

**UNDERSTANDING REGIONALISATION AND PREFERENTIAL RELATIONS IN
WORLD TRADE LAW AND POLICY: A PERSPECTIVE FROM THE EAST AFRICAN
COMMUNITY (EAC).**

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DECLARATION.

I hereby certify that this is an original work done by me for submission in fulfilment of an LLM Degree in International Trade and Investment Law and it has not been printed nor submitted elsewhere or for any other purpose.

.....

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KEY WORDS

Trade-Regionalism- Multilateralism-World Trade Organization (WTO)/General Agreement on Tariffs and Trade (GATT)- Regional integration agreements (RIAs) - Most-Favoured Nation (MFN)- Regional Trade Agreement (RTAs)-Multilateral Trade Agreement (MTAs)-East African Community(EAC).



ABSTRACT

The rapid growth in the number of regional trade agreements (RTAs) has led to concern about the weakening of the multilateral trading system. This thesis examines the spread of such agreement and the extent to which they pose a threat to the multilateral system. Regionalism and multilateralism are complimentary as shown in the case study of the East African Community.

The current regional trade agreement management rules are weak and ambiguous and possible amendments for these rules are proposed.



CHAPTER 1

1.0. INTRODUCTION AND BACKGROUND.

The growth of regional trading Blocks—often known as regional integration agreements (RIAs) or Regional Trade Agreements (RTAs) is one of the major international relations developments of recent years and a much debated concept in World Trade Organization (WTO) circles.¹ These agreements have become so widespread that most WTO members are now also parties to one or more of them, and their scope, coverage and number are still growing.² The General Agreement on Tariffs and Trade (GATT) — and now the WTO, from its inception— has allowed member countries to conclude customs unions and free-trade areas, as an exception to the fundamental principle of non discrimination set out in the Most-favoured-nation clause of GATT’s Article 1.³ It is estimated that more than half of world trade is now conducted under RTAs.⁴ They are found in every continent.⁵ This evolution in the trade regime poses a number of questions. Among

¹ See, for example, the bulk of the literature reviewed in the following papers: Bhagwati J ‘Regionalism versus Multilateralism’ (1992) 15 *The World Economy* 5 540; Giorgia Albertin, *Regionalism or Multilateralism? A Political Economy Choice*, IMF Working Paper WP/08/65, International Monetary Fund (March 2008);L.Alan, Winters , *Regionalism versus Multilateralism*, Policy Research Working Paper 1687,The World Bank International Economic Department, International Trade Division (Nov 1996);and Bhagwati, J ‘Regionalism and Multilateralism: An Overview’ in Jaime, D , and Panagariya(eds) *A New Dimensions in Regional Integration* (1993) 22-57.

² Among the best known are the European Union, the European Free Trade Association (EFTA), the North American Free Trade Agreement (NAFTA), the Southern Common Market (MERCOSUR), the Association of Southeast Asian Nations (ASEAN) and its ASEAN Free Trade Area (AFTA), the Common Market of Eastern and Southern Africa (COMESA), and the East African Community (EAC).

³ See ‘Hong Kong WTO Ministerial 2005: Briefing Notes.Rules: Regional Agreements Building Blocks or Stumbling Blocks?’ available at <http://www.wto.org/english/thewto-e/minist-e/min05-e/brief-e/brief09-e.htm>. (accessed 6 September 2010).

⁴ See ‘Hong Kong WTO Ministerial 2005: Briefing Notes. Rules: Regional Agreements Building Blocks or Stumbling Blocks?’

⁵ The surge in RTAs has continued unabated since the early 1990s. As of 31 July 2010, some 474 RTAs worldwide counting goods and services notifications separately, have been notified to the GATT/WTO. Of these, 351 RTAs were notified under Article XXIV of the GATT 1947 or GATT 1994; 31 under the Enabling Clause; and 92 under Article V of the GATS. At that same date, 283 agreements were in force. The overall number of RTAs in force has been increasing steadily, a trend likely to be strengthened by the many RTAs currently under negotiation. Of these RTAs, Free Trade Agreements (FTAs) and partial scope agreements account for 90%, while customs unions account for 10% available at <http://www.wto.org/english/thewto-e/minist-e/min05-e/brief-e/brief09-e.htm>. (accessed 6 September 2010).

these is the overriding issue of the implication of regionalism for the world trading system and its goals of multilateralism? What has been the impact of such regional agreements? What are the legal constraints and discipline of the WTO system in order to avoid erosion of the Most-Favoured Nation (MFN) Status of member states? And lastly, how are WTO member states supposed to honour their rights and obligations attached to these combinations (regionalism and multilateralism) which are not always easy to distinguish since some people argue that they are based on healthy complementarity while others see them as conflictual.⁶

Regional integration agreements can be studied from different angles. In this thesis, the focus is on the EAC region and the purpose is to undertake a brief overview of the different types of RTAs in order to assess the relationship between regional and multilateral liberalization and to consider the future of regionalism. Central to the thesis is the view that regional and multilateral liberalization has generally been a positive story. The focus of the thesis is on trade. Although it is true that the challenges facing the multilateral and regional trading system goes well beyond the traditional definition of trade which the thesis does not discuss. This thesis argues that changes to effectuate a more concrete and viable management of RTAs in the multilateralised system is necessary. It then examines and reviews proposals in the WTO aimed at modifying Article XXIV of GATT and possibly Article V of GATS.⁷

1.1. PROBLEM STATEMENT.

As the number of regional agreements increases, so does the need to analyze whether the WTO's rules on these agreements need to be clarified further. WTO members differ on whether regional agreements help or hinder the multilateral trading system — whether they function as “building

⁶ A divergence in the views of trade economists exists. Whereas Fred Bergsten and Lawrence Summers are strong supporters of bilateralism/regionalism, others including Bhagwati, Panagariya are sceptical about RTAs (see Bhagwati J *Termites in the Trading system: How preferential Agreements undermine Free Trade* (2008) 50.

⁷ See *Compendium of Issues Related to Regional Trade Agreements*, Negotiating Groups on Rules, World Trade Organization, August 1, 2002, TN/RL/W/8/Rev. 1(02-4246) which offers a short summary of an extensive debate held mainly in the Committee on Regional Trade Agreements. A more comprehensive, though somewhat outdated, account can be found in the document WT/REG/W/37, entitled *Synopsis of "Systemic" Issues Related to Regional Trade Agreements*, of 2 March 2000.

blocs” or “stumbling blocs”.⁸ One view is that the regional agreements strengthen the multilateral system because they can move faster, and because they can help integrate developing countries into the world economy.⁹ Other countries believe that the WTO’s rules should be revised— and not just reinterpreted — so that the two systems can work together better, particularly since the number of agreements has increased, and their membership has increasingly overlapped.¹⁰ At the Doha Ministerial Conference in November 2001, for example, WTO members agreed to give a political push to this question and to negotiate a solution, giving due regard to the role that these agreements can play in fostering development.¹¹ The issues raised by the regionalism debate are complex. Some are primarily **legal**. For example, GATT Article XXIV requires that a regional trade agreement should cover “**substantially all the trade**” in goods between its members. Similarly, GATS Article V calls for a “**substantial sectoral coverage**” in services. But there is no agreement among members on what this means. In *Turkey –Restrictions on Imports of Textile and Clothing Products* (hereinafter *Turkey – Textiles*) case,¹² the Panel expressed the view that “the ordinary meaning of the term “substantially” in the context of sub-paragraph 8(a) appears to provide for both qualitative and quantitative components”. The Appellate Body confirmed this view stating that the test in Article

⁸ See ‘Hong Kong WTO Ministerial 2005: Briefing Notes. Rules: Regional Agreements Building Blocks or Stumbling Blocks?’ The relationship between regionalism and multilateralism has become a critical systemic issue, reflected in the WTO Regional Trade Agreements Committee’s increasing backlog of uncompleted reports and its lack of consensus on the broader question of the consistency between regional agreements and WTO rules.

⁹ See *WTO News 1995 press Releases Press/10 18 April 1995*. It is noted that no evidence of polarization of world Trade among the “blocs” and no clash between world and regional trade system. Thus “the regional and multilateral integration initiatives are compliments rather than alternatives in the pursuit of open trade available at <http://www.wto.org/english/thewto-e/minist-e/min05-e/brief-e/brief09-e.htm> (accessed 6 September 2010).

¹⁰ These are among the main conclusions of a study, *Regionalism and the World Trading system*, published by the WTO Secretariat, in Geneva. However, commenting on the WTO rules and procedures governing regional integrations, the study says:

‘[I]t may be that governments will consider that reforms are necessary in order to put the mutually supportive relationship between multilateralism and regionalism on a more solid foundation.’

¹¹ The ministerial declaration mandates negotiations aimed at ‘clarifying and improving disciplines and procedures under the existing WTO provisions applying to regional trade agreements. The negotiations shall take into account the developmental aspects of regional trade agreements.’

¹² Appellate Body Report, adopted on 19 November 1999 (WT/DS34/AB/R).

XXIV.8 required a certain percentage of trade to be liberalized and also the non-exclusion of any major sector of economic activity. This test offered some flexibility. The word “substantial” did not mean “all”, but it required “something considerably more than merely *some* of the trade.” In practice however, many agreements leave out large and sensitive areas such as agriculture and financial services.¹³ This poses difficulties for assessing whether the agreements are consistent with WTO rules.¹⁴ Other issues are more **institutional** in nature. They highlight possible discrepancies between the regional agreements’ rules and those of the WTO. The focus in negotiations has shifted over time from tariff reductions to rules and regulations, both at the regional and at the multilateral level — for instance, rules on anti-dumping, subsidies, or product standards. Some recent regional agreements include provisions not covered by the WTO at all, such as investment or competition policies.¹⁵

Finally and most importantly, there is the **economic dimension**. Today, this goes far beyond the effects of tariff preferences on members and non-members of regional agreements. Rather, this is

¹³ WTO rules require that each member accord Most Favoured Nation (MFN) status to other WTO members. However, GATT Article XXIV allows exceptions to the MFN principle for RTAs so long as they meet certain conditions. First, the agreement must lower trade barriers within the regional group. Second, the agreement cannot raise trade barriers against non-participating members. Third, the agreement is supposed to cover substantially all trade among the RTA partners. In reality, RTA participants seldom meet all these conditions. Moreover, the trade coverage of many RTAs is incomplete with many “sensitive” sectors exempted from trade liberalization. That situation is especially true with respect to agriculture.

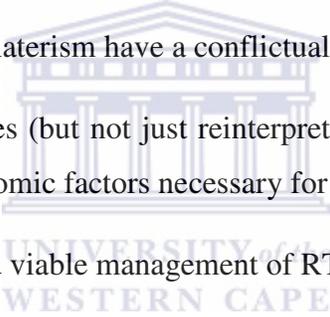
¹⁴ On the other hand, while the status of a WTO Member remains unchanged by the mere fact that it becomes party to an FTA, the legal standing of WTO Members which become parties to a customs union seems less clear. The question is whether in the latter case WTO obligations continue to subsist and operate at the level of the original customs territories. It has been argued that a new legal entity is created when customs territories form a customs union, on the ground that a new commercial policy *vis-à-vis* third countries is then to be established.

¹⁵ According to the UNCTAD (2005), of the 300-odd bilateral and regional trade agreements in force or in negotiation, over 100 contain provisions related to competition policy. The main reason is to ensure that efforts to liberalize trade by eliminating border barriers are not undercut by restrictive practices behind the border. A number of actual or proposed bilateral and regional agreements, such as NAFTA and the Free Trade Area of the Americas already contain sections on competition policy. The aim of those pushing for competition policy to be included in free trade agreements is to curtail the discretion and flexibility of host governments in regulating the entry and operations of foreign firms, and to prevent any favourable treatment being given to domestic firms. Meanwhile, the EU has also been criticized for insisting on the inclusion of competition policy in its Economic Partnership Agreements (EPAs) with African, Caribbean and Pacific countries. Malaysia’s competition policy has also been a significant point of friction in FTA talks with Washington. (See UNCTAD publication entitled “*Competition Provisions in Regional Trade Agreements: How to Assure Development Gains*”, which was launched at the Fifth UN Conference held in Antalya, Turkey in November 2005).

now a question of the regional agreements' impact on the shape and development of world trade itself — given their large and increasing number and their overlapping membership. Over the next few years, this will be one of the most important challenges facing trade policymakers in all continents and therefore changes to effectuate a more concrete, viable management of RTAs in the multilateralised system are necessary.

1.2. RESEARCH QUESTIONS.

Divergences in the views of both trade economists and lawyers on whether regional agreements help or hinder the multilateral trading system — whether they function as “building blocs” or “stumbling blocs” pinpoints to the long struggle between the proponents of the two schools of thought. It is hypothesized that regionalism and multilateralism are complimentary. The present study will be concerned with the following research questions:

- 
- i) Does regionalism and multilateralism have a conflictual or complimentary relationship?
 - ii) Is the revision of WTO rules (but not just reinterpretation) taking into account political, legal, institutional and economic factors necessary for :
 - a) A more concrete and viable management of RTAs in the multilateral system?
 - b) Enabling the two systems (regionalism and multilateralism) to work together better?

1.3. AIMS OR OBJECTIVES OF THE RESEARCH.

As stated above, like it or not, RTAs are here to stay and have therefore become so widespread that most WTO members are now also parties to one or more of them, and their scope, coverage and number are still growing. Further, issues raised by the regionalism debate are very complex ranging from legal, institutional and finally economic. The aims of the study are:

- a) To show that only changes in the WTO legal management of RTAs, taking into account institutional, political and economic factors of regionalism and standard interpretation of the legal provisions thereof will actually ensure a complimentary relationship between regionalism and multilateral objective in world trade law and policy.

- b) To explore the deficiencies in the WTO's legal framework for managing RTAs, focusing exclusively on the shortcomings of Article XXIV of the GATT, and Article V of the GATS which are the most controversial and ineffectual.
- c) To discuss the futile process by which countries notify RTAs to the WTO, and examine what is being done to address this problem, reviewing proposals in the WTO aimed at modifying Article XXIV GATT and possibly Article V of GATS and;
- d) Finally to outline how the WTO member states could honour their rights and obligations attached to regionalism and multilateralism in a beneficial way using the East Africa Community as a case study.

1.4. SCOPE OF THE STUDY.

RTAs have become so widespread that most WTO members are now also parties to one or more of them, and their scope, coverage and number are still growing. Currently there are 474 RTAs worldwide. Among the best known are the European Union, the European Free Trade Association (EFTA), the North American Free Trade Agreement (NAFTA), the Southern Common Market (MERCOSUR), the Association of Southeast Asian Nations (ASEAN) and its ASEAN Free Trade Area (AFTA), the Common Market of Eastern and Southern Africa (COMESA), and the East African Community (EAC). The study of all these needs more time and resources and in order to achieve the objectives of the study stated above, this study will focus on the East African Community (EAC).

1.5. METHODOLOGY OF STUDY.

The literature on regionalism versus multilateralism is growing as economists and political scientists grapple with the question of whether regional integration arrangements are good or bad for the multilateral system. Are regional integration arrangements “building blocks, or stumbling blocks,” in Jagdish Bhagwati's phrase,¹⁶ or stepping stones toward multilateralism? As

¹⁶ See Bhagwati, J 'Regionalism and Multilateralism: An Overview' in Jaime, D, and Panagariya (eds) *A New Dimensions in Regional Integration*.

economists worry about the ability of the World Trade Organization to maintain the GATT's unsteady yet distinct momentum towards liberalism, and as they contemplate the emergence of more regional agreements, the question has never been more pressing. A comparative analysis of the literature and the case study of the EAC will be conducted to evaluate the relationship between regional and multilateral trade liberalization.

1.6. THE IMPACT OF REGIONAL AGREEMENTS ON THE GLOBAL TRADING SYSTEM.

1.6.1. Introduction.

The growing importance acquired by Regional Trade Agreements (RTAs) in the framework of international trading system over the last few decades has provoked an intense debate and questions regarding the capacity of the WTO, the central pillar of the multilateral trade system, to face the increasing number of RTAs in the world.¹⁷ These new developments in RTA formation have led to a renewed interest in RTAs, with many academics questioning the impact RTAs have had on members and third countries.¹⁸

1.6.2. WTO and Regionalism.

Almost a decade ago, the then Director General of the World Trade Organization (WTO) Mike Moore was concerned about the future of the World trade system when regional agreements were gaining popularity. His concerns were actually captured in his speech when he asked:

“Is there a risk that regionalism is becoming a stumbling –block, more than a building block, for the new WTO, draining energy from multilateral negotiations, fragmenting

¹⁷ See Roberta Benini and Micheal, G. Plummer ‘Regionalism and Multilateralism: Crucial issues in the debate on RTAs.’ From the Issue entitled: *The Political Economy of Regional Economic Integration: the Challenges for Emerging Economies*. [Electronic Version]. *Economic change and Restructuring* 41 November 4,267-287 available at <http://www.Sringerlink.com/content/h271416318446277/> (accessed 6 October 2010).

¹⁸ See Bhagwati, J ‘Regionalism and Multilateralism: An Overview’ in Jaime, D, and Panagariya (eds) *A New Dimensions in Regional Integration*.

internal trade, and creating a new international dis-order characterized by growing rivalries and marginalization and the possibility of hostile blocks?”¹⁹

His predecessor Renato Ruggiero had, in fact voiced a similar concern in 1996, when he wrote: “*Ensuring that regionalism and multilateralism grow together-and not apart-is perhaps the most urgent issue facing trade policy-makers today*”²⁰

These words spoken in 1996 could still be relevant today with the proliferation of RTAs among developing countries which have expanded, increased and in general gained a new momentum. Mike Moore and Renato Ruggiero were not questioning the importance or the value of RTAs; they were just concerned that the proliferation of regional trade agreements spurred by globalization may endanger the future of the world trade system that has been in place for decades.

The WTO Report, *The Future of the WTO*, has also criticized this proliferation of bilateral and regional trade agreements on the grounds that this has made the most-favoured nation ²¹ principle the exception rather than the rule, and has led to increased discrimination in the world trade. However, negotiations of such agreements have continued to progress.²² The question that then

¹⁹ ‘Globalizing Regionalism: A New Role for Mercosur in the Multilateral Trading System’ A Speech by Mike Moore, Director General, World Trade Organization, Buenos Aires, November 28, 2000 in Donald A. Calvert *How the Multilateral Trade System Under the World Trade Organization is Attempting to Reconcile the Contradiction & Hurdles posed by Regional Trade Agreements, An Analysis of the Article XXIV of the General Agreement on Tariffs & Trade*. (Unpublished Master’s Thesis, International Commerce & Policy Program School of Public policy George Mason University, Virginia, 2002).

²⁰ ‘Multilateralism and Regionalism in Trade’ by Renato Ruggiero, Director-General, World Trade Organization, US. Agency, Economic Perspectives, *WTO View*, November 1996:1.

²¹ Hereinafter abbreviated as MFN.

²² Minter Ellison ‘The Future of the WTO: Report by the Consultative Board to the WTO Director General’ Published March 31, 2005 – Australia available at http://www.hg.org/articles/article_677.html (accessed 6 October 2010).The report identifies the following as being the key challenges faced by the WTO: the wide misrepresentations in civil society discussions of the process of globalisation and the role of the WTO, **the threat to the non-discrimination corner stone of the WTO posed by the spread of preferential trade agreements (FTAs)**, decision-making within the WTO and further reform of the WTO’s dispute settlement system. The report is also highly concerned with the recent proliferation of preferential trade agreements (or more colloquially FTAs) and their impact on the most-favoured-nation (MFN) and national treatment principles of the WTO. It argues that the economic case for FTAs is suspect and that by promoting preferential market access between limited numbers of

follows is whether multilateralism and regionalism have a complementary or conflicting relationship. This depends on the understanding of the two terms. Borrowing from Allan Winter's definition, regionalism is any policy designed to reduce trade barriers between a subset of countries regardless of whether those countries are actually contiguous or even close to each other.²³ Lucian Cernat on the other hand defines regionalism as both an increase in intra-regional trade flows and in the number of RTAs.²⁴

Although it has no single definition, "multilateralism" in this context refers to trade conducted without discrimination throughout the world trade system.²⁵ Cae-One Kim, Former President, EUSA Asia-Pacific opines that regionalism has in fact overshadowed multilateralism and the distinction between the two is no longer meaningful.²⁶ According to Kim what is more pragmatic is to realize the goal of multilateralism by way of regionalism. Having simply defined the two terms, multilateralism and regionalism above, the question that still stands is whether RTAs by their nature are stumbling or building blocks?

countries they are invariably trade diverting. Moreover, the report warns that the "spaghetti bowl" of discriminatory preferences under FTAs makes the world trading system confusing for traders and has the potential to substantially increase transaction costs. The report recommends that FTAs be subject to more rigorous review and effective disciplines in the WTO and that the focus of governments should be re-directed to effectively reducing MFN tariffs and non-tariff measures in multilateral trade negotiations.

²³ Allan L. Winter *Multilateralism versus Regionalism*. Policy Research Working Paper No.1687, The World Bank International Economics Department, International Trade Division available at <http://www-wds-worldbank.org/server/WDSContentserver/WDSP/IB/1996/11/01/0000009265-3970>. (accessed 6 October 2010).

²⁴ Lucian, C 'Eager to ink, but ready to act? RTA proliferation and international cooperation on competition policy' in Philippe, B. et al. (eds). *Competition Provisions in Regional Trade Agreements: How to Assure Development Gains*. (2005)1-36.

²⁵ See World Trade Organization, *Trading into the Future*, 2 ed (2001) available at <http://www.wto.org/english/res-e/download-e/tif.pdf>. (accessed 6 October 2010). The principle of non-discrimination is one of the main reasons countries join the WTO. It provides for a "level-playing field" for all members to trade goods and services with one another.

²⁶ *Multilateralism and Regionalism in a Globalizing World: A Perspective from Asia-Pacific Region*. Keynote Speech by Cae-One Kim, Former President, EUSA Asia-Pacific, Visiting Professor, Graduate School of International Studies, Seoul National University, October 8, 2005:4 available at http://wwwsoc.nii.ac.jp/eusa-japan/download/eusa_ap/keynote_Cae-OneKim.pdf. (accessed 6 October 2010).

1.6.3. RTAs a stumbling or building block?

Whether regional agreements are *building blocks* or *stumbling blocks* to open global markets—the terms Jagdish Bhagwati used—remain a central question.²⁷ On the other hand are they stepping stones, in Baldwin phrase,²⁸ towards multilateralism? Are RTAs, supportive of the multilateral trading system (MTS) or do they undermine its effectiveness? A divergence in the views of trade economists exists. Whereas Fred Bergsten and Lawrence Summers are strong supporters of bilateralism/regionalism, others including Bhagwati, Panagariya are sceptical about RTAs.²⁹

Bhagwati,³⁰ in particular, has raised the question as to whether RTAs pose a threat to the multilateral trading system, and he has initiated a rapid growth in the economic literature on the subject.³¹ As pointed out in the methodology section of this research above, the literature on regionalism versus multilateralism is growing as economist and political scientists grapple with the question of whether regional integration arrangements are good or bad for the multilateral system. As economists worry about the ability of the World Trade Organization to maintain the expanded, increased and new momentum RTAs in the world, and as they contemplate the emergence of the world-scale regional integration arrangements (the EU, NAFTA, EFTA, MERCOSUR, ASEAN, and possibly EAC), the question has never been more pressing.³²

²⁷ See Bhagwati, J 'Regionalism and Multilateralism: An Overview' in Jaime, D, and Panagariya (eds) *A New Dimensions in Regional Integration*.

²⁸ Baldwin, R.E. *Stepping Stones or building blocs? Regional and multilateral integration*. Paper prepared for the G-20 Workshop on "Regional economic integration in a global framework", Sept 22-23 2004 organised by the European Central Bank and the People's Bank of China in Beijing.

²⁹ See Bhagwati J *Termites in the Trading system: How preferential Agreements undermine Free Trade* (2008) 50.

³⁰ See Bhagwati, J 'Regionalism and Multilateralism: An Overview' in Jaime, D, and Panagariya (eds) *A New Dimensions in Regional Integration*.

³¹ Jo-Ann Crawford & Sam Laird. *Regional Trade Agreements and the WTO*. Paper prepared for a meeting of the North American Economic and Finance Association in Boston, 6-9 January 2000.

³² See *Regional Trade Agreement gateway* available at <http://www.wto.org/english/thewto-e/minist-e/min05-e/brief-e/brief09-e.htm>. (accessed 6 September 2010).

Bhagwati views regionalism as weakening the supremacy of the multilateral system as the best solution for ensuring fair competition and equal opportunities for weak countries.³³

Winter on the other hand views regionalism as a means to bring trade partners to the multilateral negotiating table because it is essentially coercive.³⁴

Tiziana Bonapace argues that regionalism has come to offer governments of both developed and developing countries alike an attractive strategy to resolve issues that would be more difficult to resolve in wider multilateral context.³⁵ She further points out that all major trading countries belong to one, or more typically, two or three, RTAs or regional integration arrangements of some kind. Therefore, it would appear that trade on a most-favoured-nation basis is more likely to be the exception than the norm.³⁶

Bhagwati³⁷ and Krueger³⁸ express strong concerns about negative effects of growing regionalism and they worry that the RTAs divert attention from the multilateral trading system. Bhagwati stresses the benefits of free trade and rejects arguments about the need for an alternative to the multilateral trading system (MTS) for countries which wish to liberalize faster, regionalism as a supplement to MTS, regionalism to accelerate the MTS processes, and so on. Cae-One Kim further opines that what is more pragmatic is to realize the goal of multilateralism

³³ See Bhagwati J 'Regionalism versus Multilateralism' (1992) 15 *The World Economy* 5 540.

³⁴ Alan L. Winters, *Regionalism versus Multilateralism*. Policy Research Paper prepared for a conference on regional integration sponsored by the Centre for Economic Policy Research, Working Paper 1687, The World Bank International Economic Department, International Trade Division, La Coruna, Spain, Nov 26-27 (1996).

³⁵ Tiziana, B. *Multilateralism and Regionalism: Enhancing Integration of Developing Countries into the Multilateral Trading system through Regionalism*. A paper prepared by Ms Tiziana Bonapace, Economic Affairs officer, Trade Policy Section, International Trade and industry Division, ESCAP (undated). available at <http://www.unescap.org/tid/publication/chap1-2161.pdf> (accessed 6 October 2010).

³⁶ Tiziana, B. *Multilateralism and Regionalism: Enhancing Integration of Developing Countries into the Multilateral Trading system through Regionalism*.

³⁷ See Bhagwati J 'Regionalism versus Multilateralism' (1992) 15 *The World Economy* 5 540.

³⁸ Krueger, A. *Free Trade Agreements versus Customs Unions*, NBER, Working Paper No.50849 (1995).

by way of regionalism and the distinction between the two is unnecessary at this juncture.³⁹ On the other hand, Baldwin, concludes in his paper that regionalism, will foster multilateral liberalisation. He regards regionalism much more as a complement to multilateralism (building blocks rather than stumbling blocks).⁴⁰

Roberta Benini and Micheal G. Plummer in their paper,⁴¹ supports Mashayeki and Ito comments that:

*“It is an urgent task in the policy agenda to find possible solutions, ensure compatibility and coherence, and limit the phenomena of treaty congestion-overlapping and contradictions across agreements-that might put the multilateral trade system at risk.”*⁴²

Mikoi Kuwayana, Jose’ Dora’n Lima and Vero’nica Silva points out that the slow progress of the multilateral trading system has led to a wave of Regional Trade Agreements(RTAs) worldwide.⁴³ These agreements emerge as an opportunity for signatory countries, but they also generate concerns in relation to such aspects as their consistency with multilateral commitments and the broadening and deepening of free trade agreements (FTA) concessions beyond those assumed in WTO(i.e.,WTO-Plus disciplines).⁴⁴ The WTO itself, however, has come to accept

³⁹ See *Multilateralism and Regionalism in a Globalizing World: A Perspective from Asia-Pacific Region*. Keynote Speech by Cae-One Kim.

⁴⁰ Baldwin, R.E. *Stepping Stones or building blocs? Regional and multilateral integration*. Paper prepared for the G-20 Workshop on “Regional economic integration in a global framework”, Sept 22-23 2004 organised by the European Central Bank and the People’s Bank of China in Beijing.

⁴¹ See Roberta B. and Micheal, G. Plummer ‘Regionalism and Multilateralism: Crucial issues in the debate on RTAs.’ From the Issue entitled: *The Political Economy of Regional Economic Integration: the Challenges for Emerging Economies*. [Electronic Version]. *Economic change and Restructuring* 41 November 4,267-287 available at <http://www.Springerlink.com/content/h271416318446277/> (accessed 6 October 2010).

⁴² Mashayeki M., & Ito, T. (ed) (2005) *Multilateralism and Regionalism: the new interface*. UNCTAD, New York and Geneva.

⁴³ Mikoi K, et al. (2005). *Bilateralism and Regionalism: Re-establishing the Primacy of Multilateralism a Latin American and Caribbean Perspective*. NACIONES UNIDAS, Division of International Trade and Integration, Santiago, Chile.

⁴⁴ Mikoi K, et al. (2005). *Bilateralism and Regionalism: Re-establishing the Primacy of Multilateralism a Latin American and Caribbean Perspective*.

that the regionalism movement has come to stay, recognises its potential positive contributions if devised effectively, and stresses the need to correct efficient RTAs.⁴⁵ Empirical studies seem to suggest that RTAs have remained supportive of the multilateral trading system(MTS).A WTO study in 1995 concluded that there was no “clash” between regional and global trade and the two complemented each other.⁴⁶ The findings of the report also confirm an overall complementary function of both MFN and preferential trade. In other words regionalism and multilateralism are complimentary. Indeed, while these may be seen as competing legal approaches, in a combination they assist in the process of dismantling trade barriers.⁴⁷ Among the main conclusions of a study, *Regionalism and the World Trading system*, published, by the WTO secretariat, in Geneva, commenting on the WTO rules and procedures governing regional integrations, the study concluded that:

“... [I]t may be that governments will consider that reforms are necessary in order to put the mutually supportive relationship between multilateralism and regionalism on a more solid foundation.”⁴⁸

As acknowledged further, in the WTO 2004 published Report of the Consultative Board to the Director General,⁴⁹ nearly six decades after the founding of the GATT, the principle of non-discrimination characterized by the Most Favored Nation clause ceased to be the rule of international trading system. While much trade between the major economies still takes place on

⁴⁵ See Pascal Lamy Director General WTO 10th September 2007 ‘Proliferation of regional trade agreements breeding concern in .WTO|News-speech. available at http://www.wto.org/english/news_e/sppl_e/sppl67_e.htm (accessed 6 October 2010).

⁴⁶ See WTO. (1995).*Regionalism and the World Trading System* (hereinafter WTO Report); for a useful summary of this report.

⁴⁷ See WTO (1995).*Regionalism and the World Trading System* .A study by the WTO Secretariat showed that there had been a definite trend toward broader as well as faster market access liberalisation of non-tariff measures in RTAs, in parallel to developments in the MTS (*Inventory of Non-Tariff Provisions in Regional Trade Agreements*, WT/REG/W/26, para. 32).

⁴⁸ See WTO. (1995).*Regionalism and the World Trading System* available at http://www.wto.org/english/news_e/sppl_e/sppl67_e.htm (accessed 6th October 2010).

⁴⁹ WTO (2004). *The Future of the WTO: Addressing institutional challenges in the new millennium*, Report by the Consultative Board to the Director-General Supachai Panitchpakdi, WTO, Geneva.

an MFN basis, the proliferation of Preferential Trade Agreements involving customs unions, regional and bilateral FTAs (RTAs and BTAs respectively) and other arrangements, has made MFN treatment an exception rather than the rule. “Certainly the term might now be better defined as LFN, Least- Favoured-Nation treatment.”⁵⁰ According to Baldwin and Thomson, the number of RTAs is impressive: all WTO members are engaged at least in one or more RTAs, excluding Mongolia.⁵¹

In the traditional, conceptual debate on "regionalism vs. multilateralism", it has been argued that RTAs, by moving generally at a faster pace than the MTS and sharing its goals, represent a way of strengthening the latter.⁵² The positive effects of RTAs on the integration of developing countries in the world economy are also usually noted.⁵³

Proponents of the *stumbling block* theory emphasize that: (1) RTAs may promote costly trade diversion rather than efficient trade creation, especially when sizable MFN tariffs remain—these tariffs create vested interests to maintain preferential margins in “their” markets; (2) proliferating regional agreements absorb scarce negotiating resources (especially in poorer WTO members) and crowd out policymakers attention; (3) competing RTAs (especially different North-South East-West combinations) may lock in incompatible regulatory structures and standards, and may result in inappropriate norms for developing country partners; and (4) by creating alternative legal frameworks and dispute settlement mechanisms, RTAs may weaken the discipline and efficiency associated with a broadly recognized multilateral framework of rules.⁵⁴ The dispute settlement provisions contained in "new generation" RTAs, could build jurisprudence conflicting

⁵⁰ WTO (2004). *The Future of the WTO: Addressing institutional challenges in the new millennium*.

⁵¹ Baldwin, R. & Thorson, P.H. (2007). *Multilateralising Regionalism: Ideas for a WTO action plan on regionalism*. Centre for Economic Policy Research (CEPR), London.

⁵² This view is expressed in *Regionalism and the World Trading System*, WTO Secretariat, 1995.

⁵³ See *Inventory of Non-Tariff Provisions in Regional Trade Agreements*, WT/REG/W/26, para. 32.

⁵⁴ See *Understanding on Rules and Procedures Governing the Settlement of Disputes*, Dispute Settlement Understanding generically referred to as the “DSU”. Annex 2 of the WTO Agreement, reprinted in Uruguay Round of Multilateral Trade Negotiations: Legal Texts Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, which sets out the procedures and rules that define disputes system.

with that of the WTO. This issue has risen in particular with respect to RTA clauses providing that, in the event of inconsistency, RTA rules prevail over WTO rules. It has been argued that this could result in a diminution of the rights that the parties had under the WTO in relation to their trade with one another.⁵⁵

It has however been noted that such situation was not contemplated in the language calling for RTA rules to prevail in the event of inconsistency; that language was geared toward situations in which the RTA provisions went beyond WTO disciplines (i.e., WTO-Plus disciplines). Critics argue that by their nature RTAs divert trade, especially when the partner countries impose very high external tariffs.⁵⁶ This conceptual distinction was developed in 1950 by the eminent economist Jacob Viner.⁵⁷ Viner saw RTAs to be trade creating when a RTA allows its members to replace the importation of expensive, inefficiently produced goods from a non-member with cheaper, more-efficiently-produced goods from other RTA members. A trade creating RTA, Viner postulated, make economically sensible trade more possible between member countries.

⁵⁵ The dispute settlement system under the DSU provides a mechanism through which WTO members can ensure that their rights under the WTO Agreement can be enforced. The respondent whose measure is under challenge has a forum to defend it if it disagrees with the claims raised by the complainant. In this way, the dispute settlement system serves to preserve the members' rights and obligations under the WTO Agreement. Article 3.2 of the DSU provides in part: "*The members recognize that dispute settlement system of the WTO serves to preserve the rights and obligations of Members under the covered agreements.*" [emphasis added].

The ruling of the bodies involved (the DSB(Dispute settlement Body),the Appellate Body panels and arbitration) are intended to reflect and correctly apply the rights and obligations as they are set out in the WTO Agreement. They must not change the WTO law that is applicable between the parties or add to or diminish the rights and obligations provided in the WTO Agreement. (See *Articles 3.2 and 19.2 of the DSU.*).

⁵⁶ See Trade diversion versus trade creation discussion by Jacob Viner. See also Donald A. Calvert *How the Multilateral Trade System Under the World Trade Organization is Attempting to Reconcile the Contradiction & Hurdles posed by Regional Trade Agreements, An Analysis of the Article XXIV of the General Agreement on Tariffs & Trade.*(Unpublished Master's Thesis, International Commerce & Policy Program School of Public policy George Mason University, Virginia ,2002).

⁵⁷ See Viner, Jacob (1950).*The Customs Unions issue.* New York; Carnegie Endowment for international Peace. See also Denis O'Brian 'Customs Unions trade creation and trade diversion in Historical Perspective' [Electronic version]. *History of political Economy* 1976.8 (4):540-563. Retrieved October 24, 2010 from Duke University Press Journals Online at <http://hope-dukejournals.org/cgi/pdf-extract.8/4/540>. (accessed 24 October 2010).

On the other hand, Viner saw RTAs to be trade diverting when they foster inefficient commerce wherein a member because of the RTA's rules, engages in unhealthy trade practices. Trade diversion occurs when a RTA member imports costly, less-efficiently produced goods from another RTA member rather than importing those same goods from a more efficient non-member only because the RTA artificially lowers the cost.⁵⁸

Building block proponents stress that moving forward in smaller steps is often easier to accomplish, and it creates a certain reform momentum: (1) regional/bilateral agreements can help sensitize domestic constituencies to liberalization and keep the stakes lower to allow for incremental progress on trade;⁵⁹ (2) expanding the number and coverage of RTAs can erode vested opposition to multilateral liberalization because each successive RTA reduces the value of the margin of preference, thereby reducing the discriminatory impact; (3) RTAs are often more about building strategic and/or political alliances or locking in domestic reforms than about actual trade liberalization, and so are not necessarily competitive with multilateral efforts; (4) regional arrangements can provide an incubator for developing country firms/producers to learn to trade with RTA partners without facing full global competition; and (5) for some issues, such as regulatory cooperation, RTAs may be viable.

The principle of non-discrimination is one of the main reasons countries join the WTO. As a key concept of the GATT/WTO, indeed the cornerstone of the present world trading system is non-discrimination between different sources of the same imported goods, which is achieved by requiring members to give each other most favoured nation treatment, except in specified circumstances.⁶⁰ It provides for a "level-playing field" for all members to trade goods and

⁵⁸ See *Appendix A: Notes on Trade Creation, Diversion and Economic Efficiency* available at <http://www.piiie.com/publications/Chapters-preview/326/appaie311xp.df>. (accessed 24 October 2010).

⁵⁹ Bicycle theory, especially in between trade rounds, NAFTA, for example, provided an impetus to the Uruguay Round (Services and TRIMS) discussed by Edwini Kessie, *WTO Rules on Regional Trade Agreement*. Power Point presentation for 2010 Masters in International Trade and Investment Law programme at the University of the Western Cape.

⁶⁰ WTO rules require that each member accord Most Favoured Nation (MFN) status to other WTO members. However, GATT Article XXIV allows exceptions to the MFN principle for RTAs so long as they meet certain conditions:

- i) *the agreement must lower trade barriers within the regional group.*

services with one another. RTAs-by definition-provide trade benefits to other members at the exclusion and discrimination of non-members that should be protected from such discrimination under WTO rules.⁶¹ Despite this, the GATT'S and GATS' founding fathers still recognised that RTAs could benefit the multilateral trade system. At the same time, they feared that, left unchecked, RTAs could damage and even weaken the world trade system. Their solution was to create a special provision-GATT Article XXIV and GATS Article V –that allows for RTAs only when two conditions are met:

- i) The level of RTA's trade barriers towards non-members are not "on the whole" higher or "more restrictive" than prior to the RTA's formation; and
- ii) A RTA liberalizes "substantially all the trade" between its members.⁶²

GATT Article XXIV and GATS Article V were in essence, an attempt to allow RTAs to exist within the larger system without damaging that system by having few certain disciplines. The hope was that Articles XXIV and V would permit RTAs as an interim exception to the WTO's non-discrimination rule. So, GATT and GATS framers intended Articles XXIV and V to be the system's instrument for both managing RTAs and encouraging their transformation into multilateral WTO trade agreements. Articles XXIV of GATT and V of GATS were designed to protect multilateralism.

Of course, what the drafters could not foresee was the degree of the proliferation of RTAs in the later years. Certainly the drafters thought that the disciplines stipulated by Articles XXIV GATT and article V GATS would protect the multilateral system from such proliferation. However, as the new millennium began, concerns about regionalism's impact on the multilateral system was of such concern to trade policy makers that it was placed at the top of the agenda at the launch of

ii) the agreement cannot raise trade barriers against non-participating members.

iii) the agreement is supposed to cover substantially all trade among the RTA partners.

In reality, RTA participants seldom meet all these conditions. Moreover, the trade coverage of many RTAs is incomplete with many "sensitive" sectors exempted from trade liberalization.

⁶¹ GATT Article I: 1 and GATS Article II: 1.

⁶² GATT Article XXIV, Paragraphs 5 and 8 and GATS Article V, Paragraphs 1 and 4.

the Doha Development Round of trade talks. In Doha trade ministers from WTO member countries agreed to re-examine RTA by “*negotiations aimed at clarifying and improving disciplines and procedures under the existing WTO provisions applying to regional trade agreements.*”⁶³ It was further agreed that the negotiations were to take into account the development aspects of the regional trade agreements because the ministers recognized that regional trade agreements plays an important role in the liberalisation promotion, trade expansion and fosters development.⁶⁴

1.6.4. Why are RTAs proliferating?

Despite the WTO Report in 2004,⁶⁵ criticizing the proliferation of bilateral and regional trade agreements on the grounds that it had made the most-favoured nation (MFN) principle the exception rather than the rule, and has led to the increased discrimination in the world trade, the surge in RTAs has continued unabated and the negotiations of new RTAs are still in place. As of 31 July 2010, some 474 RTAs worldwide counting goods and services notifications separately, had been notified to the GATT/WTO.⁶⁶ Of these, 351 RTAs were notified under Article XXIV of the GATT 1947 or GATT 1994; 31 under the Enabling Clause; and 92 under Article V of the GATS. At that same date, 283 agreements were in force.⁶⁷ The overall number of RTAs in force has been increasingly steadily, a trend likely to be strengthened by the many RTAs currently under negotiation. Of these RTAs, Free Trade Agreements (FTAs) and partial scope agreements

⁶³ See Doha WTO Ministerial 2001: Ministerial Declaration, Para 29, WT/MIN (01)/DEC/1, Adopted on November 14, 2001.

⁶⁴ See Doha WTO Ministerial 2001: Ministerial Declaration, Para 4, WT/MIN (01)/DEC/1, Adopted on November 14, 2001.

⁶⁵ Minter Ellison ‘The Future of the WTO: Report by the Consultative Board to the WTO Director General’ Published March 31, 2005 – Australia available at http://www.hg.org/articles/article_677.html (accessed 6 October 2010).

⁶⁶ See WTO|Regional Trade Agreement gateway: Regional trade agreement information available at <http://www.wto/english/tratop-e/region-ehm>. (accessed 25 October 2010).

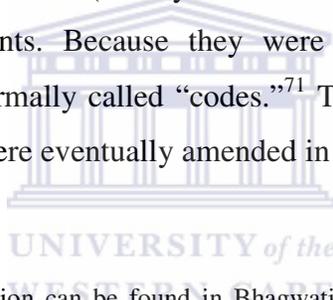
⁶⁷ For up to date information on WTO figures on RTAs currently in force, please consult the summary tables contained in the WTO RTA Database.

account for 90%, while customs unions account for 10%. There are several reasons for rapid growth in the number of trade agreements.⁶⁸

These are:

a) **Disappointment with the MTS, Tokyo Round and Uruguay Round.**

One explanation often given is that the explosion of RTAs has followed the failure of multilateralism in the form of the WTO. The Tokyo Round for example, had mixed results. It failed to come to grips with the fundamental problems affecting farm trade and also stopped short of providing a modified agreement on “safeguards” (emergency import measures).⁶⁹ Nevertheless, a series of agreements on non-tariff barriers did emerge from the negotiations, in some cases interpreting existing GATT rules, in others breaking entirely new ground.⁷⁰ In most cases, only a relatively small number of (mainly industrialized) GATT members subscribed to these agreements and arrangements. Because they were not accepted by the full GATT membership, they were often informally called “codes.”⁷¹ They were not multilateral, but they were a beginning. Several codes were eventually amended in the Uruguay Round and turned into



⁶⁸ A succinct exposition of this explanation can be found in Bhagwati, J ‘Regionalism and Multilateralism: An Overview’ in Jaime, D, and Panagariya (eds) *A New Dimensions in Regional Integration* and Krueger, A. ‘Free trade agreements as protectionist devices: Rules of Origin’ in Jaime, D., and Panagariya (eds), *A New Dimensions in Regional Integration*, (1993)22-57. These papers also appear in the World Bank ICEPR Volume on regionalism.

⁶⁹ See WTO| *Understanding the WTO* ‘Basics, The GATT years: from Havana to Marrakesh; The Tokyo Round: A first try to reform the system’ available at http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm (accessed 25 October 2010).

⁷⁰ See WTO| *Understanding the WTO* ‘Basics, The GATT years: from Havana to Marrakesh; The Tokyo Round: A first try to reform the system’ available at http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm (accessed 25 October 2010).

This means new areas never covered before in the international trade and at a multilateral forum were covered in this negotiation .

⁷¹The Tokyo Round negotiations (1973-1979) developed agreements on anti-dumping measures, government procurement, technical barriers to trade - sometimes called the Standards Code and other non-tariff measures which were all known as “codes.” Others include Subsidies and countervailing measures - interpreting Articles VI, XVI and XXIII of GATT ,Import licensing procedures ,Customs valuation - interpreting Article 7, Anti-dumping - interpreting Article 6, replacing the Kennedy Round code ,Bovine Meat Arrangement ,International Dairy Arrangement and the Trade in Civil Aircraft.

multilateral commitments accepted by all WTO members.⁷² Only four remained “plurilateral” — those on government procurement, bovine meat, civil aircraft and dairy products.⁷³ In 1997 WTO members agreed to terminate the bovine meat and dairy agreements, leaving only two.⁷⁴ On the other hand, all is told, the Uruguay Round’s achievements were quite “remarkable. They met many of the expectations leading up to what may now rightly be referred to as the “negotiations of the century”, at least as far as international trade is concerned. Nonetheless, it is clear that the very wide scope of the negotiations and the far-reaching aims of the initial programme were also weakness which prevented the achievement of completely satisfactory results for all countries and all areas. It asserted that regional integration has prospered as an alternative to multilateralism since multilateral trade negotiations have become too cumbersome to deal with today's complex trade issues. This argument, first introduced when the Uruguay Round proved difficult to conclude, has re-emerged as the Doha Round is proving difficult to conclude.⁷⁵

David Kernohan and T. Huw Edwards opined in their paper,⁷⁶ that the indefinite prorogation of the WTO’s Doha trade talks in July 2006 suggested that the global appetite for multilateralism had weakened. They stated particularly in their paper that “*The collapse – or strictly speaking*

⁷² See Uruguay Round Final Act and Marrakesh Agreement establishing the World Trade Organization. In World Trade Organization *The Legal Texts, The Results of the Uruguay Round of Multilateral Trade Negotiations* (2002) Geneva, Switzerland. The WTO’s agreements are often called the Final Act of the 1986–1994 Uruguay Round of trade negotiations, although strictly speaking the Final Act is the first of the agreement.

⁷³ See Annex 4 of Marrakesh Agreement establishing the World Trade Organization. In World Trade Organization *The Legal Texts, The Results of the Uruguay Round of Multilateral Trade Negotiations*, (2002) Geneva, Switzerland.

⁷⁴ See Edmond M. ‘International Trade Regulation’ available at <http://www.ppl.nl/bibliographies/wto/files/2427.pdf> (accessed 25 October 2010).

⁷⁵ The Doha Ministerial Declaration set deadlines have not been met. The Declaration set a deadline for completing the negotiations in 1st January 2005. In the operational part of the relevant section of the Declaration it provides that: “*The Declarations adopted by WTO Members at the Conference constitute a work programme, including trade negotiations to be concluded no later than 1 January 2005*” originally, unofficially by end of 2006. The only exceptions were the negotiation on improving and clarifying the Dispute Settlement Understanding, which was to be concluded by the end of May 2003 and the negotiations on a registration system for geographical indications, to conclude by the Fifth Ministerial Conference in 2003.

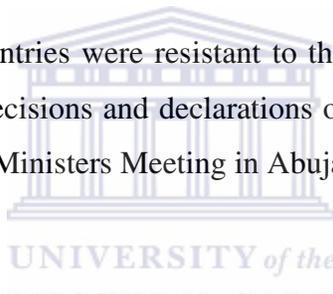
⁷⁶ David K. T. & Huw E. ‘The fall of Doha and the rise of regionalism?’ (2006) *CEPS Policy Brief No.111 September*. Centre for European Policy Studies (CEPS) available at <http://www.ceps.be>. (accessed 25 October 2010).

prorogation – of the WTO talks suggests that the enthusiasm for multilateralism, and even the world economic order, may be diminishing.”⁷⁷

b) Doha Ministerial Declaration treatment of the Singapore issues.

The so-called “Singapore issues” have been perhaps the most contentious of the issues that have been discussed or negotiated in the World Trade Organisation since its establishment in 1995.⁷⁸ The issues are investment, competition policy, government procurement and trade facilitation. The first three of these are strictly non-trade issues, and much of the controversy has been on whether issues that are not directly related to trade should be allowed to be negotiated as treaties in the WTO, which is after all a trade organisation. It is agreed that the fourth issue is related to trade, and the debate has been on whether there should be binding multilateral rules in the WTO on this issue.⁷⁹

Before Doha most developing countries were resistant to the developed countries’ push on the new issues, as evidenced by the decisions and declarations of the LDCs Ministerial Conference in Zanzibar and the African Trade Ministers Meeting in Abuja.⁸⁰



⁷⁷David K. T. & Huw E. ‘The fall of Doha and the rise of regionalism?’ (2006) *CEPS Policy Brief No.111* September.

⁷⁸ For more details and discussion on how the issues were introduced in the WTO and their evolution from the Singapore Ministerial meeting in 1996 to the Seattle Ministerial meeting in 1999 and Doha Ministerial meeting in 2001. The events at the Cancun Ministerial meeting in 2003 and the developments after Cancun up to the decision at the WTO General Council in July 2004. See Martin Khor, paper, *The “Singapore Issues” in the WTO: Implications and Recent Developments*. The paper describes the main features of the four issues and analyses the implications for development if the issues were introduced as subjects of negotiations and agreements in the WTO. Finally the paper alludes to the fact that these issues may be revived as subjects of negotiations in the WTO or other trade agreements in the future. The paper is available at http://www.policyinnovations.org/ideas/policy_library/data/01284 (accessed 28 October 2010).

⁷⁹ See World Trade Organization ‘Investment, competition, procurement, simpler procedures’. In *Understanding the WTO*. (2008) 72-73.

⁸⁰ See “ACP Declaration on the Fourth Ministerial Conferences,” Brussels, 5 to 6 November 2001. Communication from Kenya, World Trade Organization, 9th November, 2001, WT/L/430(01-5574). This document affirmed that ACP States were not prepared at that time to engage in negotiations on Singapore issues. Thus they called for the continuation of the work of various working groups that had been established to study the respective Singapore issues. See paragraphs 22 and 23 of the document.

Due to a series of unusual or even unique procedures, the views and positions of many of the developing countries in key areas (including the Singapore issues) were not adequately reflected, not reflected at all or ignored in the drafts of the Ministerial Declaration that were prepared in Geneva and transmitted to the Doha meeting.⁸¹ As a result, a decision was made in Doha that negotiations would begin on the four Singapore issues after the Fifth Ministerial, but only on the basis of an explicit consensus on modalities. In the operational part of the relevant paragraphs (20 on investment, 23 on competition, 26 on transparency in government procurement and 27 on trade facilitation) the wording is as follows: "...we agree that negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that Session on modalities of negotiations." This implied that a decision had already been taken in principle to start negotiations towards new agreements, and only the modalities of the negotiations had to be agreed to.

Developing countries have taken the phrase "...on the basis of a decision to be taken, by explicit consensus", to mean clearly that a decision was to be expressly taken by parties to allow negotiations on Singapore issues and as far as they are concerned no decision had been reached on the negotiations. Paragraph 22 of the *ACP Declaration on the Fourth Ministerial Conferences*,⁸² provided that:

"We recall the Singapore Ministerial Decision on Investment and Competition Policy, that: "it is clearly understood that future negotiations, if any, regarding multilateral disciplines in these areas (investment, competition policy, government procurement and trade facilitation), will take place only after an explicit consensus decision is taken among WTO members regarding such negotiations". [emphasis added].

⁸¹ See Martin Khor 'The "Singapore Issues" in the WTO: Implications and Recent Developments.' (2003) [Electronic version]. Policy innovations, *Third World Network (TWN)*, Nov 1 available at http://www.policyinnovations.org/ideas/policy_library/data/01284. (accessed 28 October 2010).

⁸² See "*ACP Declaration on the Fourth Ministerial Conferences*," Brussels.

The Geneva draft,⁸³ committed members to start negotiations on the Singapore issues which was not their view.⁸⁴ This failure to reflect developing countries views added to the frustration of the developing countries, which felt that the drafting process was untransparent, and the drafts were unrepresentative. They had requested that the draft to be transmitted to Doha should contain the different positions of various countries or groupings (instead of being a "clean draft" which would give the mistaken impression that it was a consensus document) or that these differences be at least made clear in a covering letter. However, these requests were rejected and a "clean text" that reflected the views of the proponents of the "new issues" became the basis of negotiations in Doha, placing the developing countries at a great disadvantage. This procedure of "sending a clean text to the Ministerial" was in contrast to the practice before Seattle, when a text denoting differing positions had been prepared, which was a more honest presentation, giving a chance for the different positions to be reflected in the text and thus to be considered in the negotiations at the Ministerial meeting.⁸⁵

WTO member states' dissatisfaction with the way Singapore issues were handled has triggered them to negotiate for RTAs that include competition policy.⁸⁶ According to the UNCTAD

⁸³ Geneva Draft refers to the Doha WTO Ministerial 2001: Ministerial Declaration, WT/MIN (01)/DEC/1, Adopted on November 14, 2001.

⁸⁴ See TWN, Third World Network. (2003). *African countries against negotiating Singapore issues* available at <http://www.twinside.org.sg/title/5323a.htm>. (accessed 28 October 2010).

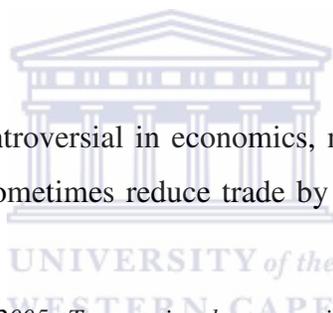
⁸⁵ See Job (99)/4797/Rev.3. (6986)18.November1999. Preparations for the 1999 Ministerial Conference. Compilation of Proposals Submitted in Phase 2 of the Preparatory Process Informal Note by the Secretariat, Revision. Following the suggestion by the Chairman at the meeting of the General Council on 29 July, the Secretariat circulated a compilation of proposals submitted in Phase 2 broadly organized around the subject list of issues identified in Job (99)/3978/Rev.9. The compilation reproduced the full texts of the specific proposals presented in the submissions by Members, as well as the full texts of submissions not in the form of specific proposals. The compilation also included all submissions circulated as at 18 November (up to and including WT/GC/W/391) available at http://www.wto.org/english/thewto_e/minist_e/min99_e/min99_e.htm. (accessed 28 October 2010)

⁸⁶ Simon, J. Evenett 'What can we really learn from the competition provisions of RTAs?' in Philippe, B. et al. (eds). *Competition Provisions in Regional Trade Agreements: How to Assure Development Gains*. (2005) 37-63. See also Peter Holmes, Anestis Papadopoulos, Bahri özgür Kayali and Anna Sydorak. 'Trade and Competition in RTAs: A missed opportunity?' in Philippe, B. et al. (eds). *Competition Provisions in Regional Trade Agreements: How to Assure Development Gains*. (2005) 65-109 available at http://www.unctad.org/en/docs/ditcclp20051_en.pdf. (accessed 28 October 2010)

(2005),⁸⁷ of the 300-odd bilateral and regional trade agreements in force or in negotiation, over 100 contain provisions related to competition policy. A number of actual or proposed bilateral and regional agreements, such as NAFTA and the Free Trade Area of the Americas already contain sections on competition policy. The aim of those pushing for competition policy to be included in free trade agreements is to curtail the discretion and flexibility of host governments in regulating the entry and operations of foreign firms, and to prevent any favourable treatment being given to domestic firms. Meanwhile, the EU has also been criticized for insisting on the inclusion of competition policy in its Economic Partnership Agreements (EPAs) with African, Caribbean and Pacific countries.⁸⁸

c) **Economic reasons.**

Regional trade agreements are controversial in economics, not simply because of the so-called ‘Vinerian’⁸⁹ view that they can sometimes reduce trade by diverting it, rather than creating it,



⁸⁷ UNCTAD *World investment Report 2005, Transnational corporations and the internationalization of R&D Statistical annex*, (2005) United Nations, New York and Geneva.

⁸⁸See Vicente Paolo B. Yu III. *Development Challenges of Competition Policy in the Economic Partnership Agreements*. (2007) South Centre available at <http://www.bilaterals.org/spip.php?article9732>. (accessed 24 October 2010). The European Union has a long history of aggressively pushing for competition rules in international trade negotiations. Attempts by the EU to place competition on the WTO negotiating agenda have been staunchly opposed by developing countries including African, Caribbean and Pacific countries. But in July 2004, the WTO General Council decided that negotiations on, inter alia, competition policy would not form part of the Doha trade negotiations. See WT/L/579, 2 August 2004, para. 1(g). Developing countries have rejected international negotiations on competition on the grounds that adopting such rules would be inimical to development. Having failed to place competition on the WTO agenda, the EU is now looking to bilateral free trade negotiations. Economic Partnership Agreement negotiations are no exception. The EU has requested all ACP regions to negotiate on competition rules. CARIFORUM, CEMAC, and COMESA regions are currently negotiating competition provisions with the EU. SADC, ECOWAS, and Pacific countries have until now refused to include competition policy in negotiations. The EU is insistent and has tabled chapters on competition to SADC and ECOWAS.

⁸⁹ See Viner, Jacob (1950). *The Customs Unions issue*. New York; Carnegie Endowment for international Peace. See also Denis O'Brian 'Customs Unions trade creation and trade diversion in Historical Perspective' [Electronic version]. *History of political Economy* 1976.8 (4):540-563. Retrieved October 24, 2010 from Duke University Press Journals Online at <http://hope-dukejournals.org/cgi/pdf-extract.8/4/540>. (accessed 24 October 2010).

but also because of the unresolved disagreements over when a regional trade agreement is likely to precede, rather than preclude, more global agreements.

As a starting point, economists have long argued that preferential trade liberalisation is desirable if the volume of imports by member countries from the rest of the world does not decline on a product-by-product basis after the implementation of the agreement. The main economic benefits of Regional Trading Arrangements (RTAs) must therefore stem from increased trade among the members after the formation of the RTA.⁹⁰ On the other hand, the 'multilateralists' argue that RTAs imply diversion of trade from non-RTA members.⁹¹ Countries are scrambling to avoid being 'excluded' from markets by getting into any RTA they can. But this argument can only hold for small countries and cannot explain how relatively large countries of North America, Europe and South-East Asia have been at the forefront of sponsoring RTA activity.

The record has been somewhat better with agreements involving industrialized countries (such as the EC), where RTAs generally are considered to have stimulated increased trade and economic growth. There are several reasons for this different outcome.⁹² First, industrialized countries have exploited gains from intra-industry specialization and product differentiation, which are more important in larger, high income markets. Expansion in intra-industry trade has been a clear outcome in the EC. But in poorer countries where the market for differentiated products is more limited, intra-industry trade has not increased. Second, trade creation appears to have been relatively larger in industrial country RTAs, at least partially because member countries were

⁹⁰ See the provisions of GATT Article XXIV and GATS Article V –that allows for RTAs only when two conditions are met:

- i) The level of RTA's trade barriers towards non-members are not "on the whole" higher or "more restrictive" than prior to the RTA's formation ;and
- ii) A RTA liberalizes "*substantially all the trade*" between its members.

⁹¹ See Bhagwati J *Termites in the Trading system: How preferential Agreements undermine Free Trade* (2008) 50.

⁹² See de la Torre, Augusto & Margaret R. Kelly. (1992). *Regional Trade Arrangements*. Occasional Paper No. 93. International Monetary Fund, Washington D.C. and de Melo, Jaime and S. Dhar (1992). *Lessons of Trade Liberalization in Latin America for Economies in Transition*. Policy Research WPS No. 1040, The World Bank, Washington D.C.

more integrated before the agreement and lastly, RTAs in high-income countries have a much better record of actually implementing agreed policy changes, often ahead of schedule.

Baldwin points out "almost all empirical studies of European and North American arrangements find positive impacts on member's living standards."⁹³ In the period 1990-97, imports from other members of these arrangements increased on average at some 15 per cent a year, while imports from non-members increased at 10 per cent.⁹⁴ The decline in trade following the financial crisis had a similar effect overall on members and non-members.⁹⁵ On the other hand, there have certainly been concerns expressed in the Caribbean⁹⁶ about the negative effects of NAFTA on their trade. Yeats⁹⁷ claims evidence of trade diversion in MERCOSUR. While Laird,⁹⁸ claims that protection of certain sectors such as automobiles certainly limits market opportunities in MERCOSUR, overall these countries are now much more open than they were in the 1980s, and imports from third countries have also been growing rapidly. It is, therefore, important to look carefully at the dynamics of particular agreements. On a simple comparative static analysis, third parties may be adversely affected by trade diversion and a reduction in their terms of trade, but this is less obvious on the basis of a crude dynamic analysis, especially in the case of the faster growing RTAs. Nevertheless, the fact is that trade within RTAs has been generally growing much faster than trade from non-members. An analysis of seven regional integration agreements (APEC, the European Union, NAFTA, ASEAN, CEFTA, MERCOSUR and the Andean

⁹³ See Baldwin, R.E. 'The Causes of Regionalism.' (1997) 20 *The World Economy* 7 865.

⁹⁴ See Jo-Ann Crawford & Sam Laird. *Regional Trade Agreements and the WTO*. Paper prepared for a meeting of the North American Economic and Finance Association in Boston, 6-9 January 2000.

⁹⁵ See Jo-Ann Crawford & Sam Laird. *Regional Trade Agreements and the WTO*.

⁹⁶ See *Multilateralism and Regionalism in a Globalizing World: A Perspective from Asia-Pacific Region*. Keynote Speech by Cae-One Kim.

⁹⁷ Yeats, A. (1997). *Does MERCOSUR's Trade performance justify Concerns about the effects of Regional trade agreements?* PPR Working Paper 1729, World Bank, Washington D.C.

⁹⁸ Laird, S. (1998) *MERCOSUR: Objectives and Achievements*, Proceedings of Third Annual World Bank Conference on Development in Latin America and the Caribbean on "Trade: Towards Open Regionalism", June 29 - July 1, 1997, Montevideo, Uruguay, The World Bank, Washington D.C.

Community) shows that, on average, imports from other members of these arrangements increased both for members and non-members.⁹⁹

On the other hand trade between EAC members has grown over the past decade.¹⁰⁰ Between 1991 and 2002 the share of exports to the region tripled, reaching 18 percent in 2002. The share of regionally sourced imports increased four-fold over the same period, accounting for about 10 percent in 2002.¹⁰¹

It's worth noting that countries perceive benefits of membership in RTAs, and become increasingly unwilling to forgo them. But another, more maligned reason is that countries suffer from being left out, and it is this that creates the rush to join. So how does the existence of RTAs affect non-member countries? The first is through the change in trade flows caused by a RTA, causing both the exports and imports of non-member countries to be smaller than they would otherwise be. That is, the fall in demand for their exports (and reduction in supply of imports) may reduce their export price (and raise their import price). Another source of loss from non-membership of RTAs is the risk attached to being isolated if a trade war occurs. Of course, all countries-inside or outside RTAs-will usually lose from a trade war, but countries in RTAs have the insurance of knowing that they will still have trade with partner countries.

In conclusion RTAs have economic benefits when they create trade between members. It is important to have a balance in RTAs in Steven Radelet's words:

“... [F]ormal RIAs have worked best when they have built on previous steps towards openness and integration. They have not worked well when they were a first step towards

⁹⁹ Laird, S. (1998) *MERCOSUR: Objectives and Achievements*.

¹⁰⁰ Steven Radelet (1997). 'Regional Integration and Cooperation in Sub-Saharan Africa: Are Formal Trade Agreements the Right Strategy?' *Development Discussion Paper No. 592*. Harvard Institute for International Development Harvard University.

¹⁰¹ See International Monetary Fund (2003). *World Economic and Financial Surveys World Economic Outlook Database* available at <http://www.imf.org/external/pubs/ft/weo/2010/01/weodata/index.aspx>. (accessed 24 October 2010). See also chapter 3 of this thesis for more detailed empirical study, analysis and discussion on effects and benefits of RTAs on East African Community (EAC).

openness, and have had especially poor outcomes when they acted as a substitute for more fundamental trade liberalization.”¹⁰²

d) Geopolitical considerations.

The geopolitical dimension on the formation of RTAs should not be overlooked. By linking their economies together so that they become more interdependent, countries reduce the likelihood of conflict between RTAs that have traditionally occurred among geographically contiguous countries with already well-established trading patterns; prime examples include the NAFTA countries, the EC, ASEAN, groupings in sub-Saharan Africa such as UEMOA and SACU, and in the Western Hemisphere, notably CARICOM, the CACM and MERCOSUR. This premise is further strengthened by the ongoing efforts by most of these regional groups to deepen intra-regional integration. Developing a common economic purpose and acting together in group of nations can enhance the group nation bargaining power and sovereignty.¹⁰³ The current EU owes much of its origins to western Europeans desire to establish a system that locked the economies of France and Germany together so that they were never likely to go to war against one another again.¹⁰⁴ Political benefits would be associated from security, wider cooperation and the “locking in” of reforms.



1.6.5. Conclusion.

Regional preferential trading arrangements have mushroomed in every region of the world. Several factors underlie the proliferation of RTAs. The chapter has given an examination of the impact of regional arrangements on the global trading system; it then briefly reviewed the larger debate over whether RTAs contribute to or weaken and damage the multilateral system. Throughout this chapter the theoretical work has been illustrated by referring to existing RTAs. Empirical evidence has been used to underscore the points made. It is clear from the topics

¹⁰² See Steven Radelet (1997). *Regional Integration and Cooperation in Sub-Saharan Africa: Are Formal Trade Agreements the Right Strategy?*

¹⁰³ Schiff, M. and L.A. Winters ‘Regional integration as Diplomacy’ (1998) *World Bank Economic Review* 2 274.

¹⁰⁴ Nicholas Perdakis ‘Trade Agreement: depth of integration’ in William A. Kerr, James D. Gaisfond (eds), *Handbook on international Trade policy.* (2007) 106-119).

covered that the RTAs of whatever depth cannot be said to be good or bad unequivocally for individual members. Consequently, the analysis of trade creation and trade diversion in this chapter suggest a cautious assessment of regional trade agreements. Whether RTAs, are good or bad for their participants, the non-member and for the wider multilateral trading system has long been debated by economists measuring trade creation against trade diversion as one way of calculating their effects on members and non-member. Several reasons for rapid growth in the number of trade agreements were also explained.

From the discussion in this chapter, the impact of regionalism is good and the only conclusion made is that regionalism and multilateral trade have had a complimentary relationship. The next chapter gives an overview of the relevant WTO rules and procedures for preferential Trade.



CHAPTER 2

2.0 AN OVERVIEW OF THE RELEVANT WTO RULES AND PROCEDURES FOR PREFERENTIAL TRADE.

2.1. INTRODUCTION.

Based upon the fundamental principle of Most-favoured-nation (MFN) treatment enshrined in Article I of General Agreement on Tariffs and Trade (hereinafter GATT),¹⁰⁵ Article II of the General Agreement on Trade in Services¹⁰⁶ and other agreements, and hence the obligation to accord immediately and unconditionally all privileges accorded to any country to all Member States of the WTO, regional trade agreements are bound to be an exception to this principle.¹⁰⁷ Such exceptions exist both in goods and services, as well as intellectual property.¹⁰⁸ WTO rules both allow and contain regional trade. They serve the purposes of preventing macroeconomic disequilibrium between MFN and regional trade as well as correcting them. In substance, WTO rules reflect a policy of encouragement and containment of regional trade.¹⁰⁹ They are an attempt to encourage trade creation, and to avoid trade diversion.¹¹⁰ The substantive rules relating to RTAs for goods are contained in Paragraphs 4 through 10 of GATT Article XXIV, as clarified in the Uruguay Round negotiations.¹¹¹ This Article includes both internal and external conditions applicable to the creation of Free Trade Areas (hereinafter FTAs) and Customs Unions (hereinafter CU). The internal requirements deal with the legal relationship among the constituent

¹⁰⁵ See Article I of the Text of the General Agreement on Tariffs and Trade 1947. The General Agreement on Tariffs and Trade came into force on 1st January 1948.

¹⁰⁶ See General Agreement on Trade in Services (hereinafter GATS).

¹⁰⁷ See generally William J. Davey / Joost Pauwelyn, 'MFN-Unconditionality: A Legal Analysis of the Concept in View of its Evolution in the GATT/WTO Jurisprudence with Particular Reference to the Issue of "Like Product," in Thomas Cottier / Petros C. Mavroidis (eds.), *Regulatory Barriers and the Principle of Non-Discrimination in World Trade Law: Past, Present, and Future* (2000) 13 22-25.

¹⁰⁸ Which, for the latter, are of lesser importance and not considered here.

¹⁰⁹ See the discussion below on multilateral disciplines on regional Trade Agreements.

¹¹⁰ See Thomas Cottier, 'The Challenge of Regionalization and Preferential Relations in World Trade Law and Policy,' *EFARev.2* (1996), 149,153-59 and Chapter 1 for more discussion on trade creation and trade diversion.

¹¹¹ See Youri Devuyt & Asja Serdarevic, 'The World Trade Organization and Regional Trade Agreement Bridging the Constitutional Credibility Gap,' (2007) 18 *Duke Journal of Comparative & International Law* 1 15.

parties to the custom union and free trade area while the external requirements concern the relationship between the RTA members and third parties.¹¹² This chapter therefore gives an overview of all WTO rules designed to protect multilateralism by facilitating and promoting the trade between the RTA parties. The rules manage RTAs formation and encourage their transformation into the multilateral trading system.

2.2. MULTILATERAL DISCIPLINES ON REGIONAL ARRANGEMENTS.

When a WTO member enters into a regional trade agreement it departs from the main pillars of non-discrimination.¹¹³ However, RTAs are governed by Article XXIV of GATT 1994,¹¹⁴ Article V of the GATS¹¹⁵ and the Enabling Clause.¹¹⁶ All these provisions allow WTO members to depart from the cornerstone principle of the MFN under certain conditions, and establish the requirements to be fulfilled by members of RTAs to be compatible with the WTO.¹¹⁷ RTAs are therefore a major and growing feature of the multilateral trading system. They show an increasing level of sophistication both in terms of scope and configuration. The coverage of

¹¹² See Youri Devuyt & Asja Serdarevic, 'The World Trade Organization and Regional Trade Agreement Bridging the Constitutional Credibility Gap,' (2007).

¹¹³ The relevant non-discrimination principles of the WTO are the National treatment (Article I) and the Most Favored Nation Treatment (Article III). The main principle of Article I is that member states are not allowed to discriminate like imported goods from locally produced good once they are inside the border. Article III of the GATT enumerates the Most Favored Nation Treatment which basically means that countries are not allowed to discriminate among other WTO member trading partners.

¹¹⁴ See Text of Article XXIV, Interpretative Note ad Article XXIV and Understanding on the Interpretation of Article XXIV of the GATT 1994.

¹¹⁵ See GATS Article V generally .This is the equivalent of Art XXIV in the field of trade in Services. Before the GATS, the services component of RTAs was not examined.

¹¹⁶ The Enabling Clause (i.e., *the 1979 Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries*) L/4903, adopted on 28 November 1979, 26S/203 also allows the formation of Regional Trading Agreements among developing countries without the requirement of non-reciprocity. For further explanation of the enabling clause and the full text of the clause refer to, available at

http://www.wto.org/english/docs_e/legal_e/enabling1979_e.htm,(accessed 12 December 2010).

¹¹⁷ See Mashayeki M., & Ito, T. (eds) *Multilateralism and Regionalism: the New Interface*. (2005)UNCTAD, New York and Geneva.

RTAs varies significantly from partial scope agreements to very comprehensive RTAs.¹¹⁸ But given its political appeal and its likely spread, it is important to contain and shape it in the ways that it becomes maximally useful and minimally damaging and consonant with the objectives of arriving at multilateral free trade for all.¹¹⁹

At the Doha Ministerial Conference, launching a new round of negotiations, for example, WTO members in recognition of systemic challenge that RTAs pose for the WTO system, stressed their commitment to the WTO as “*the unique forum for global trade rule-making and liberalization, while also recognizing that regional trade agreements can play an important role in promoting the liberalization and expansion of trade and in fostering development.*”¹²⁰ GATT Article XXIV requirements, which apply to FTAs, CUs and “interim arrangement” leading to either FTAs or CUs, essentially provide that duties and other regulations of commerce should be eliminated for “substantially all the trade” among RTA members, and that the barriers placed in the way of third countries should not be “on the whole higher or more restrictive.”¹²¹ These requirements are not applicable under the Enabling Clause. The Enabling Clause provides that the MFN clause of GATT Article I.1 is exempted for a limited number of preferential arrangements, including “*regional or global arrangements entered into amongst less-developed countries for the mutual reduction of tariff reduction or elimination of tariffs.*”¹²² Thus, it can be argued that the Enabling Clause sets out less stringent requirements than those contained in GATT Article XXIV.

¹¹⁸ See WTO, Regional Trade Agreements Notified to the GATT/WTO and in force: *Basic Table*, available at <http://www.wto.org/English/tratop-e/region-e/summary-exls>. (accessed 2 November 2010).

¹¹⁹ See Bhagwati, J ‘Regionalism and Multilateralism: An Overview’ in Jaime, D, and Panagariya (eds) *A New Dimensions in Regional Integration*, for more discussion on regionalism and multilateralism.

¹²⁰ See *Doha WTO Ministerial 2001: Ministerial Declaration*, Paras 4 and 29, WT/MIN (01)/DEC/1, Adopted on November 14, 2001.

¹²¹ See Article XXIV paras 5(a) and 8(a) of GATT.

¹²² See paragraph 2(c) of The Enabling Clause (i.e., *the 1979 Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries*) L/4903.

2.3. SUBSTANTIAL LEGAL REQUIREMENTS UNDER ARTICLE XXIV OF GATT AND ARTICLE V OF GATS.

Both article XXIV GATT and article V GATS sets out a number of substantial requirements for the conclusion of CU, FTAs and economic integration agreements in trade in goods and services respectively. For services, whenever a bilateral agreement affects trade in services, the relevant provisions are “*multilateralized*” via Art.II:1 of GATS the guiding provision for the MFN principle. Many WTO countries are reluctant to make substantial commitments multilaterally and a growing number of them resort to including goods and services in preferential agreements as a means of improving access to foreign markets as well as developing and establishing international rules on trade in goods and services. To protect the MFN principle and to reduce trade-distortive effects of preferential trade agreements, the establishment of a number of pertinent requirements which preferential agreements on goods and services must meet in order to be legally compatible with the multilateral system is therefore necessary. RTAs compatibility disciplines are laid out in Article XXIV of the GATT— others are and include the Understanding on its Interpretation,¹²³ and Article V of GATS.¹²⁴

2.3.0. Substantially all trade coverage versus Substantial sectoral coverage.

A free trade agreement or agreement establishing a custom union needs to cover substantially all the trade between the constituent territories in products originating in the territories of the parties to the agreement. Similarly, the Agreement on services requires substantial sectoral coverage. Substantial sectoral coverage is defined as a condition “*understood in terms of number of sectors, volume of trade affected and modes of supply. In order to meet this condition, [the] agreement [...] should not provide for the a priori exclusion of any mode of supply.*”¹²⁵ This means that RTAs for trade in services should, in principle, be applicable to all modes of supply

¹²³ See *Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994*.

¹²⁴ See *General Agreement on Trade in Services* (hereinafter GATS) in Annex 1B of the WTO Agreement. The Services Agreement forms part of the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations.

¹²⁵ See the footnote to article V: 1 (a).

defined in GATS.¹²⁶ GATS article V: 1(a) which provides for substantial trade coverage is based upon, and imports into GATS, the key concept of “substantially all trade” in Article XXIV: 8 GATT 1994. Unlike in GATT, the wording of the provision and of the footnote clarifies that the requirement entails both quantitative and qualitative requirements. The GATS clearly prescribes the adoption of a combined, quantitative and qualitative approach, and does not allow one to argue exclusively on the basis of one or the other approach as under Article XXIV GATT 1994 which is silent on approach to adopt since the concept of “substantially all the trade” coverage under GATT Article XXIV provisions has not been clearly defined. This ambiguity has given rise to controversy in the past and difficulties are still encountered over its exact interpretation. An attempt to define the term was in the dispute *Turkey – Restrictions on Imports of Textile and Clothing Products* (hereinafter *Turkey – Textiles*) case,¹²⁷ where the Panel expressed the view that “the ordinary meaning of the term “substantially” in the context of sub-paragraph 8(a) appears to provide for both qualitative and quantitative components”. The Appellate Body later confirmed this view stating that the test in Article XXIV.8 required a certain percentage of trade to be liberalized and also the non-exclusion of any major sector of economic activity. The word “substantial” did not mean “all”, but it required “something considerably more than merely *some* of the trade.” Various other Reports of Working Parties on agreements presented under Article XXIV also include statements that the meaning of “substantially all the trade” has never been defined in GATT.¹²⁸ It was also stated that Article XXIV:8(b) had to be interpreted to mean free trade in all products and not carved out by sectors; the exclusion of a whole sector, no matter what percentage of current trade it constituted was contrary to the spirit of both Article XXIV and the General Agreement.¹²⁹ This different interpretations of “substantially all the trade” as to whether it refers to RTA trade in substantially all product sectors or substantial trade in all product sectors combined continues to impede the effective examination of RTAs under the WTO. This ambiguity was not clarified by the Understanding on GATT Article XXIV; despite

¹²⁶ See GATS Article I: 2.

¹²⁷ Appellate Body Report, adopted on 19 November 1999 (WT/DS34/AB/R).

¹²⁸ See 18S/164; 21S/80; 27S/132.

¹²⁹ See 21S/79, para. 12.

the inclusion of the fourth paragraph in the Preamble to the 1994 Understanding,¹³⁰ which did not offer any clear definition of the concept and the interpretation of that expression has thus remained contentious. Two approaches, not mutually exclusive, are typical in that respect:

- A qualitative approach sees the requirement as meaning that no sector (or at least no major sector) is to be kept out of intra-RTA trade liberalization; this approach aims at preventing the exclusion from RTA liberalization of any sector where the restrictive policies in place before the formation of the RTA hindered trade, which could be well the case if a quantitative approach was used.
- A quantitative approach favours the definition of a statistical benchmark, such as a certain percentage of the trade between RTA parties, to indicate that the coverage of a given RTA fulfils the requirement.¹³¹

On the other hand, participants in RTAs have tended to interpret the term as referring to the whole (horizontal) trade coverage and not to specific sectors. This interpretation allows certain latitude as regards the product sectors covered. For example, many of the customs union and free trade agreements concluded by the EU have excluded the agriculture sector or certain portions of it, but which nevertheless cover a substantial portion of the overall trade between the EU and the parties concerned. These agreements, as far as the EU is concerned,¹³² meet the "*substantially all trade*" feature. Other countries favour a definition that takes a sector-by-sector approach arguing that for this particular provision to be satisfied, no major sector of economic activity

¹³⁰ "Recognizing also that such contribution ... if any major sector of trade is excluded."

¹³¹ See The Report of the Sub-group of the Committee on the "European Economic Community" which examined the consistency with Article XXIV of the EEC Treaty provisions for the association of overseas territories notes that the EEC member States proposed the following definition of the term "substantially all": "a free-trade area should be considered as having been achieved for substantially all the trade when the volume of liberalized trade reached 80 per cent of total trade" (See L/778, adopted on 29 November 1957, 6S/70, 99, para. 30). The same Report reflects different views as to whether a quantitative assessment of the trade liberalization within the free trade areas between the European and the overseas territories should be based, as suggested by the EEC States, on the total volume of trade including the intra-European trade among the EEC States or, as suggested by other contracting parties, solely on the trade between the EEC as a whole and the associated overseas territories.

¹³² See GATT, *Report submitted by the Committee on Treaty of Rome to the Contracting Parties*, on 29th November 1957, Annex IV 30 L 778/ (Nov. 29 1957).

should be excluded from the coverage of the free trade/customs union. Proponents of sector-by-sector interpretation of substantially all trade argue that the EU agreements mentioned previously, by excluding the agricultural sector or parts of it, do not conform to the substantially all trade coverage feature.¹³³ The precise extent of liberalization needed for an RTA to meet the “substantial sectoral coverage” test thus remains to be resolved.¹³⁴

2.3.1. The agreement must lower trade barriers within the regional group.

Lowering trade barriers is one of the most obvious means of encouraging trade. The barriers concerned include customs duties (or tariffs) and measures such as import bans or quotas that restrict quantities selectively.¹³⁵ Regional trade agreements therefore need to dismantle all tariffs and quantitative restrictions within a reasonable length of time. In the field of goods duties and other restrictive regulations of trade should be eliminated on substantially all trade between the constituent territories of the union or at least with respect to "substantially all trade" in products originating in such territories.¹³⁶ Apart from this requirement, union members may still "where necessary" maintain duties or restrictions permitted under GATT Articles XI (quantitative restrictions); XII (restrictions applied for balance-of-payments reasons); XIII (non-discriminatory administration of quantitative restrictions); XIV (exceptions to the rule of non-discrimination), XV (exchange arrangements); and XX (general exceptions).¹³⁷ The same is true in services. Article V: 1(b) of GATS provides for the absence or elimination of substantially all discrimination and the granting of national treatment between or among the parties, in the sectors covered through:

- (i) elimination of existing discriminatory measures, and/or

¹³³ See Chapter 4 of this thesis for the suggestions and recommendations on the issue.

¹³⁴ See Chapter 4 of this thesis for more elaboration.

¹³⁵ See World Trade Organization, *Trading into the Future* 2ed, (2001)1, available at <http://www.wto.org/english/res-e/download-e/tif.pdf>. (accessed 6 January 2011). Freer trade: gradually through negotiations.

¹³⁶ See Article XXIV: 8(a) (i) of GATT 1947.

¹³⁷ See Article XXIV: 8(a) (ii) of GATT 1947.

- (ii) prohibition of new or more discriminatory measures, either at the entry into force of that agreement or on the basis of a reasonable time-frame, except for measures permitted under Articles XI, XII, XIV and XIV bis.

In conclusion if a regional group has five members as the East Africa Community,¹³⁸ for example, one of the conditions to be fulfilled by their formation agreement is that the barriers which will prevent trade between the five members should be totally removed to facilitate trade between them within the RTA.

2.3.2. The agreement should not raise trade barriers against non-participating members.

GATT Article XXIV: 5(a) stipulates that the duties (common external tariff) and other regulations of commerce imposed on trade of non-participants shall not on the whole be higher, or more restrictive, than the general incidence of duties and other trade regulations applicable in the participants prior to the formation of the customs union or adoption of the interim agreement. In other words the single tariff of a customs union and other trade barriers should not be higher than the pre-union average. Regional trade agreements must therefore not result in more severe barriers to trade for third member states of the WTO. In other words liberalization must not be achieved at the expense of others. This “conformity test” under Article XXIV: 5(a) is intended to ensure that customs unions or related interim arrangements perform their purpose of promoting trade among participants, while seeking to not unnecessarily raise trade barriers against non-participants. In the *Turkey – Textiles* case, the Panel found that:

‘What paragraph 5(a) provides, in short, is that the effects of the resulting trade measures and policies of the new regional agreement shall not be more trade restrictive, overall, than were the constituent countries’ previous trade policies and that paragraph 5(a) provided for an “economic” test for assessing compatibility.’¹³⁹

Both these findings were shared by the Appellate Body, which added that “the text of the chapeau of paragraph 5 should be interpreted in its context”, and identified paragraph 4 as an import element in that context. This led the Appellate Body to state:

¹³⁸ The East African Community membership is Kenya, Uganda, Tanzania, Rwanda and Burundi.

¹³⁹ WT/DS34/R, para. 9.121.

*'According to paragraph 4, the purpose of a customs union is "to facilitate trade" between the constituent members and "not to raise barriers to the trade" with third countries. This objective demands that a balance be struck by the constituent members of a customs union. A customs union should facilitate trade within the customs union, but it should not do so in a way that raises barriers to trade with third countries.'*¹⁴⁰

An authentic free trade area (or interim agreement leading to the formation of a free trade area) will be accorded permission to operate in violation of the MFN principle provided that it promotes the trade of participants and does not raise barriers against trade with non-participants.¹⁴¹ For services, the Economic integration agreement must also facilitate trade between the parties and thus *'not raise the overall level of barriers to trade in services within the respective sectors or subsectors compared to the level applicable prior to such an arrangement'*.¹⁴²

2.3.3. The period for implementation of an RTA.

According to Article XXIV, an interim agreement for the establishment of a free-trade area should have "a plan and schedule" (an interim agreement) for the formation of the free-trade area "within a reasonable length of time".¹⁴³ Some clarity has been introduced by the Understanding on GATT Article XXIV over the ambiguity on what constitutes a "reasonable length of time".¹⁴⁴

¹⁴⁰ WT/DS34/AB/R, paras. 55-56.

¹⁴¹ This condition is stipulated in GATT Article XXIV: 5(b) as follows: *'the duties and other trade regulations in each of the FTA participants applied to trade with third countries at the formation of the free trade area or adoption of the interim agreement shall not be higher or more restrictive than the corresponding duties and other trade regulations existing in the same FTA participants prior to the formation of the free trade area or the interim agreement.'*

¹⁴² See Art.V:4 of GATS.

¹⁴³ See GATT Article XXIV: 5(c) (emphasis added).

¹⁴⁴ See Paragraph 3 on the *Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994*.

The Understanding provides in part that the period should exceed 10 years only in exceptional circumstance.¹⁴⁵

2.3.4. Procedure for compensatory adjustment arising from the withdrawal or modification of schedules as set forth in GATT Article XXVIII and GATS Article XXI.

If the adoption of a common external tariff by a WTO member of a custom union leads to an increase in its bound tariffs and thus becoming inconsistent with its previously negotiated schedules of tariff concessions as per GATT Article II,¹⁴⁶ then the procedure for compensatory adjustment arising from the withdrawal or modification of schedules as set forth in GATT Article XXVIII (and the Understanding on that Article) applies.¹⁴⁷ Paragraph 10 of the 1980 Guidelines on “*Procedures for Negotiations under Article XXVIII*”¹⁴⁸ provides that these procedures are in relevant parts also valid for renegotiations under Article XXIV: 6. The 1990 Award by the Arbitrator on “*Canada/European Communities - Article XXVIII Rights*” discusses, *inter alia*, the Article XXVIII rights of Canada dating from Article XXIV: 6 negotiations Canada concluded with the Community on 29 March 1962 and the agreements on quality and ordinary wheat concluded between the parties on the same day. The Award notes as follows: ‘*it is generally accepted proposition that the right to withdraw concessions is an integral part of the right to negotiate.*’¹⁴⁹

¹⁴⁵ See Understanding Article XXIV: 5 (3) for more clarification. See also the discussion in various Working Party reports concerning “reasonable length of time: EEC-Association of Greece, 11S/149, paras. 6, 7; EEC-Association with Turkey, 13S/59, paras. 6, 7, 19S/102, paras. 6, 8, 14, 21S/108, paras. 7, 10; UK-Ireland FTA, 14S/122, paras. 24, 26.

¹⁴⁶ GATT Article II provides in part that :

‘Each contracting party shall accord to the commerce of the other contracting parties treatment no less favourable than that provided for in the appropriate part of the appropriate schedule ...’

¹⁴⁷ See Article XXIV:6 GATT and Paragraph 4 on the *Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994*.

¹⁴⁸ See C/113 and Corr.1, 27S/26.

¹⁴⁹ See DS12/R, 37S/80, 85.

Paragraph 4 of the Understanding on the Interpretation of Article XXIV of the GATT 1994 on the other hand establishes the procedure to be followed when a Member forming a customs union proposes to increase a bound rate of duty. The procedure provided in GATT Article XXVIII is compensatory adjustment. In essence, this procedure obliges participating custom unions to negotiate and agree with concerned WTO members, and further consult other WTO members with substantial interest in such concession, on adequate compensation.¹⁵⁰ The Understanding on GATT notes that any compensatory negotiations be entered into in good faith and the failure to achieve any result within reasonable period of time entitles the customs union to modify or withdraw the concession made and for the other to retaliate.¹⁵¹ For services, Article V: 5 of GATS provides that if a Member intends to withdraw or modify a specific commitment inconsistently with the terms and conditions set out in its schedule, the procedure for withdrawal and modification set forth in paragraphs 2,3 and 4 of Article XXI apply. The provision builds upon the tradition of Article XXIV: 6 and Article XXVIII GATT 1994 on modification of schedules.¹⁵²

2.4. WTO BASIC TRANSPARENCY REQUIREMENTS ON RTAs.

2.4.1. Notification.

2.4.1.1. Notification of agreements under Article XXIV.

The time at which an RTA should be notified by Members is not precisely formulated nor homogeneously expressed in WTO rules.¹⁵³ In practice, many RTAs are notified when their texts have already been sealed or even when the RTA is already in force, and it has been argued that this restrains the effectiveness of the ensuing examination process. It has been suggested that the terms “shall promptly notify” and “deciding to enter” in GATT Article XXIV: 7(a) should be interpreted to mean that the notification and submission of information should take

¹⁵⁰ See Article XXIV: 6 and article XXVIII paragraph 1 of the GATT 1947.

¹⁵¹ See Paragraph 5 on the *Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994*.

¹⁵² See Article XXI: 2 Paragraph (a) of the GATS.

¹⁵³ See “*Compendium of Issues Related to Regional Trade Agreements*,” Negotiating Groups on Rules, World Trade Organization, August 1, 2002, TN/RL/W/8/Rev. 1(02-4246).

place, at least, before the entry into force of the RTA. Conversely, it has been observed that a case-by-case approach is more appropriate to take into account the complexity of issues surrounding RTAs, in particular the political and legal difficulties related to notifying an RTA prior to its ratification. The Council Decision of 25 October 1972 on procedures for the examination of customs unions and free-trade areas provides that:

*'The Council notes that Article XXIV:7(a) of the General Agreement requires that any contracting party deciding to enter into a customs union or free trade area or an interim agreement leading to the formation of such a union or area, shall promptly notify the CONTRACTING PARTIES.'*¹⁵⁴

2.4.2. Procedures for examination of agreements under Article XXIV.

The examination of agreements under Article XXIV has been conducted in working parties established for that purpose; such working parties have generally commenced with an exchange of written questions and answers concerning the agreement under examination.¹⁵⁵ The Report in 1949 of the Working Party on "The South Africa-Southern Rhodesia Customs Union", which was the first Working Party ever to examine an agreement under Article XXIV, notes that the integration agreement should be examined on a case by case basis since the use of precedents was clearly against the spirit of Article XXIV.¹⁵⁶ The Report of the Working Party on "EEC - Agreement of Association with Turkey" records the view that "as acknowledged by prior working parties, these association agreements had to be considered on a case-by-case basis and in their own context".¹⁵⁷ Paragraph 7 of the Understanding on the Interpretation of Article XXIV of the GATT 1994 provides that:

'All notifications made under paragraph 7(a) of Article XXIV shall be examined by a working party in the light of the relevant provisions of GATT 1994 and of paragraph 1 of

¹⁵⁴ See 19S/13.

¹⁵⁵ See the *Analytical Index of the GATT* p 817.

¹⁵⁶ See GATT/CP.3/SR.13, p. 5, 7.

¹⁵⁷ See L/3750, adopted on 25 October 1972, 19S/102, 103, para. 3.

this Understanding. The working party shall submit a report to the Council for Trade in Goods on its findings in this regard. The Council for Trade in Goods may make such recommendations to Members as it deems appropriate”.

Past GATT practice,¹⁵⁸ and one which is likely to continue under the WTO, shows that interim agreements are notified only after they have been agreed to and ratified by the participants, leaving no room for further changes. A further obligation is stipulated by GATT Article XXIV: 7(c) to the effect that parties to an interim agreement shall communicate any substantial change in the plan or schedule to WTO members who may request consultations with the participants if the change seems likely to jeopardize or unduly delay the formation of the customs union or free trade area.

2.4.3. Periodic reporting.

At the end of the Twenty-seventh Session in 1971, the CONTRACTING PARTIES instructed the Council to establish a calendar fixing dates for the examination, every two years, of reports on regional preferential agreements.¹⁵⁹ However, no such calendar has been fixed since 1987. At the Twenty-Fifth Session in 1968, the representative of the EEC stated that since 1 July 1968 the customs union had been fully achieved, and the Community did not anticipate submitting further reports on the formation of the customs union.¹⁶⁰ At the February 1970 Council meeting, the EEC cited its notification that on 1 January 1970 the Common Market had completed its transitional period of existence and entered the definitive stage, and “*this Customs Union is now complete in accordance with the criteria laid down in Article XXIV*”¹⁶¹ and stated that the Community would

¹⁵⁸ *Compendium of Issues Related to Regional Trade Agreements*, Negotiating Groups on Rules, World Trade Organization, August 1, 2002, TN/RL/W/8/Rev. 1(02-4246).

¹⁵⁹ See L/3641, 18S/37, 38. For calendars established by the Council, see, e.g., documents L/3682/Rev.1, L/4100, L/4445, L/4725, L/5158, L/5502 and L/5825. See also material on this subject in various reports of working parties: ANZCERT, 31S/170, paras. 26, 28, 31; Australia-Papua New Guinea, 24S/63, paras. 14, 15, 19 and Canada-US FTA, 38S/47.

¹⁶⁰ See L/3125, SR.25/7 p. 119ff, SR.25/9 p. 171ff; also see later statement by the EEC that from a legal point of view, there was no reporting obligation in the case of customs unions and free-trade areas which had been fully completed, C/M/123, p. 6.

¹⁶¹ See L/3332.

no longer submit annual reports on the development of its customs union. The Chairman in his summary noted that he had consulted on this matter with delegations and had come to the conclusion that it would be wiser not to pursue an examination of the legal issues involved; he noted as well that:

*‘such a decision was without prejudice to the legal rights of all contracting parties under Article XXIV, so that it was open to any contracting party to raise on the agenda of the Council or on the agenda of the CONTRACTING PARTIES any specific matter arising under Article XXIV in relation to the Community’.*¹⁶²

The Report of the Working Party on “Australia/New Zealand Closer Economic Relations Trade Agreement (ANZCERT)” also records the view of the representative of Australia that “consistent with past GATT practice, the parties would be prepared to submit a report biennially to the CONTRACTING PARTIES on the operation of the Agreement. They would, however, see no need to continue this reporting once the full free trade area had been finally established”.¹⁶³

Paragraph 11 of the Understanding on the Interpretation of Article XXIV of the GATT 1994 provides that ‘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’.

2.4.4. Recommendation by the Contracting Parties.

Recommendation by the Contracting Parties is also relevant. It was stated during the discussions on the General Agreement at the Geneva session of the Preparatory Committee that:

‘Where a country Member of the Agreement enters into an arrangement with another country which involves preferential arrangements which are not consistent with its obligations under the MFN and justifies that departure from its obligations on the ground

¹⁶² See C/M/61, p. 6-7.

¹⁶³ See L/5664, adopted on 2 October 1984, 31S/170, 179, para. 28.

*that it is a step toward a Customs Union, then the contracting parties should have a chance to have a look at those proposals and see whether they are in fact as represented.’*¹⁶⁴

The Report of the Working Party on “*EEC - Agreement with Spain*” on the other hand contains the following paragraph:

*“Members of the Working Party noted that paragraph 7(b) stipulated that the CONTRACTING PARTIES should make recommendations to the parties to a free-trade agreement if they found that the Agreement was not likely to result in the formation of a customs union or a free-trade area within the period contemplated by the parties to the Agreement or the period foreseen for the formation of free-trade area was not a reasonable one.”*¹⁶⁵

Paragraphs 7 through 10 of the Understanding on the Interpretation of Article XXIV of the GATT 1994 conclude by providing as follows:

“... The Council for Trade in Goods may make such recommendations to Members as it deems appropriate In regard to interim agreements, the working party may in its report make appropriate recommendations on the proposed time-frame and on measures required to complete the formation of the customs union or free-trade area. It may if necessary provide for further review of the agreement.”

2.5. Notification, examination and periodic reporting of agreements under Article V of GATS.

2.5.1. “Members which are parties to any agreement ... shall promptly notify any such agreement”

In addition to the substantive legal requirements introduced by the GATS with regard to sectoral coverage and the prohibition on raising the level of barriers to the third parties and members of the regional group, Art. V sets out notification requirements for EIA. GATS Article V: 7(a)

¹⁶⁴ See EPCT/TAC/PV/11, p. 37.

¹⁶⁵ See L/3579, adopted on 6 October 1971, 18S/166, 172, para. 21.

requires the parties to an RTA to promptly notify any such agreement and any enlargement or any significant modification of that agreement to the Council for Trade in Services. The time at which such notification should be made by Members is however not expressly stated in the Agreement and the practice under Article XXIV GATT may provide some guidance on the issue.

However, as noted earlier, many RTAs are notified when their texts have already been sealed or even when the RTA is already in force. This has been argued¹⁶⁶ to restrain the effectiveness of the ensuing examination process. It has been suggested however,¹⁶⁷ that the term “shall promptly notify” in GATS Article V: 7(a) should be interpreted to mean that the notification and submission of information should take place, at least, before the entry into force of the RTA. On the examination of the agreement, Article V: 7 (a) provides that:

“The Council may establish a working party to examine such an agreement or enlargement or modification of that agreement and to report to the Council on its consistency with the Article.”

GATS Article V: 7(b) on the other hand requires the parties to an RTA implemented on the basis of a time-frame to “report periodically” to the Council for Trade in Services (CTS) on its implementation. In that context, it has been proposed that periodic reporting should be extended to all economic integration agreements (EIAs), whether or not implemented in stages. Finally, it has been noted that this would require a renegotiation of GATS provisions.

2.5.2. RTA Consistency Assessment.

The requirement for a multilateral consistency assessment of certain notified RTAs is contained in the provisions themselves, sometimes explicitly, as in GATS Article 7(a), sometimes implicitly, as in paragraph 7 of the Understanding.¹⁶⁸ The meaning of “consistency” is also defined in paragraph 1 of the 1994 Understanding with respect to RTAs notified under Article XXIV. It has been argued that an RTA can be considered as tolerated or deemed compatible by

¹⁶⁶ See *Compendium of Issues Related to Regional Trade Agreements*, Negotiating Groups on Rules, World Trade Organization, August 1, 2002, TN/RL/W/8/Rev. 1(02-4246)50.

¹⁶⁷ See *Compendium of Issues Related to Regional Trade Agreements*, Negotiating Groups on Rules, World Trade Organization, August 1, 2002, TN/RL/W/8/Rev. 1(02-4246)52.

¹⁶⁸ *Understanding on the Interpretation of Article XXIV of the GATT 1994* (hereinafter, the 1994 Understanding).

the WTO in the absence of clear consistency conclusions being spelled out in the report on its examination, or when no such examination report exists.¹⁶⁹ Conversely, it has been argued that the legal status of RTAs in the WTO can also be considered as remaining unclear, the rights of WTO Members under dispute settlement procedures being preserved in any event. In the dispute *Turkey – Restrictions on Imports of Textile and Clothing Products* (hereinafter *Turkey – Textiles*) case, the Panel examined an argument put forward and agreed with the findings of the GATT Panel in *EEC - Imports from Hong Kong*, which had rejected a similar argument put forward by the European Communities (EC), stating that ‘ *it would be erroneous to interpret the fact that a measure had not been subject to Article XXIII over a number of years, as tantamount to its tacit acceptance by contracting parties.*’¹⁷⁰ While WTO rules provide for a multilateral assessment of the consistency of an RTA with the rules, the possibility of recourse to dispute settlement is explicitly referred to in paragraph 12 of the Understanding. On the question of a panel's jurisdiction to assess the compatibility of RTAs, the Appellate Body, in the *Turkey – Textiles* case, stated

*‘We would expect a panel, when examining such a measure [taken by a party to a customs union], to require a party to establish that both of these conditions [the customs union fully meets the requirements of XXIV: 8(a) and 5(a) and that without such measure that customs union could not be formed] have been fulfilled.’*¹⁷¹

2.6. WTO NEW TRANSPARENCY MECHANISM FOR REGIONAL TRADE AGREEMENTS.¹⁷²

Instead of awaiting the final results of the Doha Development Round negotiations, the WTO General Council formally established the transparency mechanism on 14 December 2006.¹⁷³ This

¹⁶⁹ The examination, which is a multilateral function (i.e. by the WTO Membership), should in principle include an assessment of the consistency of the examined RTA *vis-à-vis* relevant WTO rules.

¹⁷⁰ Panel Report on *EEC – Quantitative Restrictions against Imports of certain Products from Hong Kong*, adopted on 12 July 1983 (BISD 30S/129), para. 28 and Panel Report on *Turkey- Textiles*, adopted on 19 November 1999 (WT/DS34/R), paras. 9.172-174.

¹⁷¹ Appellate Body Report, adopted on 19 November 1999 (WT/DS34/AB/R), paras. 59-60.

¹⁷² Hereinafter abbreviated as RTAs.

showed the urgency felt by the WTO members for more transparency in the creation and functioning of the RTAs. The mechanism was to operate on a provisional basis.¹⁷⁴ The new “RTAs’ Transparency Process” provides for:

1. Early announcement of Regional Trade Agreements.

Provision of information of RTAs under negotiation and signed i.e. name, scope and date of signature, timetable for entry into force of the agreement, etc. Such information would be posted on the WTO website and be periodically updated by the Secretariat.¹⁷⁵

2. Notification.

Notification of the RTA should be as early as possible – after ratification or application of the agreement by a party but before the application of preferential treatment.¹⁷⁶ In notifying their RTA, the parties should specify under which provision(s) of the WTO agreements it is notified. They will also provide the full text of the RTA (or those parts they have decided to apply) and any related schedules, annexes and protocols, in one of the WTO official languages.¹⁷⁷ Where available this preliminary information is to be submitted in an electronically exploitable form.¹⁷⁸



¹⁷³ After tortuous negotiations, agreement reached on text on 14 December 2006 (WT/L/671 and 672; 18 December 2006).

¹⁷⁴ See paragraph 7 of the Preamble to *Transparency Mechanism for Regional Trade Agreements, Decision of 14 December 2006* and paragraph 22 which provides that:

“This Decision shall apply, on a provisional basis, to all RTAs.”

¹⁷⁵ See Paragraphs 1 and 2 of the *Transparency Mechanism for Regional Trade Agreements, Decision of 14 December 2006*.

¹⁷⁶ See Paragraph 3 of the *Transparency Mechanism for Regional Trade Agreements, Decision of 14 December 2006*.

¹⁷⁷ See Paragraph 4 of the *Transparency Mechanism for Regional Trade Agreements, Decision of 14 December 2006*.

¹⁷⁸ See Paragraph 4 of the *Transparency Mechanism for Regional Trade Agreements, Decision of 14 December 2006*.

3. Factual Presentation of RTAs.

The WTO Secretariat, on its own responsibility and in full consultation with the parties, shall prepare a factual presentation of the RTA. This “Factual Presentation” is to assist Members in their consideration of the RTA.¹⁷⁹ The Factual Presentation by the Secretariat is based on information and data provided by the parties. Other sources of information could be used by the Secretariat but opportunity should be given to the parties to comment on their accuracy.¹⁸⁰

4. Subsequent notification and reporting.

Any changes or modification to the regional trade agreement should be notified as soon as possible.¹⁸¹ The parties are required to provide a summary of the changes made, as well as any related texts, schedules, annexes and protocols, in one of the WTO official languages and, if available, in electronically exploitable format.¹⁸² At the end of the RTA's implementation period, the parties shall submit to the WTO a short written report on the realization of the liberalization commitments in the RTA as originally notified.¹⁸³

2.7. CONCLUSION.

Regional trade agreements are bound to be an exception to the MFN treatment principle. WTO rules both allow and contain regional trade through setting conditions for the formation of RTAs within the multilateral trade system. The current WTO rules on regional trade are weak and ambiguous.¹⁸⁴ Further the long-term misunderstanding on the interpretation of some phrases

¹⁷⁹ See Paragraph 7(b) of the *Transparency Mechanism for Regional Trade Agreements, Decision of 14 December 2006*.

¹⁸⁰ See Paragraph 9 of the *Transparency Mechanism for Regional Trade Agreements, Decision of 14 December 2006*.

¹⁸¹ See Paragraph 14 of the *Transparency Mechanism for Regional Trade Agreements, Decision of 14 December 2006*.

¹⁸² In their notification, Members may refer to official Internet links related to the agreement where the relevant information can be consulted in full, in one of the WTO official languages.

¹⁸³ See Paragraph 15 of the *Transparency Mechanism for Regional Trade Agreements, Decision of 14 December 2006*.

¹⁸⁴ See Chapter 4 for recommendation for change.

especially ‘substantially all’ hamper regionalism and trade liberalisation. It is difficult to determine whether all the requirements for regionalism have been met since WTO members have taken different interpretations of the vital phrases. For example, the phrase ‘substantially all’ has both the qualitative and quantitative interpretation. The notification procedure is also weak. Article XXIV, paragraph 7(a) GATT requires any member entering into a regional trade agreement to ‘promptly notify’ the WTO. The problem with this notification requirement is that it is unclear as to when any country should make such notification. Is it before any regional trade agreement is in force or after? The new Transparency Mechanism which is an essential component for the restoration of the WTO’s supervisory role on the trade policies pursued by RTAs is not free from fault.¹⁸⁵ This realisation formed the basis for negotiation at the Doha Round of negotiations discussed later in this thesis.¹⁸⁶



¹⁸⁵ See Chapter 4 for recommendation for change especially Ecuador Proposal for change of the Transparency mechanism.

¹⁸⁶ See Chapter 4 for recommendation for change.

CHAPTER 3

3.0 THE EAST AFRICAN COMMUNITY PERSPECTIVE.

3.1. Introduction.

Regional trade agreements (RTAs) constitute an increasingly significant feature of the world trade system. Africa and East Africa in particular is not an exception to this phenomenon.¹⁸⁷ The East African Community (EAC) is an example of such RTAs in the world now recognized “*to play an important role in promoting the liberalization and expansion of trade and in fostering development.*”¹⁸⁸ Using key principles and provisions of the East African Community Treaty, East African Customs Union Protocol and Common Market Protocol as yardsticks for analysis, this chapter shows how RTAs complements the multilateral trading system. The key objective of the RTAs has been further trade liberalisation,¹⁸⁹ through elimination of tariff, non-tariff and technical barriers to trade.¹⁹⁰ Regional integration and cooperation in the East Africa Region (EAR) has been a subject of discussion for a long period of time. The East African Community, for example, evolved from an earlier common customs collection centre that was established in 1900 during the construction of the Kenya/Uganda Railway between 1897 and 1901.¹⁹¹ Later in 1919, a Customs union was established, then the East Africa Income Tax Board and the Joint Economic Council both in 1940. In June 1967, the three East Africa State Partners signed the Treaty of East African Economic Cooperation that established the East Africa Community. The Treaty outlined the objective of East Africa Community as:

‘... to strengthen and regulate the industrial, commercial and other relations of the partner states expansion of economic activities the benefit whereof shall be equitably shared.’

However, because of perceived inequality in the benefit distribution, ideological differences, differences in levels of development and lack of political will to solve real and imagined

¹⁸⁷ Sengeeta Kharona, Kato Kimbugwa & Nicholas Perdakis. *The Impact of tariff reductions Under the East African Community Customs Union: Intra-trade effects on Uganda* (2008).

¹⁸⁸ See Para. 4 of the Doha Ministerial Declaration. Adopted on 14 Nov. 2001 WT/MIN901) /DEC/1.

¹⁸⁹ The term liberalization in this chapter means deliberate actions that reduce discrimination.

¹⁹⁰ The WTO has been working to reduce tariff and non-tariff barriers to trade through its successive trade negotiation Rounds.

¹⁹¹ See Para 2 of the Preamble to the Treaty for the establishment of the East African Community.

problems, the community collapsed in 1977.¹⁹² Efforts to revive cooperation later began after the signing of the Agreement for the establishment of a permanent Tripartite Commission in Kampala on 26th November 1994.¹⁹³ Negotiations for the re-establishment of the EAC began, leading to the signing of the Treaty for the establishment of the East African Community on 30th November 1999.¹⁹⁴ The Treaty came into force on 30th July 2000 ushering in a new era for cooperation in economic, social and political affairs to the people of East Africa.¹⁹⁵ The coming into force of the Common Market Protocol in 2010 ushered in extensive trade liberalization in East Africa region. This implied total elimination of barriers to trade in goods and services, accompanied by free movement of capital, persons and the right of establishment in the Common Market.¹⁹⁶ Harmonization and coordination of monetary and fiscal policies is also an essential requirement in the integration process.¹⁹⁷

3.2. The EAC Common Market Protocol.

3.2.0. Elements of the Common Market Protocol.

The East Africa Community Common Market Protocol establishes a framework within which the parties can cooperate with a view of realising accelerated economic growth and development through the attainment of free movement of goods, persons, labour, the right of establishment and residence, the free movement of services and capital.¹⁹⁸ This section of the research demonstrates how the EAC has further liberalized trade in goods and services to the benefit of its member states.

¹⁹² See Para 4 of the Preamble to the Treaty for the establishment of the East African Community.

¹⁹³ See Para 8 of the Preamble to the Treaty for the establishment of the East African Community

¹⁹⁴ See Article 2 of the Treaty for the establishment of the East African Community which establishes the community(hereinafter EAC Treaty)

¹⁹⁵ See Article 5.1 of the EAC Treaty.

¹⁹⁶ See Article 4.2 of the Common Market Protocol.

¹⁹⁷ See Article 30 -31 of the Common Market Protocol.

¹⁹⁸ See Para 6 of the Preamble to the Common Market Protocol.

3.2.1. Liberalizing trade in services.

Trade in services is an important component of the EAC Partner States economies.¹⁹⁹ On average, the service sector presently accounts for about 48.8 percent of GDP and 34.5 percent share of total exports in the EAC region despite the existence of various trade barriers.²⁰⁰ Liberalisation of service trade in the region depicts a change in attitude by the governments to gradually expose previous monopoly domains to competition.²⁰¹ Multilaterally, the creation of GATS as a result of the Uruguay Round negotiations provide a basis for progressive liberalisation as a means of promoting the economic growth of all trading partners.²⁰² Regionally, the EAC Treaty in its article 76 on the establishment of a common market recommends a free movement of trade in services.²⁰³ The Common Market Protocol has integrated this provision and defined the framework for liberalising trade in services in the EAC.²⁰⁴ Trade in services is defined by GATS as the supply of services through four (4) modes of supply.²⁰⁵ A similar approach is followed by the protocol in its definition of service trade which is four-pronged, depending on the territorial presence of the supplier and the consumer at the time of the transaction. Pursuant to Article 16:2, the Protocol covers services supplied

(a) from the territory of a Partner State into the territory of another Partner State;²⁰⁶

¹⁹⁹ Christopher H. Onyango. *Liberalisation of Services and its Implications on Cross-border Agricultural Trade in Eastern Africa*. (2010).5

²⁰⁰ Christopher H. Onyango. *Liberalisation of Services and its Implications on Cross-border Agricultural Trade in Eastern Africa*. (2010).5

²⁰¹ WTO Trade in Services Extended set of Documents 2010 p 8.

²⁰² See Paragraph 2 of the Preamble to GATS and WTO Guidelines and Procedures for the Negotiations on Trade in Services (document S/L 93) Adopted by the Special Session of the Council for Trade in Services on 28 March 2001.

²⁰³ Free movement of services means that service providers are able to supply their products to consumers in partner states and must be given equal treatment to domestic suppliers in those markets.

²⁰⁴ Article 23 of the Protocol states that the implementation of Article 16 (free movement of service) shall be progressive and in accordance with the schedule on the progressive liberalisation of services, specified in Annex V to the Protocol.

²⁰⁵ Article I: 2 of GATS.

²⁰⁶ Commonly referred to as **Mode 1-Cross-border trade** under the WTO terms.

- (b) in the territory of a Partner State to service consumers from another Partner State commonly referred to as Mode 2-Consumption abroad in GATS-speak;
- (c) by a service supplier of a Partner State ,through commercial presence of the service supplier in the territory of another Partner State also known as Mode 3-Commercial presence; and
- (d) by the presence of a service supplier, who is a citizen of a Partner State ,in the territory of another Partner State also referred to as Mode 4-Presence of natural persons.

Article 16:3 stipulates that the Partner States shall take such measures to ensure the observance of the measures by local government and local authorities and non-governmental bodies within the Partner States. It does not matter in this context whether a measure is taken at national or local government level, or by non-governmental bodies exercising delegated powers.²⁰⁷ The relevant definition covers any measure taken by Partner States as *'laws and administrative actions.'*²⁰⁸ Excluded from coverage are *'services provided in the exercise of governmental authority'* which, in turn, are defined as services that are supplied *"neither on a commercial basis, nor in competition with one or more service suppliers."*²⁰⁹ Services normally provided for remuneration, in so far as they are not governed by the provisions relating to free movement of goods, capital and persons are nevertheless included in the coverage.²¹⁰ The principles underlying services trade regulation under the protocol is similar to that of GATS. For example, the National treatment obligation provided for by Article 17 of the Protocol implies the absence of all discriminatory measures that modify the conditions of competition to the detriment of foreign services or service suppliers. This obligation applies regardless of whether or not foreign services and suppliers are treated in a formally identical way to their national counterpart. What matters is that they are granted equal opportunities to compete. The Article provides that:

²⁰⁷ See Article 16:4 of the Protocol.

²⁰⁸ See Article 16:4 of the Protocol.

²⁰⁹ See Article 16:7 (a) of the Protocol.

²¹⁰ See Article 16:7 (b) of the Protocol.

*'Each Partner State shall accord to services and service suppliers of other Partner States, treatment not less favourable than that accorded to similar services and services suppliers of the Partner State.'*²¹¹

The accorded treatment shall either be *'formally identical'* or *'formally different'*, but it must not be less favourable.²¹² A treatment is less favourable *'... if it modifies the conditions of competition in favour of services or services suppliers of the Partner State compared to like services or service suppliers of the other Partner State.'*²¹³

For purposes of clarity, the term *'less favourable treatment'* has been further clarified in the WTO case *Canada –Autos*²¹⁴, where it was emphasized that a treatment is less favourable only if it modifies the conditions of competition against service and service suppliers who are already disadvantaged due to their foreign character. On the other hand, Article 18 of the Common Market Protocol sets out the principle of Most Favoured Nation treatment for trade in services.

The article provides that:

'Each Partner State...shall accord unconditionally, to services and service suppliers of other Partner state, treatment no less favourable than that it accords to like services and service suppliers of other Partner States or any third party or a customs territory'

Similar provisions exist for the MFN Clause in GATS Article II: 1 which applies to all services. The MFN principle in GATS however contains one unique feature. Article II: 2 of the GATS permits members to maintain a measure inconsistent with the principle provided that such a measure is listed in, and meets the conditions of the Annex on Article II Exemptions which relieves a Member only from its obligation under paragraph 1 of Article II, according to which it is required to extend the most favourable treatment it accords to any country to all other Members of the GATS. These exemption however, does not relieve a Member from its obligations or commitment under any other provision of the GATS.²¹⁵ Therefore if a Member

²¹¹ See Article 17:1 of the Protocol.

²¹² See Article 17:2 of the Protocol.

²¹³ See Article 17:3 of the Protocol.

²¹⁴ *Canada-Certain Measures Affecting the Auto-Motive Industry.*

²¹⁵ See Paragraph 5 of the Listing of Article II Exemptions (document 2061).

takes an MFN exemption in a sector where specific commitments are undertaken, the exemption would allow that member to deviate from its obligations under paragraph 1 of Article II but not from its commitments under Articles XVI or XVII. Notification obligations are also necessary in trade service, Art.19 of the Protocol sets out notification requirements for all measures of general application affecting the free movement of services. The notification requirement in Article 19:1 of the Protocol differs from those contained in GATS in the sense that the notification has to be made to the Council of Ministers of the Community established by Article 9 of the EAC Treaty instead of the Council on Trade in Services. The relevant parts of the Protocol containing specific notification requirements are the following:

➤ Article 19 (paragraph 1)-Notification.

‘Each Partner State shall promptly notify the Council of all the measures of general application affecting the free movement of services at the entry into force of this Protocol.’

➤ Article 19 (paragraph 2)-Notification.

‘The Partner State shall notify the Council of any international agreements pertaining to or affecting trade in services with third parties that they are signatory to, prior to and after the entry into force of this Protocol.’

➤ Article 19 (paragraph 4)-Notification.

‘Each Partner State shall, promptly and at least annually, inform the Council of the introduction of any new national laws or administrative guidelines, or any changes to existing laws or administrative guidelines which affect trade in services provided for in this Protocol.’

The Protocol explicitly recognizes the continued right (and, possibly the need) of Partners States to enforce domestic policy objectives through regulation. Pursuant to Article 20:2, measures of general application are to be administered “*in a reasonable, objective and impartial manner*”, phrases borrowed from GATS Article VI: 1. The measures must also not constitute barriers to trade in services. However, harmonisation of various domestic regulations is pertinent in the realisation of the established standards in the region.

Article 21 of the Protocol provides for the general exceptions to trade in services. Partner States are allowed to restrict trade in service to protect public morals or to maintain public order. They may also restrict trade to protect human, animal or plant life or health.²¹⁶ The necessity test

²¹⁶ See Article 21(1) of the Protocol.

approach of GATT article XX is also a qualification for the adoption of restrictive measures under Article 21 of the protocol.²¹⁷ The measures adopted must be necessary to achieve the stated objectives i.e. not arbitrary and or a disguised restriction to trade.²¹⁸

Finally the service trade liberalisation in the region is progressive. Partner States have Schedule of commitment which resembles those of GATS. The schedule of commitments which is contained in Annex V of the Protocol outlines limitation on the number of service sector liberalised, the time frame for liberalisation and the modes of service supply that are being liberalised. Only 7 out of a total of 12 service sector have been included in the Protocol. The sector include business service, communication service, distribution service, education service, financial service, transport service and travel and tourism service. Within these sectors specific subsectors have been liberalised according to each partner states preference. Liberalisation time frame runs from 2010-2015.²¹⁹ Trade in professional services through the movement of natural persons is restricted by explicit trade barriers, regulatory requirements and immigration policies. These can only be remedied by mutual recognition initiatives, development of common standards, revisiting visa and immigration laws and finally regional cooperation to improve professional education in EAR.

3.2.2. Cooperation in intellectual property rights.

Cooperation in intellectual property rights (IPRs) is another major provision of the Protocol. Article 43 of the Protocol provides the framework for this cooperation which involves *inter alia* the adoption of common positions in regional and international norm setting.²²⁰ Development of legal protective mechanism in IPRs is also important .Virtually all the EAC Partner States have institutional and legal frameworks for the protection and enforcement of main aspects of

²¹⁷ Patricio Leyton, 'Evolution of the "Necessary test" of article XX (b) :From Thai Cigarettes to the Present', in Edith Brown Weiss, John H. Jackson, and Nathalie Bernasconi -Osterwalder (eds), *Reconciling Environment and Trade*, 2 ed(2008) 77-102.

²¹⁸ The Article Provides:

'Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail or a disguised restriction on trade in services.'

²¹⁹ See Annex V Schedule on the progressive liberalization of services.

²²⁰ See Article 43(3) (g) of the Protocol.

intellectual property especially patents, trademarks and copyright.²²¹ The cooperation aims at promoting and protecting creativity and innovation for economic, technological, social and cultural development in the community. It further enhances the protection of intellectual property rights.²²² In the Doha negotiations the members *inter alia* stressed the importance attached to the implementation and interpretation of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) in a manner supportive of public health.²²³ The East Africa Partner States have moved to implement this through the *Draft EAC Regional Intellectual Property Policy and Protocol on the Utilisation of Public Health Related WTO-TRIPS Flexibilities*.²²⁴ Finally it is worth to note that the Protocol has also incorporated intellectual property rights provisions that largely mirror the substantive obligations of the TRIPS Agreement.²²⁵

3.2.3. Liberalizing trade in goods.

Trade liberalization principally involves the elimination of tariffs by members against each other. Within RTAs, tariffs are close to zero except for a few sensitive products. Overall there is no evidence that high tariff rates are currently a major impediment to intra-African trade.²²⁶ Reducing these barriers for goods is relatively straightforward _taxes and tariffs at the borders are removed so that goods can move around at no additional cost. The World Trade Organisation Chief during his visit to Kenya on 30th March 2011 noted that the review of customs regulations and harmonisation of standards in the EAC region were the precondition for moving

²²¹ Mboi E. Misati. *Draft EAC Regional Intellectual Property Policy and Protocol on the Utilisation of Public Health Related WTO-TRIPS Flexibilities*. A power Point presentation at the Regional Anti Illicit Trade Conference at the Hotel Intercontinental ,Nairobi ,Kenya from 6th -7th October 2010.

²²² See Article 43(1) (a) and (b) of the Protocol.

²²³ See Para.17 of the Doha Ministerial Declaration. Adopted on 14 Nov. 2001 (WT/MIN901) /DEC/1.

²²⁴ Mboi E. Misati. *Draft EAC Regional Intellectual Property Policy and Protocol on the Utilisation of Public Health Related WTO-TRIPS Flexibilities*. A power Point presentation at the Regional Anti Illicit Trade Conference at the Hotel Intercontinental ,Nairobi ,Kenya from 6th -7th October 2010.

²²⁵ TRIPS hereinafter refer to Agreement on Trade-Related Aspects of Intellectual Property Rights.

²²⁶ African Union (2010). *Trade liberalization, investment and economic integration in African Regional Economic Communities towards the African Common Market and economic community*. AU Conference of Ministers of trade 6th ordinary session 29 October - November, 2010 Kigali, Rwanda.

internationally. Kenya was urged to spearhead the removal of trade barriers within East African Community to increase its regional business.²²⁷ The Customs union Protocol and the Common Market Protocol provides a framework for the elimination of tariff and non-tariff barriers to trade. The Preamble to the Protocol on the establishment of the East Africa Customs union at paragraph 6 provides that:

‘...Partner States are desirous to deepen and strengthen trade among themselves and are resolved to abolish tariff and non-tariff barriers to create the most favourable environment for the development of regional trade.’

Article 2.4 of the Customs Union Protocol further provides that:

‘Within the Customs Union

(a) Customs duties and other charges of equivalent effect imposed on imports shall be eliminated save as provided for in this protocol.

(b) Non-tariff barriers to trade among the Partner States shall be removed.’

Liberalising trade in goods under this circumstance involves the substantial reduction of tariff and elimination of NTBs within the Community.

a) **Substantial reduction of Tariffs.**

The Customs Union objectives in article 3 of the CU Protocol were *inter alia* to further liberalise intra-regional trade in goods on the basis of mutually beneficial trade arrangements among the Partner States.²²⁸ These requires the Partner States to cooperate in matters concerning trade liberalisation and trade related aspects including the simplification and harmonisation of trade documentation, customs regulation and procedures with particular reference to such matters such as the valuation of goods, tariff classification, collection of customs duties, cross-border trade and export drawbacks.²²⁹ Intra-EAC tariff liberalisation started when the Customs Union Protocol was implemented on 1st January 2005. Kenya was required to eliminate its tariff on imports originating in Tanzania and Uganda respectively, with immediate effect on day 1 of the Customs Union Protocol implementation. Tanzania’s and Uganda’s trade in category A products

²²⁷ Kaburu M ‘*World trade chief urges Kenya to bring down the barriers.*’ *Sunday Nation*, 3 April 2011 22.

²²⁸ See Article 3(a) of Customs Union Protocol.

²²⁹ See Article 4 of Customs Union Protocol.

was also liberalised; tariffs on both countries category B imports originating in Kenya were to be phased out gradually over a period of 5 years starting on 1st January 2005.²³⁰ A three-band Common External Tariff (CET) on EAC imports originating in third countries (countries outside the EAC Common Customs territory) was also agreed upon in the context of EAC Customs Union Protocol.²³¹ Further, Article 37(2) of the Common market Protocol provides *inter alia* that the Partner States shall adopt common principles in particular in relation to tariff rates and conclusion of tariff and trade agreements.

b) Elimination of non-barriers barriers (NTBs).

Several recent studies on NTBs, particularly in the context of the COMESA-EAC-SADC Tripartite Summit Task Force highlighted the following NTBs – cumbersome customs and administrative entry procedures cause border delays and increased costs with a view to removing them through elimination or cooperative measures. The EAC region is characterised by lengthy clearance processes, lengthy classification and valuation of import processes, arbitrary documentation requirements and difficulties related to transit traffic (cumbersome and non-standardised procedures, cumbersome procedures for verifying containerised imports and diversion of transit goods into the region). Partner States have therefore committed themselves to eliminate ‘*with immediate effect*’ all existing NTBs on intra-EAC trade and to refrain from introducing new NTBs.²³² NTBs results from deliberate policies and procedures by states which need to be eliminated in order to liberalise trade. Article 1 of the Customs Union Protocol defines non-tariff barriers as laws, regulations, administrative and technical requirements other than tariffs imposed by a particular state whose effect is to impede trade.

²³⁰ Art. 11:3: Category A goods...shall be eligible for immediate duty free treatment; and Category B goods shall be eligible for gradual tariff reduction.

²³¹ Article 12:1 of the Customs Union Protocol states in part that:

‘... a three band common external tariff with a minimum rate of 0 per centum, a middle rate of 10per centum and a maximum rate of 25 per centum in respect of all products imported into the community.’

The review of the maximum rate of the common external tariff was after a 5 year period i.e. 2010.

²³² See Article 13.1 of Customs Union Protocol.

3.2.4. Free Movement of Capital.

Article 24 provides that the Partner State will remove restrictions on capital movement for East Africa resident or nationals not impose any new restrictions on payments related to capital movement or current payment and remove restrictions on capital incidental to the movement. However, the partner states can restrict capital movement on the ground that the restriction is appropriate, reasonable and justified. For example where the free movement of capital creates *'disturbance in the functioning of the financial market or causes a balance of payment difficulties,'* then a partner state can impose safeguard measures.²³³ These safeguard measures are subject to strict rules about their scope and manner of imposition.²³⁴ Safeguards are useful values that allow governments to suspend totally or partially their obligations-on a temporary and non-discriminatory basis in relation to injury caused to a domestic industry as a consequence of unforeseen situation that stem from the implementation of trade liberalization obligations.

3.2.5 Other Areas of Cooperation in the Common Market.

Article 29 provides that Partner States will protect cross-border investment of other Partner States and the fruits of those investments. This involves ensuring protection and security of cross-border investment, national treatment, and MFN treatment for those investors, and compensation on expropriation.²³⁵ Articles 33-36 provides rules on trade related issues; mainly competition, public procurement and subsidies. The rules on competition prevent any business practices which adversely affect free trade. Article 33 of the Protocol regionalizes the competition rules, an approach different from other RTAs which have competition rules on the main treaty.²³⁶ Partner States are also prohibited from granting subsidies which distorts or threatens to distort effective competition by favouring an undertaking.²³⁷ Public procurement is subject to strict discipline as partner states are prohibited from discriminating against suppliers, products and services originating from other Partner States.

²³³ See Article 26 of the Protocol.

²³⁴ See Article 27 of the Protocol. The conditions include non discrimination, necessity and non permanency.

²³⁵ See Article 29(2) of the Protocol.

²³⁶ For example CEMAC, COMESA, ECA, ECOWAS, SACU, SADC and UEMOA.

²³⁷ See Article 17 of the CU Protocol and Article 34 of the Common Market Protocol.

3.2.6. Anti-dumping measures.

Although the CU Protocol define the phrase “*anti-dumping measure*” in its provision, the Appellate Body in *US-1916 Act* opted for a wider definition of the phrase by rejecting the argument that based on the history of Article 1 of ADA²³⁸, “the phrase ‘anti-dumping measure’ refers only to definitive anti-dumping duties, price undertakings and provisional measures.” The Appellate Body stated that

*‘the ordinary meaning of the phrase ‘anti-dumping measure’ seems to encompass all measures taken against dumping. We do not see in the words ‘an anti-dumping measure’ any explicit limitation to particular types of measures.’*²³⁹

Dumping is prohibited if it causes or threatens material injury to an established industry in any Partner States, materially retards the establishment of a domestic industry therein or frustrates the benefits expected from the removal or absence of duties and quantitative restrictions of trade between Partner States.²⁴⁰ The anti-dumping laws provide relief to domestic industries that have been, or are threatened with, the adverse impacts of imports sold in the EAC market at prices that are shown to be less than fair market value. The scope and manner of imposition of the anti-dumping measures are captured by the East African Community Customs Union (Anti-dumping Measures) Regulations specified in Annex IV to the CU protocol. Under Article 16(2) of the CU protocol the EAC secretariat is required to notify the WTO on anti-dumping measures taken by any Partner State.

3.2.7. Countervailing measures.

Article 18 of the CU Protocol provides that the community may for the purposes of offsetting the effects of subsidies and subject to the East Africa Community Customs Union (Subsidies and Countervailing measures) Regulations specified in Annex V to the Protocol levy a countervailing duty on any product of any foreign country imported into the Customs union. The Countervailing duty shall be equal to the amount of the estimated subsidy determined to have been granted directly or indirectly on the manufacture, production or export of that product in the country of

²³⁸ Anti-dumping agreement hereinafter ADA.

²³⁹ Appellate Body Report on US-1916 Act, Para 119.

²⁴⁰ Art 16 of the Customs Union Protocol.

origin or exportation.²⁴¹ Under Article 20 of CU Protocol the Partner States shall cooperate in the detection and investigation of dumping, subsidies and sudden surge in imports and in imposition of agreed measures to curb such practices.

3.3. Conclusion.

Liberalising trade for both goods and services is the main objective of the multilateral trade system. Regionalism borrows this objective and provides simple rules for further trade liberalisation. Principles associated with the multilateral trade system such as the most –favoured nation treatment and national treatment also form the basis for trade liberalisation within the EAC regional trade system. The EAC Partner States have been working hard to overcome various challenges that emanate from the multilateral trade system with the view to improving business climate as well as the economic infrastructure within the region through the simplification of rules and procedure for trade. This chapter analysed important provisions of the East Africa Community Treaty, Customs Union Protocol and the Common Market Protocol which complements most WTO-Agreement obligations especially those of GATT, GATS, and TRIPS. The Preamble to the Protocol on the establishment of the East Africa Customs union at paragraph 8 provides that:

‘The Partner States are CONSCIOUS of their obligations, as Contracting Parties to the Marrakesh Agreement Establishing the World Trade Organisation, 1994(the WTO Agreement)....’ (emphasis added).

On the other hand paragraph 3 to the WTO Agreement states that:

‘WTO members are desirous of contributing to their objectives by entering into reciprocal and mutually advantageous arrangement directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations.’(emphasis added).

One can comfortably conclude from the above provisions that both the WTO and the East Africa Community aim at liberalising trade by eliminating tariffs and NTBs to trade making them complimentary to each other. In other words regionalism and multilateralism are complimentary.

²⁴¹ Art 18(1) (b) of the Customs Union Protocol.

CHAPTER 4

4.0. CONCLUSIONS AND RECOMENDATIONS.

4.1. Introduction.

Although the number of regional trade agreements (RTAs) in force globally, has been increasing yearly, the debate over whether RTAs contribute to or weaken and damage the multilateral system still remains.²⁴² It is clear from the topics covered that the RTAs of whatever depth cannot be said to be good or bad unequivocally for individual members. Further, the analysis of trade creation and trade diversion suggest a cautious assessment of any RTA. Several factors underlie the proliferation of RTAs in the world trade today. Among these factors, is the stalling of the multilateral trade negotiations in the WTO which has resulted in an increasing focus on regionalism and RTAs.²⁴³ RTAs are in general perceived to be either stumbling blocks or building blocks for further global trade liberalisation.²⁴⁴ They may reduce welfare when trade diversion is greater than trade creation.²⁴⁵ The current regionalism trend poses some challenges to the multilateral trade system since almost all of WTO member-states are now part of that trend.²⁴⁶ Most of them have generally emphasized that their meticulously bilateral agreements reinforce the WTO system rather than undermine it.²⁴⁷ GATT Article XXIV, GATS Article V and the Enabling Clause sets the multilateral constitutional limits within which RTAs operate. However these rules have proved to be inadequate and to cause confusion to the members especially in the interpretation of some phrases. In the Doha Round of negotiations the WTO-members agreed to *'negotiations aimed at clarifying and improving disciplines and procedures under the existing WTO provisions applying to regional trade agreements.'*²⁴⁸

²⁴² See Chapter 1 of this thesis for the debate.

²⁴³ The Doha trade negotiations have now taken long than expected and some people are of the view that they are heading to collapse.

²⁴⁴ See Chapter 1.section 1.6.3.

²⁴⁵ See Chapter 1.section 1.6.3.

²⁴⁶ See Chapter 1.section 1.6.2.

²⁴⁷ See *Multilateralism and Regionalism in a Globalizing World: A Perspective from Asia-Pacific Region.*

²⁴⁸ See Para.29 of the Doha Ministerial Declaration. Adopted on 14 Nov. 2001 WT/MIN901) /DEC/1.

The negotiations were to take into account the developmental aspects of regional trade agreements. This chapter analyses *inter alia* the various review proposals so far submitted by WTO member states within the Doha Ministerial Declaration.

4.2. Deficiency in the WTO's legal framework for managing RTAs.

One of the current stumbling blocks to the WTO's effectiveness in dealing with RTAs is the lack of agreement on the interpretation of the substantive WTO criteria for regionalism. Article XXIV, paragraph 5, stipulates that RTA members must not increase the overall level of trade barriers towards non-members after the agreement is concluded.²⁴⁹ The article in essence is designed to limit a RTA's trade barriers towards non-members. The major issue that emanate from this provision is how the WTO judge whether a RTA meet the requirement of 'not increasing the overall level of trade barriers' to levels higher than the levels prior to the agreement's formation. Article XXIV: 5 is completely silent in defining this phrase. This has made it difficult, if not impossible for RTAs parties and the WTO itself to determine if this requirement has been met.²⁵⁰ Article XXIV: 5 was an attempt to restrict a RTA's introduction of trade-diverting measures but opposite results seem to have occurred. The opinion derived from this is that article XXIV:5 has actually become the legal framework justifying, -rather than limiting ,such measures. Given this, along with the fact that it is unresolved within the multilateral trading system, it is not surprising that article according to Edwini Kessie, a counsellor in the WTO's Council, is '*one of the most controversial provisions of the GATT.*'²⁵¹ The idea behind regionalism was to ensure that countries go '*all the way*' in their regional trade liberalisation. The GATT framers thought that RTAs were vehicles for further trade liberalisation rather than discriminatory platform. Article XXIV:8 GATT requires the elimination of trade barriers with respect to '*substantially all trade*' between RTA countries. The problem with Article XXIV: 8 is that there has never been any agreement on how much trade

²⁴⁹ GATT Article XXIV:5 (a) and (b).

²⁵⁰ Kessie, E Counselor, Council & Trade Negotiations Committee, World Trade Organisation '*WTO Rules Relating to Regional Trade Agreement*,' power point presentation for Trade Policy Issues Workshop, Asian Development Bank, Singapore, Malaysia 25 February 2002:13.

²⁵¹ Kessie, E Counselor, Council & Trade Negotiations Committee, World Trade Organisation '*WTO Rules Relating to Regional Trade Agreement*,' power point presentation for Trade Policy Issues Workshop, Asian Development Bank, Singapore, Malaysia 25 February 2002:43.

liberalisation must occur before a RTA member satisfies the substantially all trade test. The WTO's Committee on Regional Trade Agreement, has indicated that two interpretations of 'substantially all trade' requirement have emerged. One is a quantitative approach while the other qualitative. These two approaches both have their weakness and strength. Finally GATT provisions are silent on the establishment of development-oriented RTAs between developed and developing countries. The proposals for possible change are discussed at a latter stage of this thesis. GATS regionalism rules are also weak. As its terminology is close to that of GATT Article XXIV, GATS Article V suffers from many of the same problems that plague RTAs covering trade in goods. Other shortcomings of the regionalism management rules are discussed below.

4.3. The WTO legal standards for RTAs: Analysis and proposal for change.

A number of proposals have been presented so far for the review of the WTO provisional transparency mechanism²⁵² for regional trade agreements. The US Proposal on the transparency mechanism is that all RTAs should be reviewed in a single WTO Committee.²⁵³ This is a departure from the current mechanism where the Committee on Regional Trade Agreement reviews RTAs falling under Article XXIV of General Agreement on Tariffs and Trade (GATT) and Article V of the General Agreement on Trade in Services (GATS).²⁵⁴ The Committee on Trade and Development reviews RTAs falling under the Enabling Clause.²⁵⁵ It is argued that the

²⁵² Transparency mechanism hereinafter abbreviated as TM.

²⁵³ See 'Review of the RTAs Transparency Mechanism under paragraph 23: Proposal for the consideration of all RTAs in a single WTO Committee,' Negotiating Groups on Rules, World Trade Organization, January 24, 2011, TN/RL/W/248 which proposes that all RTAs should be considered by the Committee on Regional Trade Agreement (CRTA).

²⁵⁴ See article 18 of the Transparency Mechanism for Regional Trade Agreements, Decision of 14 December 2006 which provides in part that:

'The Committee on Regional Trade Agreements ("CRTA") and the Committee on Trade and Development ("CTD") are instructed to implement this Transparency Mechanism. The CRTA shall do so for RTAs falling under Article XXIV of GATT 1994 and Article V of GATS, while the CTD shall do so for RTAs falling under paragraph 2(c) of the Enabling Clause.'

²⁵⁵ See article 18 of the *Transparency Mechanism for Regional Trade Agreements, Decision of 14 December 2006.*

US Proposal will solve the problem of 'dual notifications' of the Transparency Mechanism.²⁵⁶ India has opposed this change on the premise that the US proposal goes beyond the mandate of the Negotiating Group on Rules as it involves a fundamental change in the operation of the mechanism. Egypt, Argentina, China, Bolivia and Brazil have also opposed the US proposal on the ground that the role of the Committee on Trade and Development would be undermined if the consideration of RTAs between developing countries (the Enabling Clause RTAs) would be moved to the Committee on RTAs. The European Union, Turkey, Korea, Japan, Switzerland, Colombia, Canada, Australia, New Zealand, Chile and Costa Rica have supported the US proposal and its consideration by the Negotiating Group. The US proposal aims at amending paragraph 18 of the Transparency Mechanism consolidating the consideration of all RTAs in a single committee in order to avoid unresolvable conflicts among the WTO members concerning the choice of forum for RTAs transparency mechanism examination. It is suggested that paragraph 18 of the TM should be amended to read in full as:

'18. The Committee on Regional Trade Agreements ("CRTA") is instructed to implement this Transparency Mechanism. [FN 3 retained]'

It is important to note however that prior to the establishment of the CRTA, RTAs were reviewed in individual working parties or considered briefly in the GATT Council. Given the proliferation of RTAs starting in the 1990's, Members sought a more efficient means by which to consider them. The General Council established the CRTA in 1996

*'having regard to agreements which are to be notified, as the case may be, under Article XXIV of the General Agreement on Tariffs and Trade (GATT) 1994, Article V of the General Agreement on Trade in Services or the 1979 Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries.'*²⁵⁷

²⁵⁶ Members have had disagreement in the past over the forum in which a number of agreements should be considered under the Transparency mechanism. Some have even notified a single agreement under both Article XXIV of 1994 and the Enabling Clause for consideration.

²⁵⁷ WT/L/127.

Finally it is also argued that the United States proposal to change the TM is aimed at ensuring its practical operation.²⁵⁸ The second proposal from Ecuador involves a number of procedural adjustments. Ecuador proposes that the communication to the WTO about RTA should take the form of joint notes signed by all the parties to that RTA and one of these parties should be entrusted to submit the information needed.²⁵⁹ The proposal suggests the insertion of the following paragraphs in section D (Other provision) before the current paragraph 20.

'a) Communications submitted under paragraphs 1, 3, 4, 14 and 15 shall take the form of joint notes signed by all of the Members participating in new negotiations or by all Members parties to the RTA in question, as appropriate.

b) The information needed to assist Members in their consideration of a notified RTA, including the information referred to in paragraphs 7(a) and 12 and in the Annex, shall be transmitted to the WTO Secretariat through the party entrusted with submitting it on behalf of all of the Members parties to the RTA in question.

c) When the WTO Secretariat holds consultations concerning a notified RTA, including the cases referred to in paragraphs 6, 7(b) and 9, it shall approach the party tasked with conducting the consultations on behalf of the Members parties to the ACR in question.

d) When Members parties to an RTA submit successive communications on the same subject matter following the procedures established under paragraph (4a), the bodies entrusted with the implementation of the Mechanism as well as the WTO Secretariat shall act pursuant to the latest of those communications, unless the said Members provide otherwise.'

²⁵⁸ Paragraph 14 of 'Review of the RTAs Transparency Mechanism under paragraph 23: Proposal for the consideration of all RTAs in a single WTO Committee,' Negotiating Groups on Rules, World Trade Organization, January 24, 2011, TN/RL/W/248.

²⁵⁹ See 'Regional Trade Agreements: Communication from Ecuador, Negotiating Groups on Rules, World Trade Organization, January 24, 2011, TN/RL/W/249 and Proposal for procedural Adjustment to the Transparency Mechanism for Regional Trade Agreements (WT/L/671).

A number of delegations have welcomed Ecuador's proposal.²⁶⁰ Chinese Taipei and Korea have opposed the "joint notes procedure" on the ground that it could result in delays. The third proposal from Bolivia aims at amending the main RTA provision of Article XXIV of GATT to include wording on special and differential treatment for developing countries contained in Article V of GATS.²⁶¹ The African group has consistently supported a similar ACP proposal on the review of GATT Article XXIV provisions. An AU Conference of Ministers meeting in Addis Ababa in March 2009 adopted a declaration on EPAs that, *inter alia*, 'call[ed] upon the African group in the WTO, in collaboration with other members to intensify efforts towards appropriately amending Article XXIV of GATT 1994 with a view to allowing for necessary Special and Differential Treatment, less than full reciprocity principle and explicit flexibilities that are consistent with asymmetry required to make the EPS's development oriented.' The African group position is clear; the substantive provisions of GATT Article XXIV presently must be changed in such a manner that facilitate the establishment of development-oriented RTAs between developing and developed countries. Such RTAs would allow deep African integration into the world trade system.²⁶² To achieve this, two approaches exist within the African group. The first approach involves inserting a generic Special and Differential Treatment(S&D) provision into GATT Article XXIV. The following provision also mirroring GATS Article V: 3(a) is proposed for inclusion in GATT 1994 Article XXIV:

'Where developing countries are parties to an agreement with developed countries for the formation of a Customs Union, a free trade area, or an interim arrangement leading

²⁶⁰ The European Union said it offered useful solutions while New Zealand said it offered sensible suggestions.

²⁶¹ See 'Negotiations aimed at Clarifying and Improving Disciplines and Procedures under the Existing WTO Provisions applying to Regional Trade Agreements –A Proposal to Clarify Developmental Aspects of Regional Trade Agreements,' Negotiating Groups on Rules, World Trade Organization, January 26, 2011, TN/RL/W/250. Special and Differential Treatment (SDT or sometimes just S& D) provides formal recognition of the disadvantages developing countries face in the world trading system.

²⁶² See further The ACP Group of States document on 'Developmental aspects of regional trade agreements and special and differential treatment in WTO rules: GATT 1994 Article XXIV and the Enabling Clause' (TN/RL/W/155) which points at key arguments to support the incorporation of a pro-development clarification and improvement of GATT Article XXIV. It calls for formally and explicitly integrating operational and effective S&DT in GATT Article XXIV in order to enhance the development dimension in the wake of the growing formation of RTAs between developing and developed countries.

to either a customs union or a free trade agreement, Special and differential treatment shall be provided to developing countries regarding the conditions set out in GATT 1994 Article paragraphs 5 to 9 inclusive, in particular subparagraph 5(c) and subparagraph 8(a)(i) and (b).”

The second approach is for the African group states being actively involved in the details of the negotiations of flexibility regarding elements such as the substantially all the trade coverage, the transition period and the degree of asymmetry in reduction of trade barriers. India, Kenya, China and South Africa have supported Bolivia’s Proposal. Bolivia argues that involving developed and developing countries, the principle of less-than-full reciprocity and longer implementation period should be accorded to developing countries.

As noted earlier in chapter two of this thesis, different interpretations of “*substantially all the trade*” as to whether it refers to RTA trade in substantially all product sectors or substantial trade in all product sectors combined continues to impede the effective examination of RTAs under the WTO. Both Australia and the European Union have taken a great interest on its interpretation differently. Australia, for instance has argued that “*substantially all the trade*” requires RTA parties to include all sectors especially agriculture. The EU has in turn, argued that the word “*substantial*” in the phrase “*substantially all the trade*” does not obligate a country in the RTA to liberalize all its trade, a position supported by the WTO case law.²⁶³ During the examination of the European Economic Community in 1957, its member states proposed that ‘*a free-trade area should be considered as having been achieved for substantially all the trade when the volume of liberalised trade reached 80 percent of the total trade*’ (emphasis added).²⁶⁴

Many other members of the Working Party examining the EEC refused this proposal as they held that it was ‘*inappropriate to fix a general figure of the percentage of trade*’ as a requirement to

²⁶³ The panel in the *Turkey-Textile Case* concluded that the word “*substantial*” is clearly not the same as “*all*”.

²⁶⁴ GATT, *Report submitted by the Committee on Treaty of Rome to the Contracting Parties*, on 29th November 1957, Annex IV 30 L 778/(Nov. 29 1957). The Report of the Sub-group of the Committee on the “European Economic Community” which examined the consistency with Article XXIV of the EEC Treaty provisions for the association of overseas territories notes that the EEC member States proposed the following definition of the term ‘*substantially all*’: “*a free-trade area should be considered as having been achieved for substantially all the trade when the volume of liberalized trade reached 80 per cent of total trade*’.

meet the ‘*substantially all trade*’ criterion.²⁶⁵ The Report of the Working Party on ‘European Communities - Agreements with Portugal’ notes the view of the EEC ‘*that no exact definition of the phrase [‘substantially all the trade’] existed and that the precise figures would vary from case to case according to several factors. At any rate, percentages were established as a general indicator of the trade covered by the Agreement and were not to be regarded as a conclusive factor*’.²⁶⁶ The Report of the Working Party on the ‘European Free Trade Area - Examination of the Stockholm Convention’ on the other hand notes that:

*[t]he phrase ‘substantially all the trade’ had a qualitative as well as quantitative aspect and that it should not be taken as allowing the exclusion of a major sector of economic activity. For this reason, the percentage of trade covered, even if it were established to be 90 per cent, was not considered to be the only factor to be taken into account.*²⁶⁷

An attempt at the interpretation of the phrase was captured by the preamble to the Understanding on the interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994 which ‘recogni [sed] that the expansion of world trade is increased if the elimination between the constituent territories of duties and other restrictive regulations of commerce extends to all trade, and diminished if any major sector of trade is excluded.’ The most elaborate proposal on the interpretation of the “substantially all trade” criterion was formulated by Australia in 2005. Australia proposes to define the ‘substantially all trade’ criterion in terms of the tariff lines

²⁶⁵ Many members of the Sub-Group said that each case of a proposed customs union or free-trade area had to be considered on its merits and that it was, therefore, inappropriate to fix a general figure of the percentage of trade which could be subjected to internal barriers without running counter to the definition in paragraph 8(b) of Article XXIV. A matter to be considered was whether the provisions of a free-trade area pointed towards a gradual increase of barriers affecting the trade between the constituent parties or a gradual reduction of such barriers. Moreover, any calculation of the percentage of trade not freed from barriers would need to take account of the fact that this would be, or would have been, larger if the trade had been allowed to flow freely. Some members of the Sub-Group thought that it would be unrealistic to apply the same criterion to a free-trade area such as that existing between Nicaragua and El Salvador and to a free-trade area the members of which were highly industrialized countries accounting for a large percentage of world trade.

²⁶⁶ L/3901, adopted on 19 October 1973, 20s/171, 176, para. 16.

²⁶⁷ The member States agreed that the quantitative aspect, in other words the percentage of trade freed, was not the only consideration to be taken into account. Insofar as it was relevant to consider the qualitative as well as the quantitative aspect, it would be appropriate to look at the consistency of the Convention with Article XXIV:8(b) from a broader point of view and to take account of the fact that the agricultural agreements did facilitate the expansion of trade in agricultural products even though some of the provisions did not require the elimination of the barriers to trade. Moreover, insofar as both qualitative and quantitative aspects were concerned it was incorrect to say that the agricultural sector was excluded from the free-trade area; in fact barriers would be removed on one third of total trade in agricultural products between member States. (L/1235, adopted on 4 June 1960, 9S/70, 83-85, paras. 48-49).

listed in the Harmonized Commodity Description and Coding System (HS). According to Australia, an RTA would-upon its entry into force –need to eliminate duties and other restrictions to trade on at least seventy percent of tariff lines at the HS Six-digit level.²⁶⁸ Discussions on this proposal are underway under the Negotiating Group of Rules and possibly a consensus will be reached soon.

4.4. Conclusion and Recommendations.

Regional trade agreements are here to stay and the following conclusions and recommendations are therefore necessary:

- a) Although scholars like Bhagwati and Panagariya are of the view that regionalism and multilateralism are conflictual, the discussions captured in this thesis support the view that regionalism and multilateralism are complimentary.
- b) Both the revision of the WTO rules to remove the ambiguity and reinterpretation of the controversial phrases taking into account political, legal, institutional and economic factors are necessary for a more concrete and viable management of RTAs in the multilateral trading system.
- c) There is a strong case for re-examining GATT 1994 Article XXIV and GATS Article V to strengthen the rules on RTA management.
- d) It is clear that an effective WTO monitoring process of RTAs requires a consensus on the interpretation of the term ‘substantially all trade’.
- e) The interpretation of the substantially all requirement should encompass both qualitative and quantitative aspects which satisfy the member states political, legal and economic factors and agenda.
- f) The multilateral rules on regional trade management are weak and ambiguous and thus the change to strengthen the rules is necessary to ensure effective examination and supervision of regional trade agreement formation in the world trade. The review proposals discussed could form the basis for this change in the RTAs rules.
- g) The discussions on the East Africa Community so far shows the continued growth of intra-EAC trade in spite of some trade imbalances which emanates from the inherited

²⁶⁸ See generally, *Negotiating Group on Rules, Submission on Regional Trade Agreements by Australia*, TN/RL/W/173/Rev. 1(March 3,2005).

historical economic structures of the partner states. The EAC has registered increased trade amongst the Partner States signifying a positive effect of the EAC Customs Union. Associated with this, the Partner States have been reporting increased revenues, and investment flows.²⁶⁹

Regionalism and multilateralism are complimentary as shown in the case study of the East African Community. The current regional trade agreement management rules are weak and ambiguous and possible amendments and reinterpretation of these rules is therefore necessary for enabling regionalism and multilateralism work together better.



²⁶⁹East African Community Secretariat. *The East African Community Trade Report 2008*. East African Community. (2010).

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