KIEP Working Paper 10-05

Regionalism within Multilateralism: WTO Review Mechanisms for RTAs

Sherzod Shadikhodjaev

KIEP Korea Institute for International Economic Policy

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Executive Summary

Given different legal regimes which govern the global and regional trading systems, the WTO as such cannot stop the proliferation of RTAs. Nevertheless, the WTO can oversee them through its political and judicial review procedures. Notably, Article XXIV of the GATT, Article V of the GATS and the Enabling Clause contain certain procedural requirements for notification and multilateral review of RTAs concluded by WTO members (political track). In addition, RTAs may be challenged in WTO dispute settlement procedures (judicial track). This paper examines legal provisions and practice of the WTO review mechanisms, explores possible remedies for WTO-inconsistent RTAs, analyzes the transparency mechanism for RTAs, and in particular specific issues of linkage with the WTO judicial review procedures and the possibility of extending the scope of the transparency mechanism to the post-formation period of notified RTAs.

Keywords: WTO, RTA, notification, transparency mechanism for RTAs, dispute settlement, remedies, CRTA, TPRM

JEL Classification: F13, F15, F55

국문요약

세계무역기구(WTO)와 지역무역협정(RTA)은 별도의 법적 제도이나, WTO는 GATT 제24조, GATS 제5조, 권능부여조항(Enabling Clause)에 따른 정치적·사법적 검토메커니즘을 통해 RTA를 감독할 수 있다. WTO의 정치적 검토메커니즘은 WTO 회원국이 체결한 RTA에 대한 통보절차와 다자적 검토를 포함하며, 사법적 검토메커니즘은 RTA가 WTO 규범과 합치하느냐의 여부를 판정하는 WTO의 분쟁해결 제도를 의미한다. 본 연구에서는 이러한 WTO 검토메커니즘에 관한 규정과 관행을 살펴보고, WTO 규범에 위배되는 RTA에 대한 가능한 구제조치를 검토하며, 2006년 창립된 RTA 투명성메커니즘 및 그와 관련된 각종 쟁점을 분석한다.

핵심용어: WTO, 지역무역협정(RTA), RTA 투명성 메커니즘, 분쟁해결, 구제조치, CRTA, TPRM

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Regionalism within Multilateralism: WTO Review Mechanisms for RTAs

Sherzod Shadikhodjaev*

I. Introduction

Proliferating regionalism is a current trend in world trade.[1] While some consider regional trade agreements (RTAs) as complementary to the multilateral trading system, others point to their negative effect for the latter. Given different legal regimes which govern the global and regional trading systems, the World Trade Organization (WTO) as such cannot stop the proliferation of RTAs. Nevertheless, the WTO can oversee them through its political and judicial review procedures. Notably, Article XXIV of the General Agreement on Tariffs and Trade (GATT), Article V of the General Agreement on Trade in Services (GATS) and the Enabling Clause contain certain procedural requirements for notification and multilateral review of RTAs concluded by

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[1] According to statistics, some 421 regional trade agreements have been notified to the GATT/WTO up to December 2008. WTO (2010), "Regional Trade Agreements," http://www.wto.org/english/tratop_e/region_e/region_e.htm (visited 1 February 2010).

WTO members (political track). In addition, RTAs may be challenged in WTO dispute settlement procedures (judicial track). However, the GATT/WTO system has failed to fully utilize its 'controlling' functions mainly due to persistent rule ambiguity. Not surprisingly, the issue of rule clarification and improvement of the existing review procedures concerning RTAs has caught the attention of both WTO membership and academia, and as a result was included into the Doha Development Agenda.[2]

A number of academic works have elaborated on various aspects of the WTO's review mechanisms for RTAs. For instance, in his paper on the legal test of compliance of RTAs with WTO rules, Petros C. Mavroidis cited several factors in explaining the judicial inaction on RTAs, such as the lack of interest in rule clarification through WTO litigation, distrust in the panel's ability to properly handle the WTO-compatibility issue, prohibitive litigation costs and etc.[3] Frieder Roessler harshly criticized the Appellate Body for encouraging panels to evaluate regional arrangements in terms of their legitimacy under the WTO legal framework.[4] In his support, Youri Devuyst and Asja Serdarevic suggested

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[2] See paragraph 29 of the Doha Declaration in WTO (2001), Ministerial Conference – Fourth Session – Doha, 9-14 November 2001 – Ministerial Declaration – Adopted on 14 November 2001, WT/ MIN(01)/DEC/1 (20 November 2001).

[3] See Petros C. Mavroidis (2006), "If I Don't Do It, Somebody Else Will (Or Won't): Testing the Compliance of Preferential Trade Agreements with the Multilateral Rules," *Journal of World Trade*, Vol. 40, pp. 187-214.

[4] See Frieder Roessler (2000), "The Institutional Balance between the Judicial and the Political Organs of the WTO," in Marco Bronckers and Reinhard Quick eds, *New Directions in International Economic Law: Essays in Honour of John H. Jackson* (The Hague/London/Boston: Kluwer Law International), pp. 325-345.

that WTO dispute panels focus only on national measures enforcing specific RTAs while the overall compatibility of RTAs with WTO disciplines be subject to 'improved transparency and diplomatic peer review'.[5] Jo-Ann Crawford briefly described the newly founded transparency mechanism for RTAs.[6] In comparison to the previous literature, this paper intends not only to analyze legal provisions and practice of the WTO review mechanisms, but also explore possible remedies for RTAs that are WTO-inconsistent, examine the transparency mechanism for RTAs, and in particular specific issues of linking it to the WTO judicial review procedures and the possibility of extending the scope of the transparency mechanism to the post-formation period of notified RTAs.

The remainder of this paper is organized as follows. Section II examines the legal foundations for RTAs under the multilateral trading system from the perspective of the international law of treaties and WTO provisions. Section III examines the WTO political and judicial review mechanisms for RTAs. Section IV specifically discusses clarification and improvement issues. Section V concludes the paper.

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[5] See Youri Devuyst and Asja Serdarevic (2007), "The World Trade Organization and Regional Trade Agreements: Bridging the Constitutional Credibility Gap," *Duke Journal of Comparative & International Law,* Vol. 18, pp. 1-75.

[6] See Jo-Ann Crawford (2007), "A New Transparency Mechanism for Regional Trade Agreements," *Singapore Year Book of International Law,* Vol. 11, pp. 133-140.

Ⅱ. Legal Foundations for RTAs under the WTO System

1. WTO-RTA Relationship

Unlike national legislations, international law does not establish a clear hierarchy of norms for the entire global system. Only peremptory norms of general international law (jus cogens) are recognized to be at the top of the international legal order with remaining rules being subordinate to them.[7] Thus, in the event of a conflict between jus cogens and other international rules, the former takes the precedence. As for conflict between non-jus-cogens rules, the principles of *lex posterior* and *lex specialis* can help.

The Marrakesh Agreement Establishing the WTO (hereinafter the 'Marrakesh Agreement')[8] and RTAs are both treaties that are not jus cogens and can, in principle, be deemed of being of the same legal effect. However, one study[9] denies such an equal footing in tandem with applicability of the *lex posterior* and *lex specialis* principles to the WTO-RTA relationship. It suggests that it is rather Article 41 of the Vienna Convention on the Law of Treaties (VCLT) which properly characteriz-

[7] See Articles 53 and 64 of the VCLT.

[8] In this context, the Marrakesh Agreement refers to the WTO Agreement (the 'WTO statute') with all annexed instruments recognized as a 'single undertaking'.

[9] See Thomas Cottier and Marina Foltea (2006), "Constitutional Functions of the WTO and Regional Trade Agreements," in Lorand Bartles and Federico Ortino eds, *Regional Trade Agreements and the WTO Legal System* (Oxford: Oxford University Press) pp. 53-58.

es the legal relationship between the global and regional trade regimes. Namely, paragraph 1 of Article 41 allows certain of the parties to a multilateral treaty to conclude an agreement to modify the former as between themselves if:

(a) the possibility of such a modification is provided for by the treaty; or
(b) the modification in question is not prohibited by the treaty and:
  (i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;
  (ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.

As WTO law explicitly acknowledges the possibility for RTA conclusion,[10] it seems that it is sub-paragraph (a) of VCLT Article 41 which is relevant to the WTO-RTA relationship. Moreover, this provision suggests that WTO disciplines on RTAs are 'inherently of a higher ranking' than RTAs.[11] Accordingly, RTAs are subject to conditions and requirements set forth in GATT Article XXIV, GATS Article V and the Enabling Clause. This 'inherent' hierarchy in the WTO-RTA relationship naturally necessitates the establishment of a WTO mechanism to monitor and 'screen' RTAs from the perspective of WTO law.

[10] For instance, Article XXIV: 5 of the GATT states 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 of a free-trade area'. RTAs are thus considered to be a modification of the Marrakesh Agreement, as they alter the legal relationship between certain WTO members only.

[11] Cottier and Foltea, above n 9, at 56.

2. WTO's Legal Framework for RTAs

WTO rules on RTAs are contained in Article XXIV of the GATT, the Enabling Clause, and Article V of the GATS with the first two sets of rules covering the goods sector and the last one concerning services. Each of them sets forth substantive and procedural requirements for RTAs concluded by WTO members. In this section, we will outline the substantive requirements. As for the procedural requirements (except the compensation rule), we will examine them in greater detail in the context of the WTO surveillance mechanism dealt with in Section III.

1) GATT Article XXIV

Article XXIV of the GATT distinguishes certain types of preferential trade arrangements, such as a free trade area, a customs union, and an interim agreement leading to the formation of either of them. The main substantive requirements are set forth basically in paragraphs 5 and 8 of the given Article.

Paragraph 8 of Article XXIV determines the main characteristics of RTAs. In particular, a free trade area (1) comprises two or more customs territories (2) with 'the duties and other restrictive regulations of commerce' (except for certain restrictive measures listed) removed with respect to 'substantially all the trade' at an intra-regional level. In a customs union which is, unlike a free trade area, a single customs territory, the intra-trade liberalization rule is supplemented by an external requirement for its members to apply 'substantially the same duties and

other regulations of commerce' vis-à-vis third countries.

With respect to a free trade area and a corresponding interim agreement, paragraph 5 of Article XXIV provides that the duties and other regulations of commerce towards third countries at a post-RTA stage must not be 'higher or more restrictive' than those maintained at a pre-RTA stage. As for a customs union or an interim agreement concerned, the requirement not to raise trade barriers 'on the whole' applies to 'the general incidence of the duties and regulations of commerce', implying that the 'pre-and-post' comparison for customs unions, unlike free trade areas, should be carried out not on an item-by-item basis but with respect to the whole range of covered products. Should a customs union member raise its MFN tariff to satisfy the external requirement, it is under obligation to provide compensatory adjustment pursuant to GATT Article XXVIII.[12]

2) Enabling Clause

The Enabling Clause, officially known as the 1979 Decision on 'Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries', is applicable to RTAs between or among developing country members. Pursuant to paragraph 2(c), such 'regional or global arrangements' provide for 'the mutual reduction or elimination of tariffs and, in accordance with criteria or conditions which may be prescribed by the CONTRACTING PARTIES, for the

[12] Paragraph 6 of GATT Article XXIV.

mutual reduction or elimination of non-tariff measures, on products imported from one another'. Obviously, this provision loosens the internal requirement for South-South RTAs by e.g. allowing tariff reduction and omitting the 'substantially all the trade' rule. The external requirement is worded in less detail. Notably, paragraph 3(a) reads that such RTAs are 'not to raise barriers to or create undue difficulties for the trade of any other contracting parties'.

3) GATS Article V

The GATS uses a broader concept of 'economic integration' agreements that are required by paragraph 1 of Article V to have 'substantial sectoral coverage' in terms of number of sectors, trade volume and modes of supply. The *a priori* exclusion of any mode of supply is not allowed. In addition, RTAs within the meaning of the GATS must eliminate existing measures or prohibit new ones that are discriminatory in the sense of the national treatment clause. Paragraph 3 introduces special and differential treatment for developing countries in the form of flexibility for meeting the paragraph 1 requirements and more favorable conditions for juridical persons owned or controlled by developing country's natural persons. As with the counterpart provisions for the goods sector, paragraph 4 of GATS Article V requires that RTAs on services do not raise pre-RTA barriers towards third countries. Procedures of Article XXI will apply if such RTAs entail modification of their member's commitment schedule.

Ⅲ. Review of RTAs in WTO: A Two-Track Approach

1. Political Track

1) Notification Requirements

GATT Article XXIV:7 requires an RTA member to promptly notify the CONTRACTING PARTIES and provide them with information on the proposed RTA so as to enable them to 'make such reports and recommendations to contracting parties as they may deem appropriate'. The GATT further elaborates on procedures for interim agreements. First, each interim agreement must include a plan and schedule for the formation of a free trade area or a customs union which are also subject to a multilateral review. Second, should the CONTRACTING PARTIES conclude that interim agreements are unlikely to result in the formation of the free trade area or customs union within the proposed period, or the period for such formation is not reasonable, they can make recommendations to the parties concerned, and no interim agreement inconsistent therewith can be implemented. Third, the parties to interim agreements must communicate any substantial change to the plan or schedule to the CONTRACTING PARTIES, and may be requested to enter into consultations with them. In order to avoid these rigorous notification requirements for interim agreements, WTO members have arguably tended to notify their RTAs as free trade areas or customs

unions although the majority of the notified arrangements had transitional periods for implementation and would thus qualify as interim agreements.[13]

GATS Article V:7 requires prompt notification of RTAs and 'any enlargement or any significant modification' thereof together with necessary information to the Council for Trade in Services. The Council may set up a working party to examine the consistency of notified RTAs with GATS Article V. In case of RTAs with a specified time-frame for implementation, the parties concerned must periodically report to the Council which in turn may establish a working party if necessary. On the basis of working party's report, the Council may make recommendations to the RTA members.

The Enabling Clause provides in paragraph 4 that any RTA or modification thereof as well as appropriate information is to be notified to the CONTRACTING PARTIES. In addition, the party concerned is required to 'afford adequate opportunity for prompt consultations' with an interested country as to 'any difficulty or matter that may arise'. In this regard, the CONTRACTING PARTIES may be requested to facilitate such consultations with a view to reaching satisfactory solutions.

2) Examination of RTAs

The examination of RTAs during the GATT period was conducted in separate working parties. The working parties generally commenced

[13] On this point, see Lorand Bartels (2009), '"Interim Agreements" under Article XXIV GATT', *World Trade Review*, Vol. 8, pp. 343-345.

with an exchange of written questions and answers and engaged in discussions on compatibility of notified RTAs with GATT provisions. However, mainly because of different interpretations of GATT requirements for RTAs, working parties failed to produce definitive findings. Only the customs union between the Czech and Slovak Republics was an exceptional case where the working party concluded that the customs union fully complied with both procedural and substantive requirements under the GATT.[14] The approval of this RTA may be explained with the fact that its parties used to be one country (Czechoslovakia) with no barriers in intra-trade and the common commercial policy. Thus, the customs union in question could be considered a means to maintain the status quo.

Starting from early 1990s, the world trading system has experienced rapid increase of RTAs and this complicated the GATT practice of RTA examination by separate working parties. For this reason, the WTO General Council took a decision to establish a Committee on Regional Trade Agreements (CRTA) that would be open to all WTO members and vested with a broad mandate, as follows:[15]

(a) to carry out the examination of agreements in accordance with the procedures and terms of reference adopted by the Council for Trade in Goods, the Council for Trade in Services or the Committee

[14] See GATT (1994), Working Party on the Customs Union between the Czech Republic and the Slovak Republic – Report, L/7501 (15 July).

[15] WTO (1996), Committee on Regional Trade Agreements – Decision of 6 February 1996, WT/L/127 (7 February).

on Trade and Development, as the case may be, and thereafter present its report to the relevant body for appropriate action;

(b) to consider how the required reporting on the operation of such agreements should be carried out and make appropriate recommendations to the relevant body;

(c) to develop, as appropriate, procedures to facilitate and improve the examination process;

(d) to consider the systemic implications of such agreements and regional initiatives for the multilateral trading system and the relationship between them, and make appropriate recommendations to the General Council; and

(e) to carry out any additional functions assigned to it by the General Council. (footnote omitted)

The examination of Article XXIV RTAs was mandatory while the examination of RTAs for services trade was optional. Notifications of RTAs falling under the Enabling Clause were received by the Committee on Trade and Development (CTD), which did not normally request in-depth examination in the CRTA. The examination was conducted on the basis of information provided by signatory members, as well as written and oral questions and replies. After the conclusion of the factual examination, the WTO Secretariat had to draft the examination report which was to be agreed by the CRTA and subsequently submitted to the relevant superior body for adoption.[16] However, since the

[16] WTO (2009), 'Work of the Committee on Regional Trade Agreements (CRTA)', http://www.wto.org/english/tratop_e/region_e/regcom_e.htm (visited 25 September).

WTO inception, no examination report has been finalized. First, the most responsible factor is the ambiguous language of 'substantially all the trade', 'other regulations of commerce' and other controversial elements of WTO provisions. Second, even though the majority of CRTA members could achieve compromised findings on a given RTA, their decision could effectively been blocked by an opposing member (e.g. the RTA signatory) due to the consensus rule. Third, CRTA consistency reports could trigger a dispute settlement process if the RTA reviewed were found in violation of WTO law. Obviously, the CRTA review process was in need of reforms.

3) New Transparency Mechanism for RTAs

Since the launch of the Doha Round in 2001, negotiations on rules have so far succeeded in improving multilateral procedures to monitor regional arrangements. Notably, the General Council's Decision of 14 December 2006 (hereinafter the '2006 Decision') provides a provisional legal basis for the operation of the transparency mechanism for RTAs. According to this document, the CRTA is responsible for implementing the transparency mechanism with regard to RTAs falling under GATT Article XXIV and GATS Article V, while the CTD is in charge of notifications falling under the Enabling Clause. The RTA transparency review mechanism consists of four major stages: (1) early announcement, (2) notification, (3) consideration and (4) subsequent notification and reporting.

Early Announcement

Early announcements for RTAs under negotiations and newly signed RTAs are to be submitted to the WTO Secretariat. Announcements for newly signed RTAs must include the official name of the agreement, scope, 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 Secretariat posts this information on the WTO website and periodically provides members with a synopsis. The early announcement stage was newly introduced in order to inform non-RTA member parties of potential emergence of new RTAs. As of 9 March 2010, there were 34 early announcements for seven newly signed RTAs and 27 RTAs under negotiations.[17]

Notification of RTAs

Although WTO provisions have required prompt notification of RTAs, precise timing of such notifications was not clear. Some members have supported the idea of ex ante notification, while others have suggested a more pragmatic approach allowing some flexibility for notification timing.[18] Thus, notifications after the entry into force of an

[17] WTO (2010), 'Regional Trade Agreements Information System', http://rtais.wto.org/UI/PublicEARTAList.aspx (visited 9 March).

[18] See WTO (2000), Committee on Regional Trade Agreements – Synopsis of 'Systemic' Issues Related to Regional Trade Agreements – Note by the Secretariat, WT/REG/W/37 (2 March), paras 12-14.

agreement were not exceptional cases in GATT/WTO practice. In this respect, the 2006 Decision has greatly clarified the timing issue stating that notifications must be done 'as early as possible', i.e. generally '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'. Parties should specify under which provision(s) of the WTO agreements the RTA is notified and provide the full text and any related schedules, annexes and protocols, in one of WTO's official languages. Electronic format is preferable for these submissions, where possible. As with notification clauses of other WTO agreements,[19] the 2006 Decision foresees a possibility for a third country to '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 this transparency mechanism.'[20] Introducing this kind of 'counter-notification', the 2006 Decision certainly improves the existing system by discouraging non-notification practices that have persisted so far.[21] Over the period of 2007-2009, 64 RTAs were notified.[22]

Consideration of RTAs

Given that examination of RTAs had been a deadlocked process

[19] See e.g. Article 25.10 of the SCM Agreement.
[20] Paragraph 20 of the 2006 Decision.
[21] See WTO, WT/REG/W/37, above n 18, paras 15-16.
[22] WTO, "Regional Trade Agreements Information System", above n 17.

since the creation of the WTO, the 2006 Decision represents a crucial shift from legal 'examination' of RTAs to their 'consideration'. This implies that as long as the new transparency mechanism is in operation, the CRTA will not devote any attention to whether notified agreements are consistent with WTO requirements. Such consideration will be normally concluded within one year after the date of notification. The WTO Secretariat will draw up a precise timetable for the consideration of the RTA in consultation with the parties at the time of the notification. RTA parties are required to submit necessary data to the Secretariat normally within a period of ten weeks (or 20 weeks in the case of RTAs involving only developing countries) after the date of notification of the agreement. The annex to the 2006 Decision elaborates on information to be submitted to the Secretariat. For RTAs on goods, the required data concern, *inter alia*, tariff concessions, MFN duty rates, preferential rules of origin, and certain trade statistics. For the services sector, the data should include trade or balance of payment statistics, foreign direct investment, movement of natural persons and others. With respect to RTAs between developing countries, the 2006 Decision calls for due account of technical constrains faced by these countries in supplying the required information, and requires Secretariat's technical support if requested so by these countries. The WTO Secretariat prepares a factual presentation of each RTA.

As a rule, the consideration of notified RTAs takes place in a single formal meeting, with any additional information exchange conducted in written form. The Secretariat's factual presentation, as well as any supplementary information submitted by the parties, is to be circulated

in all WTO official languages not less than eight weeks in advance of the relevant meeting. Members' written questions or comments on the RTA under consideration are to be transmitted to the parties through the Secretariat at least four weeks before the meeting and will be distributed, together with the replies, to all members at least three working days before the meeting. All written materials submitted and the minutes of the corresponding meeting are posted on the WTO website. As of 17 December 2008, the CRTA considered 32 RTAs, while the CTD considered its first RTA in October 2008.[23]

Subsequent Notification and Reporting

Any changes affecting the implementation of an RTA, or the operation of an already implemented RTA, such as modifications to the preferential treatment or RTA provisions must be notified 'as soon as possible' after the changes occur. For this purpose, the parties must provide a summary of the changes, and any related texts, schedules, annexes and protocols. At the end of the RTA's implementation period, the parties must submit to the WTO a short written report on the realization of liberalization commitments in the RTA as originally notified. All these communications are to be made public on the WTO website.[24] Between 15 May 2007 and 27 January 2009, 12 notifications of changes

[23] WTO (2009), Negotiating Group on Rules – Report by the Chairman to the Trade Negotiations Committee – 17 December 2008, TN/RL/23 (9 January).

[24] Paragraphs 14-17 of the 2006 Decision.

were submitted.[25]

The requirements for subsequent notification and reporting also apply to RTAs for which a GATT working party report had already been adopted, RTAs notified to the GATT under the Enabling Clause or RTAs for which the CRTA completed its factual examination by the end of 2006.[26]

2. Judicial Track

1) Justiciability and Institutional Balance

While the text of the GATT 1947 explicitly recognizes the multilateral mechanism's mandate to screen notified RTAs, it does not define the role of dispute panels in the RTA review process. If a free trade agreement (FTA) was reviewed by a panel at the time when the same agreement was under multilateral review, would the panel be constrained by the fact that the CONTRACTING PARTIES (the CRTA in the WTO) had not yet reached a final conclusion on the legality of the FTA? In the pre-WTO period, this question was addressed in three unadopted panel reports. In *EC – Citrus*, the US complained about tariff preferences granted by the EC on citrus products from certain Mediterranean countries within the framework of Article XXIV agreements. The panel noted that working parties that had reviewed these agree-

[25] WTO (2010), "Notification of Changes", http://www.wto.org/english/tratop_e/region_e/notif_changes_e.htm (visited 9 March 2010).

[26] Paragraph 22 of the 2006 Decision.

ments failed to produce conclusive findings as to their conformity with GATT provisions rendering the legal status of the agreements unclear. Holding that 'the examination – or re-examination – of Article XXIV agreements was the responsibility of the CONTRACTING PARTIES', the panel concluded that in the absence of a decision by the CONTRACTING PARTIES on this matter, it would not be appropriate for the panel to determine the conformity of agreements with Article XXIV.[27]

The GATT-compliance issue emerged again in *EEC (Member States) – Bananas I* where the EC claimed that its tariff preferences for bananas from ACP countries were accorded under the Lomé Convention and justified by Article XXIV. Referring to the findings reached in *EC – Citrus*, the EC argued that this panel had to refrain from the examination of the Lomé Convention, as this issue would fall within the CONTRACTING PARTIES' jurisdiction under Article XXIV:7(b).[28] The panel first considered whether dispute settlement provisions (Article XXIII) could apply to matters which were under Article XXIV review. It concluded that even assuming that the procedures of Article XXIV prevail over those of Article XXIII, this would be true only in those cases where

[27] GATT Panel Report, European Community – Tariff Treatment on Imports of Citrus Products from Certain Countries in the Mediterranean Region, L/5776, 7 February 1985, unadopted, paras 4.6 and 4.15. For a much more comprehensive and in-depth analysis of the WTO judicial review of RTAs and its relationship with the transparency issues under the 2006 Decision discussed in this paper, see Sherzod Shadikhodjaev (2011), "Checking RTA Compatibility with Global Trade Rules: WTO Litigation Practice and Implications from the Transparaency Mechanism for RTAs," *Jounal of World Trade*, Vol. 45, forthcoming.

[28] GATT Panel Report, EEC – Member States' Import Regimes for Bananas, DS32/R, 3 June 1993, unadopted, para 219.

'the agreement for which Article XXIV was invoked was *prima facie* the type of agreement covered by this provision, i.e., on the face of it capable of justification under it'.[29] Having found that the Lomé Convention providing for unilateral tariff preferences could not qualify as an FTA in the sense of Article XXIV tariff preferences, the panel concluded that Article XXIV justification was not valid here.[30] Although the 'Article XXIII-XXIV' relationship was not crucial in the present case, the panel noted that if a measure related to Article XXIV could not be examined in dispute settlement procedures, 'any contracting party, merely by invoking Article XXIV, could deprive other contracting parties of their rights under Article XXIII'. It also referred to panel's authority to handle balance-of-payment disputes in spite of the existence of multilateral procedures under GATT Article XVIII:B.[31]

In the subsequent case of *EEC – Bananas II*, the panel observed that the Article XXIV:7 procedures applied only to customs unions, FTAs or interim agreements leading to either formation. Because the Lomé Convention included many non-GATT-contracting parties contrary to Article XXIV:5 which authorized only RTAs 'as between the territories of contracting parties', this agreement did not fall within the framework of Article XXIV. Thus, irrespective of the relationship between the procedures under Article XXIV:7 and Article XXIII, the EC could not rely on Article XXIV defense.[32]

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[29] *Ibid*, para 367.

[30] *Ibid*, paras 368-372.

[31] *Ibid*, paras 365 and 367.

[32] GATT Panel Report, *EEC – Import Regime for Bananas*, DS38/R, 11 February 1994, unadopted, paras 156-164.

In the WTO period, the justiciability issue was clarified to a significant degree. In *Turkey – Textiles*, Turkey claimed that its quantitative restrictions imposed on Indian textiles and clothing products were necessary to complete the formation of the Turkey-EC customs union, and thus justified under Article XXIV. The panel held that these measures arising from Article XXIV agreements (i.e. the customs union in the present case) were challengeable under dispute settlement procedures as provided for in paragraph 12 of the Understanding on the Interpretation of Article XXIV of the GATT 1994 (hereinafter the 'Understanding on Article XXIV'):[33]

> The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding 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 free-trade area. (emphasis added)

The panel, however, declined to make a GATT/WTO compatibility assessment of the entire customs union on the grounds that the matter would be within the CRTA's purview rather than the panel's jurisdiction. Moreover, the panel also considered that pursuant to the principle of judicial economy the compatibility assessment was not necessary to address India's claims. On this ground, it simply assumed *arguendo* that

[33] WTO Panel Report, *Turkey – Restrictions on Imports of Textile and Clothing Products*, WT/DS34/R, adopted 19 November 1999, paras 9.49-9.51.

the customs union was compatible with the requirements of Article XXIV:8(a) and 5(a), and moved on to examine the quantitative measures.[34] The Appellate Body disagreed with the panel and held that Article XXIV justification for an illegal WTO measure was valid provided that the following conditions were met:

> First, the party claiming the benefit of this defence must demonstrate that the measure at issue is introduced upon the formation of a customs union that fully meets the requirements of subparagraphs 8(a) and 5(a) of Article XXIV. And, second, that party must demonstrate that the formation of that customs union would be prevented if it were not allowed to introduce the measure at issue. Again, both these conditions must be met to have the benefit of the defence under Article XXIV.[35]

Accordingly, the Appellate Body 'would expect a panel, when examining such a measure, to require a party to establish that both of these conditions have been fulfilled', because 'it may not always be possible to determine whether not applying a measure would prevent the formation of a customs union without first determining whether there is a customs union'. Since the panel's avoidance of RTA's overall consistency with Article XXIV was not appealed, the Appellate Body

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[34] *Ibid*, paras 9.52-9.55.

[35] WTO Appellate Body Report, *Turkey – Restrictions on Imports of Textile and Clothing Products (Turkey – Textiles)*, WT/DS34/AB/R, adopted 19 November 1999, para 58.

did not consider this issue.[36]

Frieder Roessler criticized the Appellate Body's approach for impairing the institutional balance among the WTO's legislative branch (WTO membership as a whole), the executive branch (political organs such as the CRTA), and the judiciary (panels and the Appellate Body). He suggested that panels should confine their analysis to a measure implementing the RTA and the question of whether the RTA as such may provide an Article XXIV justification for the implementation measure without carrying out a WTO-compliance test for the entire RTA. According to him, this would secure the rights of a complaining party under the dispute settlement procedures while not undermining the CRTA's surveillance authority.[37] Taking the same position, Youri Devuyst and Asja Serdarevic proposed to amend the Understanding on Article XXIV so as to limit the scope of dispute settlement to RTA specific measures only.[38] However, we consider this 'measure-only' approach irrelevant today and in fact very risky because it would rule out any possibility to screen the legality of RTAs. Indeed, as observed above the new transparency mechanism considers RTAs without looking into their legitimacy.

2) Avoidance Techniques

Notwithstanding the Appellate Body's call for panels to check

[36] *Ibid*, paras 59-60.

[37] Roessler, above n 4, at 344.

[38] Devuyst and Serdarevic, above n 5, at 70-72.

whether the RTA at issue 'fully meets' the WTO requirements, this issue has, to a great extent, been avoided in WTO practice. In *Turkey – Textiles*, the panel's refusal to examine the compatibility of the EU-Turkey customs union with Article XXIV was based on its alleged lack of jurisdiction. Since the panel's mere assumption of the validity of the customs union was not appealed, the Appellate Body did not embark upon the compatibility test.[39]

In *Argentina – Footwear (EC)*, the panel considered whether customs union members could apply safeguard measures in intra-regional trade. In particular, it referred to the requirement of Article XXIV:8 to eliminate 'other restrictive regulations of commerce' with respect to 'substantially all the trade' and the possibility of gradual formation of the customs union, and concluded that these factors left MERCOSUR countries including Argentina with the option of imposing intra-trade safeguard measures.[40] The Appellate Body, however, reversed the panel's findings on the grounds that (1) Argentina did not rely on Article XXIV defense for violation of a GATT provision, and (2) the panel did not consider whether the safeguard measures had been introduced upon the formation of the customs union that fully meets the requirements of paragraphs 8(a) and 5(a) of the GATT.[41] However, the Appellate Body's reasoning is partly doubtful, as the panel report records

[39] WTO Appellate Body Report, *Turkey – Textiles*, above n 35, para 60.

[40] WTO Panel Report, *Argentina – Safeguard Measures on Imports of Footwear (Argentina – Footwear (EC))*, WT/DS121/R, adopted 12 January 2000, paras 8.96-8.102.

[41] WTO Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear (Argentina – Footwear (EC))*, WT/DS121/AB/R, adopted 12 January 2000, para 110.

clearly suggest that Argentina did in fact invoke Article XXIV.[42] Thus, only the second reason seems to be relevant here. In any event, since the panel failed to carry out the WTO-compatibility test (included in the second reason) and this issue was not appealed, the Appellate Body successfully avoided this issue.

In *Brazil – Retreaded Tyres*, Brazil imposed an import ban on retreaded import tyres while excluding MERCOSUR countries from this measure. Having found that the import prohibition was inconsistent with GATT Article XI:1 (general prohibition of quantitative restrictions) and was not justified under Article XX(b) (authorization of measures for the protection of human health and life), the panel found it unnecessary to examine the EC's separate claims under GATT Articles I:1 and XIII:1 and corresponding defense by Brazil under Article XXIV and XX(d) of the GATT.[43] The EC later appealed this matter and requested the Appellate Body to complete the legal analysis on these issues (including the alleged justification under Article XXIV) in case that the Appellate Body upholds certain panel conclusions. As the Appellate Body reversed the relevant panel's finding and thus the condi-

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[42] WTO Panel Report, *Argentina – Footwear (EC)*, above n 40, para 8.93:
Argentina claims that it could not impose safeguard measures against imports from other MERCOSUR countries because Article XXIV of GATT as well as secondary MERCOSUR legislation prohibit it from doing so. With respect to Article XXIV of GATT, Argentina emphasises that Article XIX of GATT is not listed in Article XXIV:8(a)(i) or (b) of GATT among the exceptions from the requirement to abolish all duties and other restrictive regulations of commerce on substantially all trade between the constituent territories of a customs union or a free-trade area. Therefore, it is, in Argentina's view, incompatible with the purpose of Article XXIV:8 of GATT to impose safeguard measures within the MERCOSUR customs union.

[43] WTO Panel Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/R, adopted 17 December 2007, paras 7.454-7.456.

tion on which the EC's appeal was predicated was not fulfilled, the Appellate Body declined to complete the legal assessment, though it criticized the panel for exercising judicial economy.[44] Accordingly, the panel's exercise of judicial economy and the Appellate Body's refusal to consider the conditional appeal left the Article XXIV issue un-tackled, even though the EC criticized the panel 'for not verifying' whether MERCOSUR is a valid customs union within the meaning of Article XXIV,[45] and the EC and Brazil submitted conflicting views on this issue.[46]

In *US – Line Pipe Safeguards*, the panel held that exclusion by the US of imports from Canada and Mexico (the US partners in the NAFTA) from global safeguards might be authorized by Article XXIV as a measure necessary for elimination of 'other restrictive regulations of commerce' within the NAFTA, provided that the NAFTA complies with paragraphs 5 and 8 of Article XXIV. It was for the US, the party relying on Article XXIV defense, to bear burden of proof for demonstrating the compliance.[47] In this regard, the US argued that the NAFTA provided for elimination of all duties on 97% of the parties' tariff lines representing more than 99% of trade flows, and with respect to eliminating 'other restrictive regulations of commerce' the NAFTA applied

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[44] WTO Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres (Brazil – Retreaded Tyres)*, WT/DS332/AB/R, adopted 17 December 2007, paras 255-257.

[45] *Ibid*, para 32.

[46] *Ibid*, paras 47-50 (EC's submission) and paras 76-81 (Brazil's submission).

[47] WTO Panel Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea (US – Line Pipe)*, WT/DS202/R, adopted 8 March 2002, para 7.142.

'the principles of national treatment, transparency, and a variety of other market access rules to trade among the Parties'. In support of this, the US referred to several documents submitted to the CRTA for review.[48] Korea (complainant) claimed, however, that the NAFTA failed to comply with Article XXIV:8 because of the absence of a final decision of the CRTA on this matter.[49] The panel sided however with the US saying that:

> In our view, the information provided by the United States in these proceedings, the information submitted by the NAFTA parties to the Committee on Regional Trade Agreements ('CRTA') (which the United States has incorporated into its submissions to the Panel by reference), and the absence of effective refutation by Korea, establishes a prima facie case that NAFTA is in conformity with Article XXIV:5(b) and (c), and with Article XXIV:8(b). Concerning Article XXIV:8(b), we 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.[50]

Accordingly, the panel simply relied on evidence of *prima facie* compliance, by virtue of absence of a rebuttal, without reviewing, on its own, whether the NAFTA was indeed an agreement within the sense

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[48] *Ibid.*
[49] *Ibid,* para 7.143.
[50] *Ibid,* para 7.144.

of Article XXIV which could justify the US measures. Later, Korea appealed the panel's finding that the US could rely on Article XXIV defense. However, the Appellate Body found the panel's conclusion 'moot' and with 'no legal effect' because the exceptions under Article XXIV would have been relevant if the parallelism requirement had been met. As the Appellate Body already found the US measures as inconsistent with the parallelism requirement, it declined to rule on whether Article XXIV defense was available to the US. Obviously, the Appellate Body avoided consideration of the Article XXIV issue raised by Korea by exercising judicial economy, though this stance would run counter to DSU Article 17.12 which requires the Appellate Body to 'address each of the issues raised … during the appellate proceeding'. Another critical point is that the Appellate Body failed to explain why only 'parallel' safeguard measures are eligible for Article XXIV defense. In any event, if parallelism is indeed a separate requirement and if RTA members could rely on Article XXIV to justify any GATT violation, it would not be irrational to invoke Article XXIV for non-compliance with the parallelism requirement under the Safeguards Agreement that in turn elaborates GATT Article XIX.[51]

3) Remedies for WTO-Inconsistent RTAs

The issue of remedies for RTAs not consistent with the WTO has not been explored yet, and seems to be theoretical at this moment. How-

[51] See Joost Pauwelyn (2004), "The Puzzle of WTO Safeguards and Regional Trade Agreements," *Journal of International Economic Law,* Vol. 7, pp. 121-123.

ever, given the rapid proliferation of RTAs and their growing implications for the multilateral trading system and trade interests of particular countries, this issue has all the potential for exploding into a major issue in the future. It is clear that remedies will be pursued through the judicial review track. From our perspective, they will vary depending on (1) whether a dispute is brought against an RTA per se (i.e. when the complainant challenges the RTA itself), or (2) whether a particular RTA-related measure is complained of. Although we admit that the first case seems less likely to materialize than the second one,[52] it still needs to be addressed to give a broader picture of all possible remedies. Moreover, it is not ruled out that a single complaint may question the validity of *both* an RTA and a related measure.

The first situation above raises a question as to whether the RTA per se would be treated as a triable 'measure' for the WTO litigation purposes.[53] Normally, WTO dispute settlement procedures have been a legal avenue for challenging domestic measures such as national laws, regulations or practices. To our knowledge, however, no treaty as such has so far been complained of before WTO panels. Nonetheless, the language inscribed in paragraph 12 of the Understanding on Article XXIV (DSU procedures may be invoked with respect to 'any matters arising from the application of … Article XXIV') and the Appellate

[52] One study explains WTO members' reluctance to challenge RTAs before panels with, inter alia, disinterest in rule clarification through litigation that may work against its own RTA, lack of trust in the panel's ability to properly handle the WTO-compatibility issue (given the absence of precedents and ambiguity of WTO language on RTAs), cost of litigation etc. For details, see Mavroidis, above n 3, at 207-212.

[53] See e.g. DSU Articles 3.3, 4.2 and 6.2

Body's findings in *Turkey – Textiles* indicating panel's jurisdiction for a WTO-compatibility test seem to indicate that an RTA as such can, in principle, qualify as a triable 'measure'.[54] If a case involving such a measure ever arises, what would be a remedy for an RTA found to be inconsistent with WTO rules? It appears that the Dispute Settlement Body (DSB) would confine itself to a standard recommendation that the responding member (or several RTA parties who are targeted on the same charge) bring the measure (RTA) into conformity with the relevant WTO rules without specific suggestions as to the ways for implementing its recommendation. The responding country will have several implementation options such as proper rectification of the RTA which would require a collective action of all RTA parties, discontinuance of its participation in the RTA, obtaining WTO's approval under GATT Article XXIV:10, or other appropriate steps to end the dispute.

As for the second situation, if an RTA is found to be a 'failed' justification for an illegal measure on the grounds that the RTA does not fully comply with the relevant WTO provisions, then the alteration or withdrawal of the illegal measure at issue would suffice to implement the DSB's ruling. However, if the case is brought against both the RTA and related measure, then the implementation options considered in the preceding paragraph would also be required.

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[54] In this context, it is remarkable that a Uruguay Round proposal to explicitly limit judicial review of RTAs to specific measures implementing RTAs was not reflected in the final version of the Understanding on Article XXIV. For the proposal, see GATT, Uruguay Round – Trade Negotiations Committee – Communication from the European Communities, MTN.TNC/W/125 (13 December 1993).

Ⅳ. Some Reflections on Further Clarification and Improvement

1. Factual Presentations and Litigation

Paragraph 10 of the 2006 Decision provides that '[t]he 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'. This clause raises two questions as to (1) whether it precludes a disputing party from invoking the relevant information in support of its claims or arguments, and (2) whether panels themselves are allowed in their assessments to rely on the Secretariat's factual presentation. Obviously, the answer to these questions hinges upon what should be understood by the meaning of the word 'basis' for dispute settlement.

With respect to the first question, a complaint that initiates a case in the WTO can be said to be 'a basis for dispute settlement procedures'. Thus, the Secretariat's factual presentation as such should not be used to trigger litigation procedures against an RTA or RTA-related measure. Even if a complaining party submits the factual presentation as supplementary information, the submission itself should not serve as the main evidence supporting the complaint. From this perspective, the non-invocation clause in the 2006 Decision applies to the complaining party at the case-initiation stage, but it is still unclear whether it will apply *during the ongoing* dispute settlement process. In order to clarify

this matter, we will see the litigation practice involving materials before the Trade Policy Review Mechanism (TPRM) and the CRTA.

Paragraph 10 of the 2006 Decision largely reiterates section A(i) of the TPRM which states that the TPRM 'is not … intended to serve as *a basis* for the enforcement of specific obligations under the [WTO] Agreements or *for dispute settlement procedures*' (emphasis added). In several cases, the parties to dispute referred to certain findings of a Secretariat's Report to the TPRM in support of their assertions. However, when it came to the complainant's invocation of the Secretariat Report, the responding party was normally opposed to such invocation.[55] Moreover, in *Chile – Price Band System* and *Canada – Aircraft*, the panel explicitly refused to take account of trade policy review reports cited by the complainant pointing to the requirements of the above-mentioned section A(i).[56] Accordingly, this practice suggests that trade policy review reports do not serve as evidence to substantiate legal findings, though some scholars opined to the contrary.[57]

As to RTA-related litigation practice, in *Brazil – Retreaded Tyres*, both parties to the dispute referred to submissions to the Committee on Trade and Development in order to prove (non)compliance of

[55] See e.g. WTO Panel Report, Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products (Chile – Price Band System), WT/DS207/R, adopted 23 October 2002, paras 4.50 and 4.109; WTO Panel Report, Canada – Measures Affecting the Export of Civilian Aircraft (Canada – Aircraft), WT/DS70/R, adopted 20 August 1999, paras 6.198-6.200 and 6.342.

[56] WTO Panel Report, Chile – Price Band System, above n 55, footnote 664 to para 7.95; WTO Panel Report, Canada – Aircraft, above n 55, paras 8.14 and 9.274.

[57] See e.g. Rüdiger Wolfrum, Peter-Tobias Stoll and Karen Kaiser eds (2006), *WTO – Institutions and Dispute Settlement* (Leiden: Martinus Nijhoff Publishers), pp. 626-627.

MERCOSUR with the internal and external requirements under Article XXIV of the GATT.[58] In *US – Line Pipe*, the US referred to the notification of the NAFTA and relevant submissions to the CRTA to prove that the NAFTA is a WTO-compatible FTA.[59] However, the invoked materials were not the factual presentations prepared by the Secretariat, but RTA members' submissions to the CTD or the CRTA. Moreover, the second case was settled before the establishment of the transparency mechanism for RTAs, and in the first case no factual presentation under the 2006 Decision was released at that moment. Thus, dispute settlement involving RTAs does not shed much light on the non-invocation requirement, so there is a need to wait and see what future developments on this issue will be.

Hence, only trade policy review cases have the potential to serve as a benchmark for interpreting the non-invocation clause of the 2006 Decision, albeit with three important caveats. First, in its reports the Secretariat does not only provide factual information, but may also have its own conclusion concerning consistency of certain measures with WTO rules.[60] In contrast, the factual presentations under the 2006 Decision are by definition of factual nature only. More importantly, the Secretariat 'shall refrain from any value judgement' – something which is not required under the TPRM. Second, the Secretariat draws up a report

[58] WTO Appellate Body Report, *Brazil – Retreaded Tyres*, above n 44, footnote 73 to para 47 and footnotes 98-101 to para 79.

[59] WTO Panel Report, *US – Line Pipe*, above n 47, para 7.142.

[60] See e.g. WTO (2009), Trade Policy Review Body – Trade Policy Review – Report by the Secretariat – Kingdom of Morocco, WT/TPR/S/217 (20 May), para 16, where the Secretariat opines that Morocco still maintains a VAT regime that does not respect the principle of national treatment.

'on its own responsibility, based on the information available to it and that provided by the Member or Members concerned'.[61] This implies that the Secretariat may seek information from sources other than the member(s) concerned, provided that it seeks 'clarification from the Member or Members concerned of their trade policies and practices'.[62] Secretariat's factual presentations on RTAs, by contrast, '*shall be primarily based* on the information provided by the parties; *if 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*'.[63] The emphasized words suggest that the Secretariat's discretion in fact-finding for the RTA factual presentations is more limited than that for the TPRM purposes. Finally, while no dispute under the TPRM may be brought in the WTO,[64] measures taken by WTO members' under and with respect to the transparency mechanism remain triable in litigation procedures.[65] Given these differences, the trade policy review cases do not seem to offer clear-cut guidance on the interpretation of the 2006 Decision's non-invocation requirement. Unless further clarification through follow-up rule-making or litigation demonstrates to the con-

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[61] Section C(v)(b) of the TPRM.

[62] Section C(v)(b) of the TPRM.

[63] Paragraph 9 of the 2006 Decision (emphasis added).

[64] The DSU rules and procedures apply to the covered agreements listed in Appendix 1 of the DSU with the TPRM not mentioned in the list.

[65] The 2006 Decision elaborates the transparency provisions of Article XXIV of GATT 1994, the Understanding on Article XXIV, Article V of GATS and the Enabling Clause that in turn are included into the 'covered agreements' (the Understanding on Article XXIV and the Enabling Clause are incorporated into the GATT 1994 pursuant to the latter's paragraphs 1(b)-(c)).

trary, we can assume that at least the responding party who invokes e.g. Article XXIV as defense may rely on factual presentation. The factual presentation invoked in this way will hardly constitute the 'basis' for dispute settlement which we deem to mean the initiation of dispute settlement.

With respect to the second question, panels can consider at least those Secretariat's factual presentations that have been invoked by the responding party. Even if one refers to the TPRM practice, it is remarkable that in the two cases above where the panel rejected to take into account trade policy review reports, the latter were invoked by the complainant (not respondent). In addition, panel's authority to consider factual presentations on RTAs seems to be endorsed by its obligation to 'objective assessment of the facts of the case' and the comprehensive right to 'seek information'.[66]

2. Notification and Litigation

Another contentious issue which seems not to have been explored in WTO litigation yet is whether Article XXIV (Article V or Enabling Clause) defense is conditioned to the RTA's notification, notably (1) whether an RTA party may invoke the agreement which has not been notified at that point, and (2) whether it can claim justification under one provision (e.g. Article XXIV) whereas the agreement concerned was notified under another provision (the Enabling Clause or GATS

[66] Articles 11 and 13 of the DSU.

Article V).

As concluded by the Appellate Body in *Turkey – Textiles*, the invocation of Article XXIV defense would require the demonstration of RTA's full compliance with the provisions of Article XXIV. In order for a customs union, FTA or a corresponding interim agreement to be consistent with Article XXIV, they 'must satisfy, *inter alia*, the provisions of paragraphs 5, 6, 7 and 8 of that Article'.[67] As the notification requirement is contained in paragraph 7 of Article XXIV, only properly notified RTAs would be eligible for a WTO-conformity test while RTAs not notified or notified with breach of paragraph 7 would *a priori* fail this test. On the same rationale, in order for RTAs in the services sector or among developing countries to qualify as falling within GATS Article V and the Enabling Clause respectively, they must meet the relevant notification requirements.[68] Given that the notification requirement for RTAs is further elaborated in the transparency mechanism, RTAs that do not meet the latter's standards could not serve as justification of a measure that has been targeted in WTO dispute settlement. Accordingly, the first question above as to whether an RTA party may invoke non-notified agreement in WTO litigation should be answered in the negative.

The second issue concerning RTAs notified and invoked under different legal provisions is also of crucial importance because the WTO-compatibility test would first require determination of an appropriate legal basis, i.e. the relevant provisions of the GATT, the GATS or the

[67] Paragraph 1 of the Understanding on Article XXIV.

[68] Article V: 7 of the GATS and paragraph 4 of the Enabling Clause.

Enabling Clause, and then review the RTA in the light of specific standards therein. In certain cases, however, notifying members and non-party members may not concur over the provision under which notification is to be done. This is especially true for agreements that are notified under the Enabling Clause. For instance, the Southern Common Market (MERCOSUR) was notified as a preferential arrangement under the Enabling Clause.[69] While many developing countries expressed their support for the MERCOSUR's notification under the Enabling Clause pointing to the 'South-South' nature of the agreement and S&D treatment contemplated by the Enabling Clause, a number of developed countries led by the US opined that the MERCOSUR treaty as an interim agreement leading to the formation of a customs union would fall within the scope of GATT Article XXIV.[70] At the end, the compromise was found in that MERCOSUR was subject to review under both the Enabling Clause and Article XXIV.[71] Another possibility to challenge invocation of the Enabling Clause may be questioning the developing country status of signatory parties. Thus, each notification under the Enabling Clause, which has arguably more flexible and looser intra-trade liberalization standards to comply with, may potentially be questioned in the future. In contrast, notifications under GATS Article V seem to be less problematic because RTAs in services do not overlap

[69] GATT (1992), Latin American Integration Association, L/6985 (5 March).

[70] See e.g. GATT (1992), Council – 14 July 1992 – Minutes of Meeting – Held in the Centre William Rappard on 14 July 1992, C/M/258 (4 August), at 34-46.

[71] See WTO (2003), Committee on Trade and Development – Legal Note on Regional Trade Arrangements under the Enabling Clause – Note by the Secretariat, WT/COMTD/W/114 (13 May), para 47.

with RTAs under the GATT and the Enabling Clause in terms of their subject matter.[72] Given the lack of clear guidance on handling controversies over the legal basis issue, this matter will be resolved on a case-by-case basis.

The matter of an appropriate legal basis is especially important in the context of WTO dispute settlement involving RTAs. For instance, in *Argentina – Footwear (EC)* and *Brazil – Retreaded Tyres*, Article XXIV was invoked as justification for illegal measures, though neither the panel nor the Appellate Body took into account the assertion of the third party (US) that MERCOSUR was notified under the Enabling Clause and Article XXIV defense was allegedly not relevant in these cases.[73] Since MERCOSUR was subject to the multilateral review in the light of both the Enabling Clause and Article XXIV, it could be said that reliance on Article XXIV is justified to some extent. Nonetheless, from our standpoint, MERCOSUR's exceptional case of being subject to review under different provisions is not an example to be followed in the future. If notification is questioned, the members should agree to follow one out of the three provisions, i.e. GATT Article XXIV, GATS Article V or the Enabling Clause. Finally, there should be a link between the notification and invocation of legal defense in WTO litigation, and this link should explicitly be recognized in rules.[74] Thus, WTO-inconsistent

[72] Even if the same RTA comprising both goods and services is notified in parallel under the GATT/Enabling Clause on the one hand and the GATS on the other, the notification will concern only the provisions dealing with goods and services respectively.

[73] See WTO Appellate Body Report, *Argentina – Footwear (EC)*, above n 41, para 65; WTO Appellate Body Report, *Brazil – Retreaded Tyres*, above n 44, para 116.

[74] Although paragraph 4 of the 2006 Decision states that '[i]n notifying their RTA, the parties shall

measures should be eligible for RTA justification pursuant to the provision under which notification took place, or else the effect of double standards or 'rule shopping'[75] may arise.

3. Post-Formation Monitoring System?

The newly instituted transparency mechanism covers the stages from the 'pre-establishment' of RTAs up to their full formation with subsequent ('post-establishment') notification of modifications made to the RTA concerned. In this respect, Youri Devuyst and Asja Serdarevic take the position that such subsequent notification and reporting lack in 'regularity in the timing of the submission of information' and 'a detailed reporting format', and that the transparency mechanism 'fails to set up a proper institutional framework for the permanent monitoring of RTAs'. They propose that subsequent notifications take place periodically (e.g. every five years), and a newly established CRTA's subcommittee review them. In other words, they appear to advocate the establishment of a permanent review mechanism that would monitor RTAs until they terminate.[76]

Admitting that a permanent monitoring of RTAs would strengthen transparency of members' regional trade policy, we are yet quite skep-

specify under which provision(s) of the WTO agreements it is notified', none of the current WTO disciplines require parallelism between the notification and legal defense.

[75] A WTO member may choose to invoke e.g. the Enabling Clause for an RTA that it notified under Article XXIV if it expects successful defense under the Enabling Clause rather than Article XXIV.

[76] See Devuyst and Serdarevic, above n 5, at 54-55.

tical about its feasibility and efficiency. In fact, the proposed idea is not new to the WTO and has already been incorporated into the Understanding on Article XXIV. Paragraph 9 of the Understanding requires notification of 'substantial changes in the plan and schedule' of an interim agreement, while paragraph 11 reads:

> Customs unions and constituents of free-trade areas shall report periodically to the Council for Trade in Goods, as envisaged by the CONTRACTING PARTIES to GATT 1947 in their instruction to the GATT 1947 Council concerning reports on regional agreements (BISD 18S/38), on the operation of the relevant agreement. Any significant changes and/or developments in the agreements should be reported as they occur.

The instruction mentioned in this passage was adopted in 1971 and required the GATT 1947 Council to establish a calendar fixing dates for biennial examinations of reports on RTAs. Such calendars were adopted up to 1987, and RTA parties used to report on the operation of their agreement until the full formation of the free trade area or a customs union.[77] This periodic reporting functioned independently of conventional multilateral reviews. The aforementioned passage has taken over this practice and together with paragraph 9 of the Understanding requires that all RTAs – whether at the pre- or post-formation stage – be subject to a periodic review. However, the WTO biennial re-

[77] GATT Analytical Index (1995), *Guide to GATT Law and Practice* (Geneva: WTO) Vol. 2, p. 815.

porting system has applied only to RTAs examined in the old GATT system, with virtually no practical effect on post-WTO notified RTAs.[78] Another shortcoming is that on several occasions, members have failed to respect the submission deadlines set forth in reporting calendars, giving rise to 'a backlog of reports'. Moreover, due to the overly burdensome workload, the CRTA decided to postpone biennial reporting obligations for the year 2003 to 2004.[79] This practice manifestly exemplifies the failure of the periodic reporting, and in this context it is doubtful that a permanent post-establishment monitoring system comprising both reporting and review would operate successfully. In fact, subsequent notification and reporting requirements of the new transparency mechanism have replaced 'the largely dysfunctional RTA biennial reporting schedule'[80] and concentrates only on changes affecting the implementation or operation of notified RTAs. Currently, the regular monitoring of RTAs in the post-formation stage seems to be operational only within the purview of the TPRM. Notably, trade policy reports prepared by both governments and the WTO Secretariat have separate sections dedicated to regional trade arrangements with the involvement of the country under review. Thus, at least extending the portion of RTAs in the overall trade policy reviews would contribute to increasing transparency in RTA-related national practices.

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[78] Roberto V. Fiorentino, Jo-Ann Crawford and Christelle Toqueboeuf (2009), "The Landscape of Regional Trade Agreements and WTO Surveillance," in Richard Baldwin and Patrick Low eds, *Multilateralizing Regionalism* (Cambridge: Cambridge University Press) p. 61, fn 77.

[79] WTO (2002), Committee on Regional Trade Agreements – Thirty-Third Session – Note on the Meeting of 12-13 November 2002, WT/REG/M/33 (2 December), para 9.

[80] Fiorentino, Crawford and Toqueboeuf, above n 78, p. 61.

In any event, the subsequent notification/reporting clause still needs further clarification. Notably, the required notification of changes must take place 'as soon as possible after the changes occur'. Two timing aspects should be specified: (1) the point in time from which the timing requirement commences (e.g. the date of signature or entry into force of an RTA modification), and (2) the point in time until which such notification is required (i.e. how 'soon' should the notification be made).

V. Conclusion

The WTO review mechanisms for RTAs are of interest to both the WTO as a whole, and individual member countries. For the WTO, these are useful tools to ensure that regional arrangements do not undermine the multilateral trading system. As for members including Korea, in the political track, they are given detailed information on each notified RTA, and they can raise their questions or make comments, ensuring that their voices and concerns are heard in a multilateral forum. In the judicial track, members may lodge complaints against troublesome RTAs in order to block their trade-distorting impacts. At the same time, members that are subject to political or judicial reviews are also given opportunity to inform the remaining membership of their RTAs and assure them their RTAs are indeed WTO-complementary in nature.

The transparency mechanism for RTAs is an 'early harvest' of the ongoing Doha Round and will be covered by a single undertaking once the negotiations end successfully.[81] With the adoption of this mechanism, WTO members have drawn a visible borderline between the jurisprudence of WTO's political bodies (CRTA and CDT) and that of dispute panels or the Appellate Body with respect to RTAs. Another important implication is that there is no more way for speculation as to whether CRTA's 'silence' on legality of notified RTAs suggests legal or

[81] See paragraphs 22-23 of the 2006 Decision.

illegal nature of the regional arrangement concerned.[82]

Yet, WTO members will have to review the transparency mechanism in light of the experience gained from its operation. Practice so far suggests that some members have had difficulty with tight time periods foreseen in the 2006 Decision and the provision of mandated data in the required format. The periodicity of data used in factual presentations and the legal relationship between the transparency mechanism and relevant WTO provisions concerning RTAs are other issues to be discussed within the framework of reappraisal of the transparency mechanism.[83]

Although great progress has been achieved, albeit provisionally, in the improvement of the RTA review procedures, the pending work on the clarification of substantive provisions ('systemic issues') should be accelerated. With the lack of clarity in the language of those provisions, panels will be likely to continue to avoid the WTO-conformity test. While in many instances, WTO jurisprudence has clarified obscure wording of standards enshrined in multilateral agreements, the interpretation of RTA-related rules seems to be too sensitive an issue for facile treatment by adjudicating bodies. Therefore, as one of the possible options we suggest that if the Doha Round negotiations fail to bring clarity into the existing rules, the WTO membership should recognize

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[82] In two cases, disputing parties held different views on this question, with Korea suggesting that CRTA's 'silence' is proof of WTO-inconsistency of an RTA (WTO Panel Report, *US – Line Pipe*, above n 47, para 7.143) and Brazil opposing such an interpretation (WTO Appellate Body Report, *Brazil – Retreaded Tyres*, above n 44, para 78).

[83] See paragraph 23 of the 2006 Decision, and Fiorentino, Crawford and Toqueboeuf, above n 78, at 63-64.

their inability to reach an agreement on the systemic issues[84] and explicitly re-ensure the interpretative authority of the dispute settlement bodies on WTO provisions dealing with regional trade, but of course, without prejudice to the exclusive authority of the Ministerial Conference or the General Council to adopt interpretations.[85] This will likely not only encourage judicial activism in the sphere of RTAs but also discourage possible criticism on another type of influences undermining institutional ba-lance in the field of rule-making and rule-interpretation.

[84] We assume that given the persistent lack of consensus on systemic issues and the increasing number of RTAs, after the Doha Round, members will have less chance (if any) to reach agreement on these controversial issues.

[85] See Article IX: 2 of the WTO Agreement.

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Regionalism within Multilateralism: WTO Review Mechanisms for RTAs

Sherzod Shadikhodjaev

Given different legal regimes which govern the global and regional trading systems, the WTO as such cannot stop the proliferation of RTAs. Nevertheless, the WTO can oversee them through its political and judicial review procedures. Notably, Article XXIV of the GATT, Article V of the GATS and the Enabling Clause contain certain procedural requirements for notification and multilateral review of RTAs concluded by WTO members (political track). In addition, RTAs may be challenged in WTO dispute settlement procedures (judicial track). This paper examines legal provisions and practice of the WTO review mechanisms, explores possible remedies for WTO-inconsistent RTAs, analyzes the transparency mechanism for RTAs, and in particular specific issues of linkage with the WTO judicial review procedures and the possibility of extending the scope of the transparency mechanism to the post-formation period of notified RTAs.

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