Art. V GATS have been notified by members under Art. II:2 GATS in conjunction with Annex II (STEPHENSON, 2000, p. 520).

4 RTAs and the WTO Legal System – The Key Issues

4.1 Interpretation of the Language of Art. XXIV GATT and Art. V GATS

Both central provisions on RTAs in the WTO legal framework, Art. XXIV GATT and Art. V GATS contain considerably broad and unclear language describing the core conditions that must be met by an RTA in order to

qualify for an exception from WTO rules. Additionally, the examination of RTAs economic impacts is significantly inhibited by the difficulty of collecting, assessing or computing relevant economic data, in particular insofar as the "hypothetical trade" in an alternative setting must be quantified. In particular the notions "substantially all the trade" and "substantial sectoral coverage" are of such an uncertainty that a clarification is desperately needed. In fact, lacking precise conditions, nobody can tell at present, when an RTA is in compliance with the WTO legal framework. Whereas the 1994 Understanding clarified at least some of the imprecise language, the 2006 Transparency Mechanism focuses exclusively on the procedural side of the RTA "problem".

4.2 WTO-Compatibility of Deeper Economic Integration

RTAs going beyond the traditional FTA/CU dimension confront the WTO legal framework with further problems which so far have hardly been addressed.²⁹ The ways in which for example the European Union's internal market leads to a discrimination between EU Member States and non-Member States is much more intricate than a mere discriminatory tariff duty that can easily be spotted. Some examples for that, which have been put forward elsewhere, shall be mentioned here: Under the European Union's trade mark legislation, the EU Member States must apply a regional exhaustion to trademarks, which means that the re-import of goods marketed in other EU Member States cannot be blocked by the right-holder, whereas the re-import from outside the EU can effectively be prevented. Under European food labeling legislation, the labeling of sardines was changed, so that some types of sardines which before had been marketable as "sardines" at least in some Member States, were prohibited to use this label any longer.³⁰ Under EU tobacco legislation, minimum standards for the marketability of cigarettes were established. European cigarettes complying with these standards benefitted from a free-circulation clause, but the Member States could provide for higher standards with regard to their own producers. How should cigarettes manufactured outside the EU be treated in such case? According to the National Treatment obligation of Art. III:4 GATT or could they demand MFN-treatment (which in such case would be better)?

29 But see BARTELS (2005) and TRACHTMAN (2003).

30 See European Communities – *Trade Description of Sardines*, WT/DS231.

In *Turkey – Textiles*, the Appellate Body limited the possibility to invoke Art. XXIV GATT to measures which were “necessary” for the establishment of a CU or FTA.³¹ However, the measures necessary for deeper economic integration go necessarily further than what is necessary for the establishment of a CU and are hence, in that sense, unnecessary. Some of the discrimination caused by deeper integration RTAs may be justified on the basis of mutual recognition provisions of the WTO legal framework, but certainly not all of them. Should the Appellate Body be read in such manner which could render deeper integration RTAs WTO-illegal altogether?

The easiest solution to this problem would be to apply the obligations deriving from WTO law directly to the respective RTA. This would pose no specific problems with regard to the European Community, which is a WTO Member in its own right anyway. Other CUs could be treated as separate customs territories to which the obligations would apply instead of their constituent member countries, as was suggested by JOHN JACKSON already in 1969 (JACKSON, 1969, p. 584). A question of MFN treatment would then not occur any more, since measures affecting goods and services from inside the RTA could not be taken as comparison under MFN, but only under National Treatment obligations. This is in fact the line of argument the Panel followed in *EC – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs* with a view to the MFN obligation contained in Art. 4 TRIPS. According to the Panel, “to the extent that advantages are granted under the Regulation, by the Community and EC member States authorities exercising powers under the Regulation, to the European Communities’ own nationals, those advantages are not granted to “the nationals of any other country”, within the meaning of Article 4 of the TRIPS Agreement”.³²

4.3 Political and Judicial Review of RTAs

The lack of clarity in the substantive provisions drags the attention all the more to the institutional framework. In the case of RTAs, its setup is of a particular kind, with the CRTA, which was established to examine the compatibility of notified RTAs under Art. XXIV GATT, Art. V GATS etc. respectively, and the DSB, which might be called upon to decide about the question, whether a particular measure taken by a WTO member violates

³¹ Appellate Body, *Turkey – Restrictions on Imports of Textiles and Clothing Products*, WT/DS34/AB/R.

³² Panel, *European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs*, WT/DS174/R, para. 7.725.

certain provisions of the WTO agreements and whether this *prima facie* violation may be justified on the basis of one of its RTA-exceptions.

In Turkey – Textiles, the Panel held that the question of the overall WTO compatibility of an RTA as such was not a measure for the dispute settlement organs to rule on, but a political question reserved for the CRTA to decide.³³ The Appellate Body did not express its opinion with regard to this, but concurred with the Panel that any specific measure of a WTO Member can be subject to review by the dispute settlement organs and that the possible justification on the basis of Art. XXIV GATT implies jurisdiction over the question whether an agreement fully meets the conditions established therein, including the criteria contained in the definitions of Art. XXIV:8 GATT. However, whereas the Appellate Body demonstrated a principal willingness to scrutinise an RTA's compliance with Art. XXIV GATT, it granted a considerable degree of flexibility to the Members by the interpretation it applied to the substantive internal and external criteria. It has been argued that a more stringent approach would go beyond the mandate of the Appellate Body, if it developed a more precise interpretation of such broad terms as “substantially all the trade”, the meaning of which has been constantly disputed amongst WTO Members. The question, however, must be raised, which body of the WTO will finally be able and willing to take the responsibility to deliver a workable definition of the conditions to be met by an RTA. In the current institutional setting, the DSB with its “negative consensus” rule clearly is the only body that would be able to step in. As regards the CRTA, it seems rather impossible that the deadlock will be broken within any foreseeable future and it remains uncertain, which changes to the decision-making process would be helpful. A reversal of the consensus principle in the CRTA would not change things to the better. In the present setting, the inability of the CRTA to deliver conclusive reports basically works in favour of RTAs, since there will in fact never be a report finding an RTA not to meet the conditions of Art. XXIV GATT or Art. V GATS. Under the present provisions, it seems that such finding would not even be binding on the DSB, even though a ruling against a unanimously adopted report of the CRTA seems highly unlikely. If one made the application of Art. XXIV:5 GATT and Art. V:1 GATS, however, formally conditional upon a prior decision by the CRTA confirming the legality of the RTA in question, Art. XXIV GATT and Art. V GATS could not be applied any more, since no such affirmative decision would be reached either. In such scenario, a single WTO Member – irrespective of its motivation – could obstruct the

33 Panel, Turkey – Restrictions on Imports of Textiles and Clothing Products, WT/DS174/R, paras. 9.52ff.

execution of an RTA like the European Union. This would clearly be the knock-out for the whole WTO system, since Members with a high preference for RTAs, as in particular the European Union, would not be willing or even able to sacrifice their regional aspirations for the sake of the multilateral trading system.

The only alternative to the current system would hence be to abolish the consensus principle in the CRTA and replace it by a qualified-majority voting system, in which, however, the Members party to the RTA in question could not participate. One could imagine a system in which the CRTA could find by three quarters of its Members that an RTA *does meet or does not meet* the conditions of Art. XXIV GATT and Art. V GATS. If such change were made to the procedure, to make it effective, it would of course be necessary to make the adopted report binding for Panels and Appellate Body.

The 2006 Transparency Mechanism may very well make the notification procedure more transparent. However, the present author has considerable doubt whether more transparency alone will change anything. As long as there is no clarification of the yardstick used, the transparency of the measuring process remains rather meaningless.

4.4 Status of RTAs inside the Institutional Framework and Substantive Legal Order of the WTO

A further problem, which is caused by RTAs that – like the European Union – provide for a common trade policy, but also for other common policies relevant for the WTO, concerns its institutional design. At present, provision is made only for WTO membership of States, separate customs territories and the “European Communities”³⁴, but not for RTAs in general. If other RTAs developed to a level of integration similar to that of the European Union and wanted to become a Member of the WTO, the WTO Agreement would *need to be changed first*, or a pragmatic *de facto* solution would have to be found, as it was the case with the then European Economic Community in the 1960s. However, even in the case of the European Union, the legal framework of the WTO does not answer all possible questions that may be asked with a view to the peculiar “parallel membership” of the European Community and its Member States. The consistent misnomer, for example in dispute settlement reports, of the European Community, which is the only one of

34 Art. XI:1 and XII:1 of the WTO Agreement.

the formerly three European Communities that has acceded to the WTO³⁵ as “European Communities”, accompanied by the inappropriate use of the singular (as for the “United States”), is only the tip of an ice peak. The difficulties that are caused by the parallel membership are demonstrated by a number of more recent dispute settlement reports. In EC – Selected Customs Matters³⁶, the United States challenged the administration of Community customs law by the customs authorities of the EU Member States. According to the US, the European Community violated its obligation to administer its customs laws in a uniform manner, deriving from Art. X:3 (a) GATT, since the Community’s legislation left a number of questions open for decision by the EU Member States’ legislation and customs authorities.³⁷ Furthermore, the US contended that the EC had violated Art. X:3 (b) GATT, since it had not established a first instance review tribunal governing the practice of all customs agencies throughout the Community.³⁸ If the European Community were only a CU, but not a Member to the WTO in its own right, these questions could not even have been brought before the WTO, since Art. XXIV:8 (a) (ii) GATT only requires that the members of a CU apply “substantially the same duties and other regulations of commerce”, something the European Community clearly does, but not that they apply them “uniformly” or that they establish uniform review procedures and tribunals. Even though the Appellate Body did not follow most of the allegations of the US, it upheld the Panels finding of a non-uniform administration of customs laws with regard to one product and considered a challenge of the whole system of EC customs law possible, but it felt unable to complete the analysis concerning this claim.³⁹ However, more important for the European Union was the finding of Panel and Appellate Body that Art. X:3 (a) GATT did not require uniform administrative processes, but a uniform, impartial and reasonable administration of customs laws. Furthermore, Panel and Appellate Body agreed that Art. X:3 (b) does not mean that decisions of first instance review tribunals must govern the practice of all agencies entrusted with the administrative enforcement of customs laws throughout the territory of a WTO Member. Nevertheless, EC – Selected

35 Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994), OJ 1994 L 336/1.

36 WT/DS315.

37 See WT/DS315/1 [G/L/694] – Request for Consultations by the United States. For a summary of the main arguments made by the United States cf. Panel, European Communities – Selected Customs Matters, WT/DS315/R, paras. 7.85ff. However, in the oral hearing the US confirmed that it did not consider that Art. X:3 (a) GATT required a centralized system of customs administration in the European Community (Appellate Body, European Communities – *Selected Customs Matters*, WT/DS315/AB/R, para. 277.

38 See Panel, European Communities – *Selected Customs Matters*, WT/DS315/R, paras. 7.492.

39 Appellate Body, European Communities – *Selected Customs Matters*, WT/DS315/AB/R.

Customs Matters provokes the question whether an RTA which is a WTO Member in its own right can be treated like a State, even though it operates on the basis of limited attributed competences and its constituent territories are also sovereign members of the WTO. In some cases, however, as demonstrated by the aforementioned EC – Trademarks and Geographical Indications case, it may rather be beneficial for the European Union to have a separate member status in the WTO, when questions of EC law are being treated as “*sui generis* domestic constitutional arrangements”⁴⁰ rather than questions of public international law and interstate trade preferences.

5 Concluding Remarks

A critique of the current relationship between regionalism (including bilateralism) and the multilateral trading system, in order to make any sense, must first of all establish a normative idea of what the relationship should actually be. Insofar, the predominant view seems to be that there should first of all be less RTAs altogether or that they at least should comply with WTO law. The obvious problem with such criticism is that as of 2007 nobody really knows what WTO law actually tells us about how an RTA should look like in order to be permissible, since the applicable legal provisions are so broadly worded that their interpretation can be compared with “nailing a pudding to a wall” (German proverb). The evident lack of clarity of the substantive criteria is mingled with an institutional framework arguably designed to fail. The system, as it stands, is hence hardly able of delivering more than a judicial answer in more or less clear-cut cases such as the Canada-US Auto Pact. However, it may very well be the case that the features, which are widely perceived as weaknesses, are actually holding the system together, since they grant the WTO Members the leeway in the conduct of their preferential trading relations which they seem to aspire and be unwilling to give up. The newly established 2006 Transparency Mechanism is consequential-ly only a procedural placebo which will not cure the problem of a further increasing consumption of the “drug of regionalism”. However, it seems that regionalism rather resembles alcohol, tobacco or marihuana at worst than cocaine, heroin or other even deadlier substances. Regionalism may cause an earlier death of the multilateral trading system, but not necessarily. It may very well be the case that the multilateral system shows the condition of a life-long heavy smoker and drinker who happily survives most of his

40 Panel, European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs, WT/DS174/R, para. 7.725.

healthier-living companions. This is all the more likely, since barriers to trade are considerably lower today than they were when Art. XXIV GATT was drafted. Nowadays, "frictions and loss of friendship"⁴¹ between separate trading blocs seem hence much less likely than 60 years ago.

41 JOHN MAYNARD KEYNES before the House of Lords, quoted in CULBERT (1987).

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