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# THE FRAGMENTATION OF THE MULTILATERAL TRADING SYSTEM: THE IMPACT OF REGIONALISM ON WTO LAW.

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## ABSTRACT

This is a study of the fragmentation of the multilateral trading system. It evaluates whether and to what extent regional trade agreements have conflicted with World Trade Organization (WTO) law. The substantive and dispute settlement aspects of conflict are the main focus of this paper. Sections of this paper will cover an overview of multilateralism in international trade law, the WTO as a universal regulator of world trade, the proliferation of regional trade agreements (RTAs) and the general implications of regionalism in trade. The main argument presented is that the proliferation of RTAs gradually erodes the WTO's core principle of non-discrimination and, consequently, impairs the coherence of international trade law.

Keywords— Fragmentation, International Trade Law, Regionalism, Regional Trade Arrangements.

## I. Introduction

The multilateral trading system is facing a great danger of fragmentation. Its *modus operandi*, multilateralism, is increasingly becoming 'clogged by trade barriers created by the proliferation of preferential regional trading blocs'.<sup>1</sup> This paper explores the fragmentation of the multilateral trade regulation system (World Trade Organization or WTO law) by analysing whether and to what extent Regional Trade Agreements (RTAs) have conflicted with the Multilateral Trading System (MTS).

The conclusion of the Uruguay Round of multilateral trade negotiations in 1994 and the establishment of the World Trade Organization in 1995 to provide the

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<sup>1</sup> S. Cho, 'Defragmenting World Trade', *Northwestern Journal of International Law and Business* 2006-1, p. 40.

institutional support to the multilateral trade system, constituted a significant milestone in the evolution of the multilateral trading system. It significantly reinforced multilateral control over international trade on a global scale.<sup>2</sup> The whole purpose of the establishment of the WTO was to set up global rules and principles regulating the conduct of international trade and facilitating negotiations for lowering trade barriers, so as to achieve free and fair international trade.<sup>3</sup> However, international trade today is regulated at both the multilateral level under the WTO and at the regional level (including sub-regional and inter-regional level). Almost all countries in the world and virtually all WTO members today are party to or are in the process of negotiating at least one Regional Trade Agreement.<sup>4</sup> Regionalism is thus a permanent feature of the international trading environment.<sup>5</sup>

This paper examines the effects of RTA dominance in view of the quest for trade liberalisation. This is an important inquiry because, as will be discussed, the proliferation of RTAs implies the erosion of the WTO law's core principle of non-discrimination. The paper further explores how the proliferation of RTAs has endangered the coherence of the multilateral trading system. The study is carried out with the initial assumption that RTAs can be complementary and coherent with the multilateral trading system (MTS), and thus facilitate international trade and enhance development prospects. But there is also evidence that is tested by this study, which suggests that RTAs can be divergent and, hence, undermine the WTO multilateral rules of regulating international trade.

RTAs have introduced a new level of competition with the WTO. Today, disputes in international trade may not always fall clearly within one of the regimes. This is because a vast increase in regional trade agreements has generated numerous new fora for dispute settlement that coexist with the WTO dispute settlement system, yet the legal interrelation of the different jurisdictions is unclear. The potential for conflicting rules and clashing courts has, thus, increased immensely. It is from this premise that this paper examines how international trade law is fragmented through regionalism.

The study commences with a background overview of the WTO as a multilateral or universal institution for the regulation of international trade. This is followed by an examination of the proliferation of RTAs; the rules governing the relationship between the WTO and RTAs explaining instances of conflicts of rules and interpretation; and case studies of conflicts in dispute settlement. The analysis is carried out with the ultimate goal of answering the question of whether the proliferation of regional trade arrangements has caused the fragmentation of the multilateral trading system. This study is limited to examining the WTO-RTA

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<sup>2</sup> Y. S. Lee, 'Bilateralism under the World Trade Organization', *Northwestern Journal of International Law and Business* 2006-2, p. 357.

<sup>3</sup> See Article 2 of The Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994, entered into force on 1 January, 1995 (hereafter 'The WTO Agreement').

<sup>4</sup> M. Mashayekhi, L. Puri & I. Taisuke, 'Multilateralism and Regionalism: The New Interface' in *United Nations Conference on Trade and Development Publication UNCTAD/DITC/TNCD/2004/7* (2005), p. 2.

<sup>5</sup> The regionalism represented by RTAs is as much a factor as the multilateralism of the WTO in shaping international trade relations today.

relationship through an institutional and regulatory perspective, rather than an economic perspective.

## II. The WTO Multilateral Trading System

The World Trade Organization was established and became operational on 1 January 1995.<sup>6</sup> The WTO is the primary international inter-governmental organisation for the regulation of international trade and trade-related matters.<sup>7</sup> This organisation has become a key pillar of global governance.<sup>8</sup> Some commentators refer to the WTO as the 'United Nations of International Trade'.<sup>9</sup> It is important to commence the study of fragmentation of WTO law with a brief examination of the historical regulation of international trade, so as to provide the necessary background against which the rest of the chapter's critique of RTAs may be examined. This background lays out the original idea behind multilateral regulation of international trade, and from that, it will be seen how RTAs have deviated from the original idea of multilateralism.

### II. 1 Origins and Establishment of the WTO

The origins of the WTO lie in the General Agreements on Tariffs and Trade (hereafter: GATT) 1947.<sup>10</sup> This is why the WTO is guided by the decisions, procedures and customary practices of the GATT 1947.<sup>11</sup> The GATT itself was born from proposals made at different levels in international conferences and at the United Nations. First, at the 1944 Bretton Woods Conference which established the IMF and the World Bank, the conference expressed the need for a comparable institution to complement the IMF and the World Bank.<sup>12</sup> Secondly, in 1945, the United States also invited its war-time allies to conclude an agreement for the reciprocal reduction of tariffs on trade in goods.<sup>13</sup>

Efforts to establish the trade organisation gained momentum when the United States also made a proposal to the United Nations. This proposal led to the adoption of a Resolution<sup>14</sup> by the United Nations Economic and Social Council, in

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<sup>6</sup> See website of the World Trade Organization at <https://www.wto.org> (accessed on 3 July 2014).

<sup>7</sup> P. Van Den Bossche & W. Zdouc, *The Law and Policy of the World Trade Organization*, Cambridge: Cambridge University Press 2012, p. 78.

<sup>8</sup> M.J.E.C. Bronckers, 'More Power to the WTO', *Journal of International Economic Law* 2001-1, p. 41.

<sup>9</sup> Lee, 2006 supra note 2, p. 357.

<sup>10</sup> 1947 The General Agreement on Tariffs and Trade, WTO 1986.

<sup>11</sup> Article XVI (1) of the WTO Agreement states that 'Except as otherwise provided in this Agreement or the Multilateral Trade Agreements, the WTO shall be guided by the decisions, procedures and customary practices followed by the Contracting Parties to GATT 1947 and the bodies established in the framework of GATT 1947.'

<sup>12</sup> United Nations Monetary and Financial Conference (Bretton Woods NH 1-22 July 1944), Proceedings and Documents 941 (US Department of State Publications No. 2866, 1948) at <http://fraser.stlouisfed.org/publication/?pid=430> (accessed on 22 July 2013).

<sup>13</sup> Van Den Bossche & Zdouc 2012, supra note 7, p. 79.

<sup>14</sup> UN ECOSOC Res. 13, UN Doc. E/22 (1946).

February 1946, calling for a conference to draft a charter for an International Trade Organization (ITO). Consequently, in February 1946, a Preparatory Committee was established and started working on a Charter for the Organization. The work of the Committee continued in Geneva up to November 1947, but the Charter was not completed until 1948.<sup>15</sup> In 1947, negotiations had reached an agreement on the GATT and it was brought into force immediately.

Although the GATT was intended to be attached to the ITO Charter, this proved impossible,<sup>16</sup> and even after the ITO Charter was subsequently concluded in Havana in March 1948, it never came into force. The GATT 1947 was, therefore, the only existing international institution for handling trade relations. It was conceived as a multilateral agreement for the reduction of tariffs, which would later be transformed into an international organisation.

Transformation began with the Uruguay Round of Multilateral Trade Negotiations. The *Punta del Este* Declaration explicitly recognised the need for institutional reforms in the GATT system.<sup>17</sup> Other more formal proposals for a multilateral trade organisation followed. In April 1990, Canada formally proposed the establishment of a World Trade Organization which would administer the different legal instruments relating to international trade developed in the context of the ongoing negotiations.<sup>18</sup> In July 1990 the European Community proposed that the GATT needed a sound institutional framework 'to ensure effective implementation of the results of the Uruguay Round'.<sup>19</sup> Again in 1991, the European Community, Canada and Mexico drafted a joint proposal that served as the basis for further negotiations, resulting in the Draft Agreement Establishing the Multilateral Trade Organization. This agreement was part of the 1991 Draft Final Act embodying the results of the Uruguay Round.<sup>20</sup>

The Agreement Establishing the World Trade Organization was finally signed in Marrakesh in April 1994, and entered into force on 1 January, 1995. The universal

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<sup>15</sup> J. Jackson, *The World Trade Organization: Constitution and Jurisprudence*, London: Royal Institute of International Affairs 1998, p. 16.

<sup>16</sup> Van Den Bossche & Zdouc 2012, supra note 7, p. 80.

<sup>17</sup> The Declaration stated that: 'Negotiations shall aim to develop understandings and arrangements: (i) to enhance the surveillance in the GATT to enable regular monitoring of trade policies and practices of contracting parties and their impact on the functioning of the multilateral system; (ii) to improve the overall effectiveness and decision-making of the GATT as an institution, including *inter alia*, through involvement of Ministers; (iii) to increase the contribution of the GATT to achieving greater coherence in global economic policy-making through strengthening its relationship with other international organisations responsible for monetary and financial matters'. See the Ministerial Declaration on the Uruguay Round, GATT 'Functioning of the GATT System' 20 September 1986, Part I Section E.

<sup>18</sup> T. Stewart, *The GATT Uruguay Round: a Negotiating History (1986-1992)*, Vol. 3, Deventer: Kluwer Law and Taxation 1993.

<sup>19</sup> Communication from the European Community: GATT Doc. No. MTN.GNG.NG14/W/42, dated 9 July (1990) 2. See also Van Den Bossche & Zdouc 2012, supra note 7, p. 80.

<sup>20</sup> Draft Final Act embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, GATT Doc. MTN.TNC.W.FA, 20 December 1991.

significance of the Marrakesh Agreement appears in paragraph four of its Preamble, in which members:

*'Resolved ... to develop an integrated, more viable and durable multilateral trading system encompassing the General Agreement on Tariffs and Trade, the results of past liberalization efforts, and all of the results of the Uruguay Round of Multilateral Trade Negotiations'.*<sup>21</sup>

This significance was confirmed by the Appellate Body report on *Brazil - Measures Affecting Desiccated Coconut*, where the Appellate Body stated that: 'The authors of the new WTO regime intended to put an end to the fragmentation that had characterised the previous system'.<sup>22</sup>

Membership of the WTO also reaffirms its universality. As of 2 March 2013, the WTO has 159 members.<sup>23</sup> Membership of the WTO includes all the major trading powers and most developing countries.<sup>24</sup> Most members have a representative or diplomatic mission in Geneva, where officials attend WTO meetings to present their governments' views.<sup>25</sup>

Initially, the WTO Agreement provided for two ways of becoming a member. The first was 'original membership',<sup>26</sup> which allowed the Contracting Parties to the GATT 1947 to join the WTO by accepting the terms of the WTO Agreement and the Multilateral Trade Agreements, as well as by making concessions and commitments for trade in goods and services.<sup>27</sup> The second way is through accession<sup>28</sup> to the WTO Agreement and the Multilateral Trade Agreements. Accession is a multi-phase process in which a prospective member of the WTO also has to negotiate terms of accession with existing members, give information on all aspects of its trade and relevant economic policies, negotiate membership terms and await the important decision by the Ministerial Conference or General Council.<sup>29</sup>

Article VI of the WTO Agreement sets out the basic institutional structure of the WTO. At the highest level there is the Ministerial Conference;<sup>30</sup> at the second level the General Council, the Dispute Settlement Body, the Trade Policy Review Body

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<sup>21</sup> See Paragraph 4 of The WTO Agreement.

<sup>22</sup> Appellate Body Report, *Brazil - Measures Affecting Desiccated Coconut*, WT/DS22/AB/R, DSR (1997:1) 17.

<sup>23</sup> See website of the World Trade Organization at <https://www.wto.org> (accessed on 3 July 2014).

<sup>24</sup> See Article XII of the WTO Agreement.

<sup>25</sup> Van Den Bossche & Zdouc 2012, *supra* note 7, p. 109.

<sup>26</sup> Provided for in Article XI of the WTO Agreement.

<sup>27</sup> Of all the WTO members, 123 are original members in that they became members pursuant to Article XI. The period for acquiring membership in this way was closed by the General Council at the end of March 1997.

<sup>28</sup> Provided for in Article XII of the WTO Agreement.

<sup>29</sup> See 'Members and Accession: Becoming a Member of the WTO' Cancun WTO Ministerial Briefing Notes at [www.wto.org/english/thewto\\_e/minist\\_e/.../cancun\\_presspack\\_e.pdf](http://www.wto.org/english/thewto_e/minist_e/.../cancun_presspack_e.pdf) (accessed 2 August 2015).

<sup>30</sup> Established by Article IV:1 of the WTO Agreement.

and the Secretariat. At lower levels there are specialised councils, committees and working parties. There are many subordinate committees and working groups that have been added to the structure by later decisions. The WTO does not have an executive body comprising only a core group of WTO members to facilitate the process of deliberation and decision-making.<sup>31</sup>

The Ministerial Conference is the supreme body of the WTO, composed of minister-representatives from all members. It has decision-making powers on all matters under the Multilateral Trade Agreements.<sup>32</sup> The Ministerial Conference is also empowered to adopt authoritative interpretations of WTO Agreements<sup>33</sup> and make decisions on accession.<sup>34</sup>

The General Council is established by Article IV(2) of the WTO Agreement. It is composed of ambassador-diplomats representing all members of the WTO. The General Council is responsible for the management of the WTO activities (such as adopting the annual budget and financial regulations)<sup>35</sup> and exercises full powers of the Ministerial Conference.<sup>36</sup>

The functions assigned to the General Council also cover dispute settlement and trade policy review. This appears in Article IV (3) and (4) of the WTO Agreement which state that:

‘(3) The General Council shall convene as appropriate to discharge the responsibilities of the Dispute Settlement Body provided for in the Dispute Settlement Understanding. The Dispute Settlement Body may have its own Chairman and shall establish such rules of procedure as it deems necessary for the fulfilment of those responsibilities.

(4) The General Council shall convene as appropriate to discharge the responsibilities of the Trade Policy Review Body provided for in the TPRM. The Trade Policy Review Body may have its own Chairman and shall establish such rules of procedure as it deems necessary for the fulfilment of those responsibilities’.

This means that the General Council, the DSB and the Trade Policy Review Body are the same body, convening under each title when acting in the administration of particular functions.

The WTO also has three specialised councils below the General Council, the DSB and the TPRB. These are: the Council for Trade in Goods, the Council for Trade in Services, and the Council for Trade-Related Aspects of Intellectual Property.<sup>37</sup>

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<sup>31</sup> See B.M. Hoekman and M.M. Kostecki, *The Political Economy of the World Trading System: The WTO and Beyond*, London: Oxford University Press 2001, p. 60; and Van Den Bossche & Zdouc, *supra* note 7, p. 120.

<sup>32</sup> Article IV(1) of the WTO Agreement.

<sup>33</sup> Article IX(2) of the WTO Agreement.

<sup>34</sup> Article XII of the WTO Agreement.

<sup>35</sup> Article VIII (3) of the WTO Agreement.

<sup>36</sup> Article IV (2) of the WTO Agreement.

<sup>37</sup> See Article IV (5) of the WTO Agreement.

The WTO Secretariat has the primary responsibility for keeping the WTO network operating smoothly.<sup>38</sup> It is headed by a Director-General appointed by the Ministerial Conference.<sup>39</sup> The Secretariat has no decision-making powers. It acts as a body facilitating decision-making processed within the WTO. The main duties of the Secretariat are: to provide technical support to WTO bodies, provide technical assistance to developing-country members, and monitor and analyse developments in world trade, advising prospective members of the WTO and providing information to the public.

## II. 2 Objectives and Mandate of the WTO

The Preamble of the WTO Agreement sets out the reasons for establishing this international organisation.<sup>40</sup> The aim was multilateral expansion of production and trade in both goods and services throughout the world, including developing countries. This is an organisation created for the establishment of basic rules and principles for the multilateral trading system. As a multilateral organisation, the primary function of the WTO is to ‘provide the common institutional framework for the conduct of trade relations among its members in matters related to the agreements and associated legal instruments’.<sup>41</sup> According to Article III of the WTO Agreement, the mandate of the WTO is also to facilitate the implementation of all WTO Agreements, providing a forum for trade-related negotiations, administering the dispute settlement system, conducting trade policy reviews and achieving greater coherence in global policy-making, as well as providing technical assistance to developing countries.<sup>42</sup>

## II.3 WTO Law, Sources and Basic Principles

The principal source of WTO law is the Marrakesh Agreement Establishing the World Trade Organization (the WTO Agreement). This Agreement is the most far-reaching international trade agreement ever concluded.<sup>43</sup> The Marrakesh Agreement is the basic agreement consisting of sixteen articles and Annexes of numerous other agreements included.<sup>44</sup> There are, therefore, many agreements under the Marrakesh Agreement which, apply equally and are binding on all members of the WTO as a ‘single undertaking’.<sup>45</sup> These annexed agreements deal with a broad spectrum of issues ranging from tariffs, import quotas and customs formalities to intellectual property rights, food safety regulations and national

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<sup>38</sup> Van Den Bossche & Zdouc 2012, *supra* note 7, p. 135.

<sup>39</sup> Article VI (2) of the WTO Agreement.

<sup>40</sup> See Paragraph 1 to 4 of the Preamble of the WTO Agreement.

<sup>41</sup> Article II (1) of the WTO Agreement

<sup>42</sup> See Article III (1) to (5) of the WTO Agreement.

<sup>43</sup> Van Den Bossche & Zdouc 2012, *supra* note 7, p. 45.

<sup>44</sup> According to Article II:2 of the WTO Agreement the Annexes (referred to as Multilateral Trade Agreements) are integral parts of this Agreement and are binding on all members.

<sup>45</sup> This was confirmed by the WTO Appellate Body in *Brazil – Measures Affecting Desiccated Coconut*, WT/DS22/AB/R, DSR (1997:1) (n 22) at par 177.

security measures.<sup>46</sup> Within the WTO Agreements, there are six groups of basic rules and principles that can be distinguished, which make up the multilateral trading system.

Firstly, there are two principles of non-discrimination: the most-favoured nation (MFN) treatment obligation and the national treatment obligation. The MFN treatment obligation requires a WTO member that grants certain favourable treatment to another country to grant that same favourable treatment to all other WTO members.<sup>47</sup> This is a very important rule in WTO law. According to this rule, a WTO member is not allowed to discriminate between its trading partners by giving products imported from some countries more favourable treatment with respect to market access than the treatment it accords to the products of other members.<sup>48</sup> The national treatment obligation requires a WTO member to treat foreign products, services and service suppliers not less favourably than it treats 'like domestic products, services and service suppliers.'<sup>49</sup> This means that once foreign products have entered the borders of a WTO member, they should not be subject to less-favourable taxation or regulation than like domestic products.<sup>50</sup>

Secondly, there are rules on market access. These rules require member states to negotiate mutually beneficial reductions of customs duties or tariffs,<sup>51</sup> non-use of quantitative restrictions,<sup>52</sup> financial charges and non-tariff barriers. Thirdly, there are rules on unfair trade which deal with dumping<sup>53</sup> and subsidised trade. These rules do not necessarily outlaw practices of dumping, but allow affected members to impose anti-dumping duties on those particular products so as to offset the dumping. Fourthly, there are rules on conflicts between trade liberalisation and other societal values. These rules allow members of the WTO to take account of

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<sup>46</sup> Most of the WTO agreements are the result of the 1986-94 Uruguay Round negotiations, signed at the Marrakesh ministerial meeting in April 1994. There are about 60 agreements. The 'Final Act' signed in Marrakesh in 1994 is like a cover note. Everything else is attached to this. Foremost is the Agreement Establishing the WTO (or the WTO Agreement), which serves as an umbrella agreement. Annexed are the agreements on goods, services and intellectual property, dispute settlement, trade policy review mechanism and the plurilateral agreements. The schedules of commitments also form part of the Uruguay Round agreements. See [http://www.wto.org/english/docs\\_e/legal\\_e/legal\\_e.htm](http://www.wto.org/english/docs_e/legal_e/legal_e.htm) (accessed 23 July 2015).

<sup>47</sup> Provided for in Article I of the General Agreement on Tariffs and Trade (hereafter GATT 1994) and in Article II of the General Agreement on Trade in Services (hereafter GATS).

<sup>48</sup> Van Den Bossche & Zdouc 2012, *supra* note 7, p. 40.

<sup>49</sup> See Article III of the GATT 1994.

<sup>50</sup> This rule applies generally regarding trade in goods. With regard to trade in Services, the national treatment obligation applies only to the extent that the WTO Member has explicitly committed itself (in the Member's Schedule of Specific Commitments on Services) to grant national treatment in respect of specified service sectors (Article XVII of the GATS).

<sup>51</sup> Article XXVIII of the GATT 1994.

<sup>52</sup> Article XI of the GATT 1994.

<sup>53</sup> Dumping is defined as bringing a product onto the market of another country at a price less than the normal value of that product. See Van Den Bossche and Zdouc (n 19 above) at 676-7; and Van Den Bossche (n 7) 42.

economic or non-economic interests that compete or conflict with free trade<sup>54</sup>, such as the protection of the environment (which is dealt with in the next chapter), public health, national security etc. The fifth group of rules and basic principles deals with the granting of special and differential treatment to developing country members.<sup>55</sup> The last (sixth) group relates to institutional procedural rules regulating decision-making processes and dispute settlement.

Put together these rules are meant to facilitate free and fair international trade globally. It appears from the discussions below that the preferential nature of RTAs causes them to deviate from the WTO fundamental principles of free trade, both in their form and in their practice.

### III. The Proliferation of Regional Trade Agreements (RTAs)

Regionalism is described in the *Dictionary of Trade Policy Terms* as ‘actions by governments to liberalise or facilitate trade on a regional basis, sometimes through free-trade areas or customs unions’.<sup>56</sup> RTAs have been successful in achieving trade liberalisation at a much faster speed than the WTO.<sup>57</sup> States, therefore, enter into regional trading agreements for this reason, and for different other reasons, some of which are economic, political and security considerations. This part examines the nature and proliferation of RTAs, as well as how their unclear relationship with the WTO has affected the multilateral trading system.

#### III.1 Defining RTAs

Regional Trade Agreements are defined as institutions or groupings of countries formed with the objective of reducing barriers to trade between member countries.<sup>58</sup> These institutions, based on a treaty, may be concluded between countries not necessarily belonging to the same geographical region. Depending upon their level of integration, RTAs can be broadly divided into different categories<sup>59</sup> such as:

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<sup>54</sup> Provided for in Articles XII, XX and XXI of the GATT 1994, and Articles V, X, XII, and XIV of the GATS.

<sup>55</sup> Provided for in Articles XVIII and Part IV of the GATT 1994.

<sup>56</sup> W. Goode, *The Dictionary of Trade Policy Terms*, Cambridge: Cambridge University Press 2007.

<sup>57</sup> G. Dirar Luwam, ‘Multilateralism or Regionalism: What Can Be Done About the Proliferation of Regional Trading Agreements?’ *Cornell Law School Inter-University Graduate Student Conference Papers*, 2009, p. 20 available at: [http://scholarship.law.cornell.edu/lps\\_clacp/20](http://scholarship.law.cornell.edu/lps_clacp/20) (accessed 24 June 2015).

<sup>58</sup> The acronym ‘RTA’ as used in this paper refers to ‘regional trade agreements’, ‘preferential trade arrangements or areas’ as well as ‘free trade areas’. Sometimes RTAs take the form of Free Trade Agreements (‘FTAs’), Preferential Trade Agreements, or, in some circumstances, Customs Unions: See R.J. Jackson, *Global Politics in the 21<sup>st</sup> Century*, Cambridge: Cambridge University Press 2013, p. 394; Van Den Bossche & Zdouc, *supra* note 7, p. 651 and J. Frankel, *Regional Trading Blocs in the World Economic System*, New York: Columbia University Press 1997, pp. 12-16.

<sup>59</sup> See P. Pal, ‘Regional Trade Agreements in a Multilateral Trade Regime: An Overview’, 2004, at [http://www.networkideas.org/feathm/may2004/ft05\\_RT\\_Index.htm](http://www.networkideas.org/feathm/may2004/ft05_RT_Index.htm) (accessed 23 July 2015).

Preferential Trade Agreements (PTAs), Free Trade Agreements (FTAs), or Customs Unions (CUs).

A PTA is a union in which member countries impose lower trade barriers on goods produced within the union. A Free Trade Area (FTA) is a special case of PTA, where member countries completely abolish trade barriers (both tariff barriers and non-tariff barriers) for goods origination within the member countries. A Customs Union (CU) provides deeper integration than an FTA because, unlike FTAs where member countries are free to maintain their individual level of tariff barriers for goods imported from non-member countries, in a CU, member countries also apply a common external tariff (CET) on goods imported from outside countries.<sup>60</sup> The CET can vary across goods but not across union partners.

Cross-regional RTAs are also increasingly being negotiated and signed between countries in different regions of the world.<sup>61</sup> Thus, the concept of ‘regional’ has also changed from intra-regional to inter-regional agreements.<sup>62</sup>

### III.2 The proliferation of RTAs (1948 – 2012)

The multilateral trade system has witnessed phenomenal growth in the number, coverage, and scope of RTAs.<sup>63</sup> Contemporary literature on trade regionalism distinguishes between what is known as ‘old regionalism’ and ‘new regionalism’.<sup>64</sup> Old regionalism was characterised by regional trade agreements formed in the bipolar war context of the 1960s and 1970s.<sup>65</sup> Regionalism during this period was characterised by strong protectionist standards and the unwillingness of trading partners within a region to have dependency on foreign products.<sup>66</sup>

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<sup>60</sup> J.P. Trachtman, ‘International Trade Regionalism’ in: A.T. Guzman and A.O. Sykes (eds.), *Research Handbook of International Economic Law*, Massachusetts: Edward Elgar Publishing 2006, p. 2.

<sup>61</sup> See [http://www.wto.org/english/tratop\\_e/region\\_e/region\\_e.htm](http://www.wto.org/english/tratop_e/region_e/region_e.htm) (accessed 23 July 2015).

<sup>62</sup> WTO, ‘Overview of Developments in the International Trading Environment’ document WT/TPR/OV/12 (2009) 36 par. 18 at: [http://www.wto.org/english/news\\_e/news09\\_e/wt\\_tpr\\_ov\\_12\\_a\\_e.doc](http://www.wto.org/english/news_e/news09_e/wt_tpr_ov_12_a_e.doc) (accessed 3 August 2015).

<sup>63</sup> See C.B. Picker, ‘Regional Trade Agreements v. The WTO: A Proposal for Reform of Article XXIV to Counter this Institutional Threat’, *University of Pennsylvania Journal of International Economic Law*, 2005-2, p. 273; T. Cottier, ‘The Challenge of Regionalism and Preferential Relations in World Trade Law and Policy’, *European Foreign Affairs Review*, 1996-1, p. 149.

<sup>64</sup> See WTO Press Release ‘Fast-Changing Nature of World Trade Poses New Challenges’ 18 July 2013 at [http://www.wto.org/english/news\\_e/pres13\\_e/pr692\\_e.htm](http://www.wto.org/english/news_e/pres13_e/pr692_e.htm) (accessed 22 July 2015); L. Van Langenhove & A. Costea, ‘The Relevance of Regional Integration’, *Comparative Regional Integration Studies Programme (UNU-CRIS)*, 2005-0, pp. 3-6; E.D. Mansfield & H.V. Miller, ‘The New Wave of Regionalism’, *International Organization*, 1999-3, pp. 589-627.

<sup>65</sup> B. Hettne, ‘The United Nations and Conflict Management: The Role of the New Regionalism’, *Transnational Law and Contemporary Problems*, 1994-4, pp. 643 & 653.

<sup>66</sup> R. Devlin & A. Estevadeordal, ‘What’s New in the New Regionalism in the Americas?’, *Inter-American Dev. Bank, Working Paper No. 6*, 2001, pp. 14.

Regional trade arrangements established after the 1980s are known as new regionalism. New regionalism is characterised by RTAs formed in a multi-polar context, and having environmental, political, social and democratic objectives.<sup>67</sup> It is also characterised by integration across the North-South divide, with a number of schemes involving both developing and industrialised countries. Several of the new agreements are cross-regional in that the members extend over more than one of the world's geographic regions.

The increased interest in regionalism in the 1980s was prompted by the uncertainty of a successful conclusion of the Uruguay Round of multilateral trade negotiations (1986-1994).<sup>68</sup> The uncertain fate of the Uruguay Round prompted many countries to pursue preferential deals as an insurance against an eventual failure of multilateral trade negotiations.<sup>69</sup> But even after the successful conclusion of the Uruguay Round and the establishment of the WTO, interest in RTA formation did not diminish.<sup>70</sup> Instead, there has been a boom in RTA negotiations from that time on.

In the period between 1948 and 1994, the GATT received 123 notifications of RTAs (relating to trade in goods), and, since the creation of the WTO in 1995, over 300 additional arrangements covering both trade in goods or services have been notified.<sup>71</sup> With the Doha Round stalling, legislative focus in the international trade sphere shifted to the negotiation of more RTAs.<sup>72</sup> At the end of 2012, the WTO Secretariat published the following chart, which shows the facts and figures of all RTAs notified to the GATT/WTO from 1948 to 2012 by year of entry into force:

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<sup>67</sup> C.H. Lin, 'Regionalism or Globalism? The Process of Telecommunication Cooperation with the OAS and NAFTA', *International Trade Law Journal*, 2002, pp. 30-32.

<sup>68</sup> S.J. Powell & P.C. Perez, 'Global Laws, Local Lives: Impact of the New Regionalism on Human Rights Compliance', *Buffalo Human Rights Law Review*, 2011, p. 5.

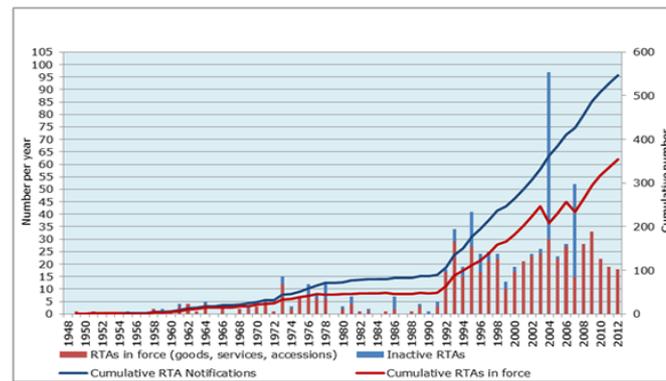
<sup>69</sup> J. Crawford & R.V. Fiorentino, 'The Changing Landscape of Regional Trade Agreements' WTO Discussion Paper No. 8, 2005, p. 6 at [http://www.wto.org/english/res\\_e/booksp\\_e/discussion\\_papers8\\_e.pdf](http://www.wto.org/english/res_e/booksp_e/discussion_papers8_e.pdf) (accessed 23 July 2015).

<sup>70</sup> T. Srinivasan, *Developing Countries and the Multilateral Trading System: From the GATT to the Uruguay Round and the Future*, New York: Westview Press 1998, pp. 60-61.

<sup>71</sup> See [www.wto.org](http://www.wto.org) (accessed 24 June 2015).

<sup>72</sup> F. Hammond, 'A Balancing Act: Using WTO Dispute Settlement to Resolve Regional Trade Agreement Disputes' *Trade Law and Development*, 2012-2, pp. 421-428.

Fig. 1: The Proliferation of RTAs.



Source: *WTO Secretariat*.<sup>73</sup>

From the above chart, it appears that the proliferation of RTAs has accelerated exponentially since the years of the Uruguay Round negotiations. We can also see that, by the end of 2012, there had been over 300 RTAs in force and over 500 notifications. As of 10 January 2013, some 546 notifications of RTAs (counting goods, services and accessions separately) had been received by the GATT/WTO.<sup>74</sup> Of these, 354 were in force.

There are approximately 100 RTAs in the pipeline (signed, not yet in force or under negotiation).<sup>75</sup> These figures prove without a doubt that 'RTAs are a major and perhaps irreversible feature of the multilateral trading system'.<sup>76</sup> The impasse in the Doha Development Agenda negotiations is further strengthening WTO members' resolve to conclude RTAs, and indeed new RTA initiatives have emerged in recent years whose effects will be felt in the years to come.

A notable feature in the recent rise of regionalism is that countries that had traditionally favoured the multilateral approach to trade liberalisation, including Australia, New Zealand, Japan, Singapore, India and the Republic of Korea, have now joined the RTA bandwagon.<sup>77</sup> This shows that the shift to regionalism is an inevitable trend.

Motivations behind the proliferation of RTAs vary across regions. The formation of RTAs is driven by a variety of factors which include economic<sup>78</sup>, political and security considerations.<sup>79</sup> It is important to understand those factors or reasons because they allow a greater understanding of the feasibility of any proposal to

<sup>73</sup> See [http://www.wto.org/english/tratop\\_e/region\\_e/regfac\\_e.htm](http://www.wto.org/english/tratop_e/region_e/regfac_e.htm) (accessed 24 June 2015)

<sup>74</sup> See [http://www.wto.org/english/tratop\\_e/region\\_e/regfac\\_e.htm](http://www.wto.org/english/tratop_e/region_e/regfac_e.htm) (accessed June 2015).

<sup>75</sup> *Ibid.*

<sup>76</sup> Crawford & Fiorentino 2005, *supra* note 69, p. 1.

<sup>77</sup> Mashayekhi, Puri & Taisuke 2005, *supra* note 4, p. 3.

<sup>78</sup> This study will not delve into an economic analysis. For a serious economic analysis of why countries would choose one form over another see B.V. Yarbrough & R.M. Yarbrough, *Cooperation and Governance in International Trade: The Strategic Organisational Approach*, New Jersey: Princeton University Press 2014, pp. 111-133.

<sup>79</sup> Crawford and Fiorentino 2005, *supra* note 69, p. 16.

regulate RTAs, so as to reduce their negative impacts on the WTO multilateral regime.

Firstly, due to their less-crowded nature, RTAs have provided a comparatively efficient means by which members can pursue their trade liberalisation goals, through the negotiation of reduced trade barriers and also improved rules. Therefore, RTAs are easier to administer. Mutually beneficial relations also increase RTA members' bargaining power in multilateral negotiations, by securing commitment first on a regional basis.<sup>80</sup>

Secondly, the conclusion of RTAs is driven by the search of access to larger markets, which are easier to engineer at the regional or bilateral level, particularly in the absence of a willingness among WTO members to liberalise further on a multilateral basis.<sup>81</sup> Thirdly, membership in RTAs also provides a means of securing foreign direct investment, particularly for developing countries with low labour costs, which have access to larger more developed markets: developing countries commit themselves to signing reciprocal RTAs with developed countries in order to secure access to their markets.<sup>82</sup>

Political considerations also foster regional trading arrangements. Governments seek to increase regional security and consolidate peace with their RTA partners.<sup>83</sup> For example, the original European Economic Community and European Coal and Steel Community were famously motivated by a desire to make war between Germany and France impossible.<sup>84</sup>

According to Bhagwati,<sup>85</sup> frustration with the multilateral trading system is also another factor driving the proliferation of RTAs. Governments view regionalism as an easier alternative because the large number of participants in multilateral trade negotiations creates rigidity in the system. Also according to Bhagwati,<sup>86</sup> modern trade barriers are much more complicated to negotiate in a multilateral forum, and most countries find it easier to deal with these issues on a bilateral or regional level. This means that negotiations are more efficient at regional level because the regimes are less complex. Progress is very slow in the multilateral agenda.<sup>87</sup> Therefore, the stagnation in multilateral negotiations may, for example, create incentives for states to pursue preferential trade liberalisation and encourage exporters to lobby their governments for more PTAs.<sup>88</sup>

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<sup>80</sup> See E. Mansfield & E. Reinhardt, 'Multilateral determinants of regionalism: the effects of GATT/WTO on the formation of preferential trading arrangements', *International Organisation*, 2003-4, pp. 829-862.

<sup>81</sup> Ibid.

<sup>82</sup> Crawford and Fiorentino 2005, *supra* note 69), p. 16.

<sup>83</sup> S.R. Khan, *Regional Trade Integration and Conflict Resolution*, London and New York: Routledge 2009, p. 18.

<sup>84</sup> Trachtman 2006, *supra* note 60, p. 1.

<sup>85</sup> J. Bhagwati, 'Regionalism versus Multilateralism', *The World Economy*, 1992-5, p. 15.

<sup>86</sup> Ibid.

<sup>87</sup> This has been evident in the Uruguay Round which took seven years, and now the Doha Round since 2001 which is still ongoing.

<sup>88</sup> World Trade Organisation, 'The WTO and Preferential Trade Agreements: From Co-existence to Coherence' *World Trade Report*, 2011, pp. 96-97. See also the case studies in A. Capling & P. Low, *Governments. Non-State Actors and Trade-Policy Making*, Cambridge: Cambridge University Press 2010.

It has also been observed that RTAs have proliferated because multilateral negotiations on a global scale have become more difficult in certain areas, as the subjects of multilateral negotiations in the WTO framework have been expanded into politically sensitive areas such as trade and investment, trade and competition policy, intellectual property rights and epidemics.<sup>89</sup> As an alternative to multilateral negotiations on a global scale that could take years to reach any consensus, nations have begun to resort to trade negotiations among a more limited number of countries sharing common interests in trade and investment, closer economic and cultural ties and geographic proximity. This trend has led to the formation of more RTAs around the world.

#### IV. Relationship with the WTO: WTO Rules Regulating RTAs

The WTO endeavours to regulate regional trade agreements under its rule-based system. To do so, it uses various norms, procedures and organs which attempt to discipline trade regionalism according to specific parameters.

From its inception, the GATT (now the WTO) has not prohibited member states to conclude customs unions or free trade areas. There is, however, a requirement pursuant to Article XXIV (7) of the GATT that the WTO must be notified of an RTA as soon as it is concluded. This means that members of an RTA should not put in force or maintain any RTA unless they comply with the WTO's members' recommendations for making the RTA concerned WTO consistent. However, in practice, no RTA has ever been explicitly approved as being WTO consistent, because of the consensus decision-making practice of the WTO: RTA parties will generally refuse to make any changes demanded by non-RTA members.<sup>90</sup> Therefore, the consensus requirement thwarts the adoption of compliance recommendations by WTO members.

The GATT allows the development of regional or free trade areas. By allowing the development of regional trade areas, the GATT effectively created an exception to the fundamental principle of non-discrimination set out in the 'most-favoured-nation' provision of Article I.<sup>91</sup> Hence, Article XXIV of the GATT 1994 allows

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<sup>89</sup> See M. Matsushita, 'Legal Aspects of Free Trade Agreements in the Context of Article XXIV of the GATT 1994' paper presented at the United Nations University Seminar: *The Way Forward to Successful Doha Development Agenda Negotiation* Tokyo Japan (May 24-25, 2004). The failure of the WTO ministerial conference in Cancun has also shown this difficulty: See S. Cho, 'A Bridge Too Far: The Fall of the Fifth WTO Ministerial Conference in Cancun and the Future of Trade Constitution', *Journal of International Economic Law*, 2004-7, pp. 219-244.

<sup>90</sup> G. Marceau & J. Wyatt, 'Dispute Settlement Regimes Intermingled: Regional Trade Agreements and the WTO', *Law and Social Sciences Journal of International Dispute Settlement*, 2010-1, p. 77.

<sup>91</sup> Article 1 of the GATT states in part that '... any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.' In effect this means that trade concession granted to one member must be applied immediately and unconditionally to all other WTO Members. RTAs are therefore an exception to this

regional trading arrangements to be set up as a special exception, provided that certain strict criteria are met. This exception allows members to adopt measures that are WTO-inconsistent, taken in the context of regional economic integration.<sup>92</sup> The rationale for this exception is that the preferential trade arrangement of an RTA could eventually develop into a multinational framework, thereby giving the benefit of lower trade barriers to more countries as the number of participating countries increases.<sup>93</sup>

Therefore, the provisions of Article XXIV are *prima facie* considered to serve the objective of global trade liberalisation rather than hinder it. When RTAs are in conformity with the rules of Articles XXIV GATT and Article V General Agreement on Trade in Services (GATS), there is deemed to be no conflict with the WTO. This means that there is a hierarchy between the WTO and the respective legal systems of RTAs,<sup>94</sup> a hierarchy not based upon subordination but on conformity.

Article XXIV stipulates that RTAs should be designed to facilitate trade among the parties concerned and not raise barriers to the trade of third parties. Thus, RTAs are required to liberalise substantially all trade among the parties and not to raise additional barriers against outsiders.

Article XXIV is commonly viewed as an exception to the MFN rule, allowing a subset of members to liberalise trade between them, but without extending such liberalisation to all other WTO members.<sup>95</sup> The provisions of Article XXIV are thus capable of operating as exceptions or as defences that can be invoked by a WTO member to justify a measure that would, otherwise, be in violation of its WTO obligations.<sup>96</sup> For example, the Appellate Body in *Turkey - Textiles* insisted that 'Article XXIV of the GATT 1994 ... may be invoked as a defence to a claim of inconsistency with Article XI of the GATT and Article 2(4) of the Agreement on Textiles and Clothing, provided that the conditions set forth in Article XXIV for the availability of this defence are met'.<sup>97</sup> This case is further discussed in the case studies section below.

The Article XXIV rules are further elaborated in the 'Understanding on the Interpretation of Article XXIV of the GATT 1994', which forms part of the GATT

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provision since they are allowed to make preferential trade concessions within members of the region or trade bloc.

<sup>92</sup> Van Den Bossche & Zdouc 2012, supra note 7, p. 650.

<sup>93</sup> Lee 2006, supra note 2, p. 358.

<sup>94</sup> P.J. Kuijper, 'Conflicting Rules and Clashing Courts: The Case of Multilateral Environmental Agreements, Free Trade Agreements and the WTO', *International Center for Trade and Sustainable Development* Issue Paper No. 10, 2010, p. 19.

<sup>95</sup> See J.H. Jackson, *World Trade and the Law of the GATT*, Lexis Law Publishing 1969, p. 576; P. Hilpold, 'Regional Integration according to Article XXIV: GATT - Between Law and Politics' in Bogdandy and Wolfrum (eds.), *Max Planck Yearbook of United Nations Law*, 2003, pp. 219-260; Panel Report *Brazil- Measures Affecting Imports of Rethreaded Tyres* WT/DS332/R, 12 June 2007 par 7.272.

<sup>96</sup> Marceau & Wyatt 2010, supra note 90, p. 77.

<sup>97</sup> Appellate Body Report *Turkey - Restrictions on Imports of Textile and Clothing Products* WT/DS34/AB/R adopted 19 November 1999 DSR 1999:VI 2345 at par 45.

1994. The WTO has endeavoured to limit the misconstruction of Article XXIV by expressly elucidating some of its provisions in the ‘Understanding’.<sup>98</sup> This Understanding was intended to clarify the meaning of some of the ambiguous obligations contained in Article XXIV, by elucidating the brief text. The Understanding seeks to clarify the criteria and procedures for assessing new or developed agreements and to improve transparency. The Understanding, therefore, is an integral part of the rules governing RTAs under the WTO.

Article XXIV of the GATT 1994 prescribes some conditions to be met only by RTAs for trade in goods.<sup>99</sup> For trade in services, RTAs are governed by Article V of the GATS<sup>100</sup>, which places requirements similar to those of Article XXIV. Article V of GATS is similar in intent, both with respect to the effects on outsiders of discriminatory liberalisation and the coverage among the parties to an agreement, although the provisions are phrased in somewhat dissimilar language to take account of differences in how services trade is conducted.

With regard to developing country-members, preferential trade agreements between them are regulated by an ‘Enabling Clause’, dating from 1979.<sup>101</sup> The enabling clause stipulates, just like Article XXIV (4), that the main purpose of RTAs of developing countries should be facilitating trade among themselves, and not creating barriers with other members.<sup>102</sup> The Enabling Clause relaxes (some of) the GATT provisions on PTAs for developing countries in the name of ‘special and differential treatment for this group of countries. But, as for agreements involving developing and developed countries, WTO members are required to seek a waiver of the WTO rules. Commentators argue that the Enabling Clause is also an exception to Article I of the GATT.<sup>103</sup>

The conditions laid down in all of these provisions seek to guarantee that the general clause of trade liberalisation among all members does not suffer from such agreements *inter se*.<sup>104</sup>

In order to determine the compatibility of RTAs with the WTO rules stated above, the General Council of the WTO established the Committee on Regional Trade Agreements (CRTA) in 1996.<sup>105</sup> This Committee is the organ mandated to examine

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<sup>98</sup> Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994.

<sup>99</sup> These are supplemented by the Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994.

<sup>100</sup> The GATS refers to the conclusion of RTAs as ‘Economic Integration Agreements.’ See Article V of the GATS.

<sup>101</sup> Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries 28 November 1979, GATT B.I.S.D. (hereafter ‘The Enabling Clause’).

<sup>102</sup> *Idem*, par 3.

<sup>103</sup> G.Z. Marceau & H. Irfan, ‘Is there a necessity test within Article XXIV of the GATT 1994? And if so, is it applicable to RTAs among developing countries covered by the Enabling Clause?’ Unpublished paper presented at the University of Edinburgh School of Law on Regional Trade Arrangements, June 2005, p. 6.

<sup>104</sup> Kuijper 2010, *supra* note 94, p. 10.

<sup>105</sup> The *Committee on Regional Trade Agreements (CRTA)*, WTO General Council Decision WT/L/127 (7 February, 1996).

agreements of proposed RTAs referred to it by the Council of Trade in Goods (that is, agreements falling under Article XXIV of the GATT 1994), the Council for Trade in Services (Agreements under Article V of the GATS), and the Committee on Trade and Development (Agreements notified under the Enabling Clause). The CRTA is also mandated to facilitate the examination process and ensure proper reporting on the operations of RTAs. The CRTA also has the important task of considering the relationship between RTAs and the multilateral trading system, as well as the systemic implications of RTAs to the MTS.<sup>106</sup>

At the time of the launch of the Doha Round in November 2001, the CRTA had made no progress on its mandate of consistency assessment due to the questions of interpretation of the provisions contained in Article XXIV of the GATT 1994.<sup>107</sup> WTO members had not been able to reach consensus on the format, nor the substance of the reports on any of the examinations entrusted to the CRTA. The stalemate in that area also resulted in little or no progress in the other areas falling under the CRTA mandate.

These factors prompted further attempts to develop detailed rules for RTA regulation in the ongoing Doha round of trade negotiations. Concerns over the increasing number of RTAs and a malfunctioning multilateral surveillance mechanism prompted the Ministers meeting at the Fourth Ministerial Conference in Doha in November 2001 to include RTA rules under the Doha Development Agenda (DDA).

In the Doha Ministerial Declaration<sup>108</sup>, WTO members recognise that RTAs can play an important role in promoting trade liberalisation and in fostering economic development, and stress the need for a harmonious relationship between the multilateral and regional processes.<sup>109</sup> On this basis, Ministers agreed to launch negotiations aimed at clarifying and improving existing WTO provisions, with a view to resolve the impasse in the CRTA and minimise the risks related to the proliferation of RTAs. A formal agreement was made in July 2006, when a Draft Decision on a 'Transparency Mechanism for Regional Trade Agreements' was adopted.<sup>110</sup> This Mechanism was enacted on a provisional basis on 14 December 2006 by the WTO General Council to further strengthen the transparency requirements,<sup>111</sup> while awaiting the conclusion of the Doha Round. The decision is informed by the need for greater transparency on RTAs and it aims to refine the CRTA, so as to improve the WTO supervision of RTAs.

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<sup>106</sup> Committee on Regional Trade Agreements *Annotated Checklist of Systemic Issues* WT/REG/W/16, 26 May 1997.

<sup>107</sup> WTO 'RTAs and the WTO: A Troublesome Relationship' Discussion paper at: [www.wto.org/english/res\\_e/booksp\\_e/discussion\\_papers12b\\_e.pdf](http://www.wto.org/english/res_e/booksp_e/discussion_papers12b_e.pdf) p. 26 (accessed 23 July 2015).

<sup>108</sup> WTO, *Doha Ministerial Declaration* WT/MIN(01)/DEC/1 adopted on 14 November 2001.

<sup>109</sup> *Idem*, par 4.

<sup>110</sup> WTO General Council *Transparency Mechanism for Regional Trade Agreements*—Decision of 14 December 2006 WTO Doc. WT/L/671 18 December 2006.

<sup>111</sup> WTO General Council, *(Provisional) Transparency Mechanism for Regional Trade Agreements*, Dec 14, 2006 at: [http://www.wto.org/english/tratop\\_e/region\\_e/trans\\_mecha\\_e.htm](http://www.wto.org/english/tratop_e/region_e/trans_mecha_e.htm) (accessed 13 June 2015).

The purpose of all these rules and procedures discussed above is to ‘ensure that Regional Trade Agreements become building blocks, not stumbling blocks to the regulation of world trade’.<sup>112</sup>

Over the years, there have emerged numerous concerns regarding the effectiveness of the multilateral oversight of RTAs.<sup>113</sup> It is important therefore to examine the shortcomings of the existing framework of RTA regulation, so as to determine whether conflict prevention can be, or has been, successful.

## V. The WTO-RTA Interface: Regulatory and Substantive Conflicts

Normative and institutional conflicts occur whenever different legal systems or different rules apply concurrently to an issue. When we consider RTAs and the WTO to be separate systems and jurisdictions both governing international trade relations, it becomes apparent that there would be potential for conflict between them. It may also be recalled that a conflict of jurisdiction arises when a dispute can be brought (entirely or partly) before two or more different courts or tribunals. This study finds that, in the WTO-RTA relationship, normative and institutional or jurisdictional conflicts exist concurrently. It is, therefore, important to start the analysis by constructing a definition of conflict of law suitable for the present inquiry.

A generic conflict of law results from two or more norms which are different in substance but apply to the same or similar facts, and whose application would lead to contrary decisions such that a choice must be made between them.<sup>114</sup> Pauwelyn has adopted a strict definition of conflict in international law, according to which, conflict only arises if ‘a party to two treaties cannot simultaneously comply with its obligations under both treaties’.<sup>115</sup> This kind of conflict is illustrated in the *Brazilian Tyres dispute*, where Brazil faced a conflict between its obligations under the MERCOSUR and the WTO. This case is discussed further below.

The WTO Panel and Appellate Body have developed a definition of conflict in accordance with Kelsen and Jenks’s approach. In the case of *Indonesia-Autos*, the WTO Panel has maintained that conflict would arise only if two norms were

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<sup>112</sup> ‘Lamy Welcomes WTO Agreement on Regional Trade Agreements’ *WTO Press Release* (10 July 2006) at [http://www.wto.org/english/news\\_e/news06\\_e/rta\\_july06\\_e.htm](http://www.wto.org/english/news_e/news06_e/rta_july06_e.htm) (accessed 13 June 2015).

<sup>113</sup> P. Low, ‘*Regionalism: challenges for the WTO*’, Paper presented at the Asian Development Bank Institute/Graduate Institute of Geneva conference on Multilateralizing Asian Regionalism Tokyo (18-19 September 2008) at: <http://www.adbi.org/conf-seminar-papers/2008/10/07/2729.low.regionalism.wto.challenges/> Accessed on 20 July 2015. See also W.J. Davey, ‘A model article XXIV: are there realistic possibilities to improve it?’ in: Bagwell & Mavroidis (eds.), *Preferential Trade Agreements*, New York: Cambridge University Press, 2011.

<sup>114</sup> The International Law Commission Report of the Study Group of the International Law Commission on Fragmentation of International Law ‘Difficulties Arising from the Diversification and Expansion of International Law’ U.N. Doc. A/CN.4/L.682 (2006) at par 21-26.

<sup>115</sup> J. Pauwelyn, *Conflict of Norms in Public International Law - How WTO Law Relates to other Rules of International Law*, Cambridge: Cambridge University Press 2003, p. 167.

‘mutually exclusive’.<sup>116</sup> While the Appellate Body in *Guatemala - Anti-dumping Investigations Regarding Portland Cement from Mexico* has upheld a similar strict definition,<sup>117</sup> in *EC-Bananas III* the Panel also included in its definition of possible conflicts of laws ‘the situation where a rule in one agreement prohibits what a rule in another agreement explicitly permits’.<sup>118</sup>

In order to fully assess possible conflicts between the trading systems and laws, this study finds it essential to pursue a wide definition of conflict of laws. Like the Panel has done in *EC-Bananas III*, i.e. not only including conflicts that arise if a party ‘cannot simultaneously comply with two different agreements’, but also comprising potential conflicts that may occur if a party freely chooses to take advantage of a right or an exception in one agreement, which would result in a breach of the other agreement.

Marceau agrees that a conflict may be defined narrowly or broadly<sup>119</sup> ‘depending on one’s conception of the international legal order’.<sup>120</sup> One central argument for Marceau’s supporting of Jenks’s definition is the coherence of the international legal order which her definition is meant to promote.<sup>121</sup> This study, therefore, uses the term ‘conflict’ in a broad sense, including the potential conflicts just mentioned.

Having developed a suitable definition, the study proceeds to examine the kinds of conflict posed by RTAs to the MTS. Substantively, conflicts between RTAs and the WTO occur because the RTAs include provisions or rules that may suggest different requirements than those in the WTO. Regulatory conflicts are those created by the exceptionalism of RTAs to the WTO rules (departure from the original idea of non-discriminatory trade). The sections that follow discuss examples of both regulatory and substantive conflicts between the WTO and RTAs.

## V.1 Erosion of the MFN Obligation

Members of RTAs offer each other more favourable treatment in trade matters than they offer other trading partners who are also WTO members. The proliferation of trade blocs which provide trade preferences limited to their members undermines the WTO’s objective of promoting non-discriminatory trade for all nations. Discriminatory treatment is inconsistent with the Most-Favoured-Nation treatment obligation. According to Bhagwati, ‘RTAs have proliferated on such an enormous scale that they have become a systemic problem for the World

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<sup>116</sup> Panel Report *Indonesia - Certain Measures Affecting the Automobile Industry* 14.99 WT/DS54/R WT/DS55/R, WT/DS59/R WT/DS64/R (2 July 1998).

<sup>117</sup> Appellate Body Report *Guatemala - Anti-dumping Investigations Regarding Portland cement from Mexico* 65 WT/DS60/AB/R (1998).

<sup>118</sup> Panel Report *European Communities - Regime for the Importation Sale and Distribution of Bananas III* 337 WT/DS27/R/ECU (May 22, 1997).

<sup>119</sup> G.Z. Marceau, ‘Conflicts of Norms and Conflicts of Jurisdictions: The Relationship between the WTO Agreement and MEAs and other Treaties’, *Journal of World Trade*, 2001-6, pp. 1081-1083.

<sup>120</sup> *Idem*, pp. 1082 -1083.

<sup>121</sup> If one believes that international commitments should be understood in the light of some coherent international order, one favours narrow definitions of conflict. See Marceau 2001, *supra* note 119, p. 1082.

Trade Organization'.<sup>122</sup> This is because RTAs generally deny the Most-Favoured-Nation cause concerning the non-discriminatory handling of trade, which is the cornerstone of the multilateral trading system.<sup>123</sup> Indeed, RTAs have grown at a phenomenal rate and are a significant contributing factor to the present difficulties of the WTO.<sup>124</sup> The original idea behind the creation of GATT was to spread out this MFN principle and, presumably, build a world of free trade based on that principle. RTAs, on the other hand, represent a clear kind of trade bloc based on the inherent notion of discrimination.

RTAs are being embraced by many WTO members as trade policy instruments. RTA parties can trade among themselves using preferential tariffs and easier market access conditions than what is applicable to other WTO member countries. As a result, WTO member countries that are not a part of the RTA lose out in these markets. RTAs are, therefore, counter-productive to the WTO's MFN principle.

## V.2 Problematic Rules of Origin

Rules of origin are the criteria used to determine the national source of a product. Rules of origin are domestically applicable regulations which determine the origin of imported products.<sup>125</sup> An RTA needs rules of origin by its very nature, because preferential tariffs and preferential treatment are accorded exclusively to products from member countries (originating goods). Members of RTAs create rules of origin because of their importance in allocating the appropriate duty for imported goods. These rules tell the customs officer where those goods come from: if they come from a country which has a trading agreement with the importing state, then the product will receive preferential treatment.

The problem with rules of origin is that they are mostly designed to have a protectionist impact.<sup>126</sup> Complex rules of origin would not be necessary if every

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<sup>122</sup> WTO Online Forum 'Are Regional Trade Agreements Stepping Stones or Obstacles to the Multilateral Trading System?' Video Debate posted 9/13/07 at [http://www.wto.org/english/forums\\_e/debates\\_e/debate3\\_e.htm](http://www.wto.org/english/forums_e/debates_e/debate3_e.htm) (accessed 24 June 2015).

<sup>123</sup> M.J. Trebilcock & R. Howse, *The Regulation of International Trade*, London and New York: Routledge 2005, p. 49.

<sup>124</sup> See 'The International Bank of Reconstruction and Development, World Bank, Global Economic Prospects: Trade Regionalism and Development' (2005) at <http://siteresources.worldbank.org/INTGEP2005/Resources/gep2005.pdf> (accessed 24 June 2015).

<sup>125</sup> Rules of origin are necessary for differentiating, or discriminating, among competitive imports. See M. Hirsch, 'Rules of Origin as Trade or Foreign Policy Instruments? The European Union Policy on Products Manufactured in the Settlements in the West Bank and the Gaza Strip.', *Fordham International Law Journal*, 2003, pp. 572-576.

<sup>126</sup> A. Estevadeordal, K. Suominen, J.T. Harris & M. Shearer, 'Bridging Regional Trade Agreements in the Americas', *Inter-American Development Bank Special report on Integration and Trade*, 2009, at: <http://www.iadb.org/intal/intalcdi/PE/2009/04427.pdf> (accessed 3 August 2015). This report states in part that: 'Rules of origin are widely considered as 'hidden protectionism,' an obscure and opaque trade policy instrument that can work to offset the benefits of tariff liberalisation. Rules of origin in effect set up walls around RTA members that prevent them from using certain inputs in each final product. This limits the access of member country producers to inputs from the rest of the world, as

product was 100 per cent made in a certain country. However, because manufacturing processes are often spread over multiple nations, it is difficult to attribute a finished good to any one nation.<sup>127</sup> If an RTA has liberal rules of origin, more products are regarded as originating goods and, thus, entitled to preferential treatment. However, if an RTA has strict rules of origin, more products are denied preferential treatment in the regional markets. The latter scenario results in local protectionism and, unfortunately, most RTAs follow the latter scenario.

Rules of origin should play a neutral role with respect to trade policy. When they are too restrictive or are enforced arbitrarily, they can expand the coverage of trade restrictions in an improper way. Strict rules of origin are, in effect, becoming a new form of non-tariff barrier. Therefore, the abuse of rules of origin for protectionist purposes casts a shadow over the legitimacy of an RTA.

Another problem is that GATT has no specific rules governing the determination of the country of origin of goods in international commerce. Each contracting party is free to determine its own origin rules, and could even maintain several different rules of origin depending on the purpose of the particular regulation.

### V.3 Regulatory Failures under Article XXIV of the GATT 1994

Perhaps, the most significant problem caused by RTAs is their failure to satisfy Article XXIV of the GATT, and their consequent potential to undermine the very legitimacy of the WTO. This is the factor that poses the greatest threat to the WTO. As a mechanism to control RTAs, Article XXIV has itself proven weak over the decades.<sup>128</sup> This is because Article XXIV only focuses on the economic aspects of RTAs, that is, it is focused on the trade-distorting effects and not the institutional or regulatory effects. The terms of the provisions of Article XXIV effectively reveal an approach or attempt to control RTA-formation, with a goal to minimise economic harm while maximizing economic benefit. As a result, RTAs can be formed willy-nilly, so long as the economic criteria are addressed. This study submits that this kind of approach to RTA regulation fails to consider the non-economic harms of RTAs, and, in particular, the institutional impact of RTAs on the WTO. Article XXIV, being an exception to the MFN principle, allows discrimination instead of combating it.

Article XXIV fails to regulate RTAs and this regulatory failure can also be considered as a trade failure, because regulatory fragmentation itself is a trade barrier in the global context.<sup>129</sup> When exporting to RTA markets, producers from non-member countries must bear additional compliance costs and face disparate

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well as extra-regional input providers' sales to the RTA region. The more restrictive are the rules of origin, the higher are the walls they create, and the more difficult efficient allocation of resources becomes.'

<sup>127</sup> J.A. LaNasa, 'Rules of Origin and the Uruguay Round's Effectiveness in Harmonizing and Regulating them', *American Journal of International Law*, 1996, 625-634.

<sup>128</sup> S. Cho, 'Breaking the Barrier between Regionalism and Multilateralism', *Harvard International Law Journal*, 2001, 419-428.

<sup>129</sup> Cho 2006, *supra* note 1, p. 69.

RTA regulations.<sup>130</sup> In this regard, Cho<sup>131</sup> states that the regulatory barriers posed by RTAs completely block non-members' market access. For example, U.S. soy bean producers who employ certain biotechnology skills in their production may not be able to export their products to the European Union, because of the European Union's different regulations on genetically modified foods.<sup>132</sup>

GATT Article XXIV fails to remedy such situations because its provisions only concern the 'formation' of RTAs. Most RTA charters and regulations which are created after the formation fall outside of the Article's jurisdiction. Article XXIV is also silent on whether an entire RTA should be void when a regulatory scheme fails to meet the Article's requirement.

#### V.4 New and Specialised Laws

Another problem is that RTAs have a propensity to go far beyond being tariff-reduction systems: they provide for increasingly complex and specialised regulations (special laws or *lex specialis*) governing trade within their jurisdiction. Many RTAs do include substantive rights and obligations that are parallel to those of the WTO Agreement, but problems are caused when RTAs purport to impose regulatory elements beyond the reduction of trade barriers. These elements include enforcement of intellectual property rights, the requirements of environmental and labour standards and authorisation of uninhibited capital transfers.<sup>133</sup> These new requirements pose problems of another dimension, by imposing a new set of trade rules on their members which are not yet agreed upon multilaterally at the WTO level. The inclusion and promotion of these new regulatory elements in RTAs have significant implications on the multilateral trading system, as they potentially complicate and cause inconsistencies in the discipline of world trade.

These considerations have led Baldwin to conclude that 'it is ... possible and even likely that the new disciplines form an independent system of governance that does not intersect much, or at all, with Marrakesh rules'.<sup>134</sup> When this is the case, the coherence challenges posed by regional agreements may be quite different from those arising from discriminatory tariff reductions. The challenge, in this regard, is that new international trade rules are being negotiated and decided outside the WTO, and this is being done in a setting where differences in power are greater and in the absence of the basic principles of non-discrimination and reciprocity.<sup>135</sup>

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<sup>130</sup> K. Heydon, 'Regionalism: A Complement, Not a Substitute' in 'Regionalism and the Multilateral Trading System', *Organization for Economic Co-operation and Development*, 2003, p. 17.

<sup>131</sup> Cho 2001, supra note 128, p. 428.

<sup>132</sup> Request for the Establishment of a Panel by the United States *European Communities—Measures Affecting the Approval and Marketing of Biotech Products* WT/DS291/23 (Aug. 8, 2003).

<sup>133</sup> A. Hilaire & Y. Yang, 'The United States and the New Regionalism/Bilateralism', *Journal of World Trade*, 2004, p. 609.

<sup>134</sup> R.E. Baldwin, '21st Century Regionalism: Filling the gap between 21st century trade and 20th century trade rules' Geneva Graduate Institute, Working Paper No. 2010-31, p. 31 at: [http://www.wto.org/english/res\\_e/reser\\_e/ersd201108\\_e.pdf](http://www.wto.org/english/res_e/reser_e/ersd201108_e.pdf) (accessed 10 July 2015).

<sup>135</sup> See the WTO World Trade Report 'The WTO and preferential trade agreements: From co-existence to coherence', 2011, p. 188 at

There is also some evidence that RTAs want to go further in their liberalisation beyond the GATT and GATS. For example, in Article 103 of the North American Free Trade Agreement (NAFTA) it is stated that: 'In the event of any inconsistency between this Agreement and [GATT 1994 and GATS], this Agreement shall prevail to the extent of the inconsistency, except as otherwise provided in this Agreement'.<sup>136</sup> This is one example of a provision that purports to marginalise the WTO system.

### V.5 The Spaghetti-Bowl Problem

Baldwin has described proliferation of bilateral and regional trade arrangements, and the consequent interface of RTAs and the MTS, as the 'spaghetti-bowl crisis'.<sup>137</sup> It is, indeed, a fact that the growing number of RTAs leads to a complex system of regulatory structures in international trade. The spaghetti-bowl effect results in undesirable complexity and lack of transparency in the global trading system. The proliferation of RTAs, especially as their scope broadens to include new areas not regulated multilaterally, increases the risks of inconsistencies in the rules and procedures among RTAs themselves, and between RTAs and the multilateral framework. This is likely to give rise to a regulatory confusion and severe implementation problems, especially where there are overlapping RTAs.<sup>138</sup>

This is also connected to the problem of overlapping membership: most RTAs tend to develop their own mini-trade regimes and the coexistence of differing trade rules applying to different RTA partners in a single country has become a frequent feature. This can hamper trade flows because of the costs involved for traders in meeting multiple sets of trade rules.<sup>139</sup> The result is unfair trade, which the WTO seeks to eradicate

### V.6 Diverting Attention from Multilateralism

Regionalism diverts attention from the multilateral agenda. The dominant view suggests that regionalism is harmful to the multilateral trading system.<sup>140</sup> Bhagwati and Krueger<sup>141</sup> have found that RTAs are essentially discriminatory in nature, and they view the drift towards RTAs as a serious threat to global trade regulation.

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[http://www.wto.org/english/res\\_e/booksp\\_e/anrep\\_e/world\\_trade\\_report11\\_e.pdf](http://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report11_e.pdf) (accessed 23 July 2015).

<sup>136</sup> Article 103 of the North American Free Trade Agreement, 1992.

<sup>137</sup> R.E. Baldwin, 'Multilateralising Regionalism: Spaghetti Bowls as Building Blocks on the Path to Global Free Trade', *The World Economy*, Wiley Blackwell Online Library, 2006-11, pp. 1451-1518.

<sup>138</sup> Ibid.

<sup>139</sup> Ibid.

<sup>140</sup> See Pal 2004, supra note 59, p. 1. See also T. Moylan, 'Is Regionalism Really a Threat to Trade Liberalisation?' *e-International Relations paper* 10 April 2013 at: <http://www.e-ir.info/2013/04/10/is-regionalism-a-threat-to-trade-liberalisation/> (accessed 2 August 2015).

<sup>141</sup> J. Bhagwati, 'Regionalism versus Multilateralism', *The World Economy*, 1992, p. 15; A. Krueger, 'Free Trade Agreements versus Customs Unions' *NBER Working Paper No. 5084*, 1995, p. 4.

According to them, 'Increased regionalism is dangerous because it reduces the interest for participation in the multilateral trade regime'.<sup>142</sup> They worry that RTAs divert attention from the multilateral trading system. Consequently, they argue that most preferential agreements lead to trade discrimination and, thereby, harm the multilateral trading system.

## VI. Dispute Settlement Issues

International trade law is often highlighted for its unity and the strength of its dispute settlement and remedies systems, but it is itself no stranger to the phenomenon of fragmentation. As RTAs are increasing, they set up more and more solid and far-reaching dispute settlement systems. They are, therefore, expected to come into direct contact with the multilateral system of the WTO.

When parties to a trade dispute are members to both the WTO and a RTA, and the RTA in question also provides for dispute settlement, which dispute settlement clause should prevail?<sup>143</sup> Parties to such disputes then have opportunity to go forum shopping.<sup>144</sup> This is true because, even when a matter falls within the competence and jurisdiction of RTA tribunals, the WTO Dispute Settlement System does not readily decline jurisdiction to hear any matter brought to it by a member. Implicitly, the concurrent jurisdiction between the two allows the losing party to have a second bite at the cherry.<sup>145</sup>

The relationship between the dispute settlement mechanisms of the WTO and that of regional trade agreements demonstrates the difficulties surrounding the issues of overlaps or conflicts of jurisdiction and of hierarchy in international law.<sup>146</sup> There is the imminent danger that as countries pursue deeper integration within RTAs, dispute settlement provisions contained in the RTAs could build jurisprudence conflicting with that of the WTO.

Overlaps and conflicts of jurisdiction are unavoidable due to the horizontal allocation of judicial jurisdiction between RTA and WTO dispute settlement mechanisms, and also due to the quasi-automatic and compulsory nature of the WTO dispute settlement mechanism. The following parts examine the WTO dispute settlement and deal with conflicting jurisdictions in the dispute settlement processes of RTAs and the WTO.

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<sup>142</sup> Ibid.

<sup>143</sup> The *Mexico-Soft Drinks* and *Argentina Poultry* cases in the WTO show that this ambiguity allows disputants to forum-shop, at [www.wto.org/resources](http://www.wto.org/resources) (Accessed 11 June 2015).

<sup>144</sup> In such a situation disputing entities would have a choice between two adjudicating bodies or between two different jurisdictions for the same facts.

<sup>145</sup> F. Fletcher, 'Fragmentation of International Law: Forum Shopping' Discussion Paper Available at [www.fletcherfila.worldpress.com](http://www.fletcherfila.worldpress.com) (Accessed 12 June 2013).

<sup>146</sup> K. Kyung & M. Gabrielle, 'Overlaps and Conflicts of Jurisdiction between the World Trade Organisation and Regional Trade Agreements', *Canadian Year Book of International Law*, 2003-43, p. 83.

## VI.1 WTO Dispute Settlement

The GATT 1947 did not provide for an elaborate dispute settlement system. It contained only two brief provisions relating to dispute settlement: Article XXII which provided for party ‘consultations’, as a method of dispute resolution; and Article XXIII which covered disputes arising out of ‘nullification or impairment’ of benefits accruing under the Agreement.<sup>147</sup> Both Articles provided for consultations as the primary method for dispute settlement. When consultations failed to resolve a dispute, a decision would be made by all interested Contracting Parties on the basis of consensus.<sup>148</sup>

The WTO dispute settlement system is today governed by the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU),<sup>149</sup> which is attached to the WTO Agreement as Annex 2, and constitutes an integral part of the Agreement. This is a coherent rule-based dispute settlement system, whose purpose is the prompt settlement of disputes between WTO members concerning their respective rights and obligations under WTO law.<sup>150</sup> The methods of dispute settlement under the DSU are: consultations or negotiations,<sup>151</sup> and adjudication. These are administered by panels, the Appellate Body,<sup>152</sup> *ad hoc* arbitration tribunals<sup>153</sup> and good offices conciliation or mediation.<sup>154</sup> The jurisdiction of the WTO dispute settlement system is very broad in scope, as it covers any matter between WTO members arising out of the ‘covered agreements’.<sup>155</sup>

The WTO dispute settlement system is compulsory<sup>156</sup> in nature. This means that a member who seeks the redress of a violation is obliged to bring any dispute arising under the covered agreements to the WTO dispute settlement system and abide by its rules and procedures. There is no need to accept, in a separate declaration, the jurisdiction of the WTO dispute settlement system. Therefore, membership to the WTO constitutes consent and acceptance of the compulsory jurisdiction of the WTO dispute settlement system.

The WTO dispute settlement system has exclusive rules on conflict of jurisdiction. Of particular importance is Article 23 (1) of the DSU which states that:

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<sup>147</sup> Article XXIII of The GATT 1947 entitled ‘Nullification and Impairment.’

<sup>148</sup> Article XXIII (2) of the GATT 1947.

<sup>149</sup> The WTO Dispute Settlement Understanding (hereafter The DSU).

<sup>150</sup> See Article 3 of the DSU.

<sup>151</sup> Expressed as the preferred method See article 4 of the DSU

<sup>152</sup> Appeal at the Appellate Body is the next available method after consultations and negotiations have failed. See Articles 6 to 20 of the DSU.

<sup>153</sup> Provided for as an alternative means of dispute settlement, in Article 25 of the DSU.

<sup>154</sup> Article 5 of the DSU.

<sup>155</sup> See Article 1 (1) of the DSU. These are the Agreements listed in the Appendix to the DSU namely: the WTO Agreement, the GATT 1994 and all other multilateral agreements on trade in goods, the GATS, the TRIPS Agreement and the DSU. This list excludes the Trade Policy Review Mechanism. The list also includes ‘additional rules and procedures on dispute settlement contained in the covered agreements as are identified in Appendix 2 to this Understanding’ See Article 1.2 of the DSU.

<sup>156</sup> See Article 23 (1) of the DSU.

‘When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding’.<sup>157</sup>

This is clearly an exclusive and compulsory jurisdiction clause. The essence of it is that, in addition to the compulsory jurisdiction, the WTO dispute settlement system also has exclusive jurisdiction. It is exclusive in the sense that members shall have recourse to the WTO dispute settlement system to the exclusion of any other system. In *US - Section 301 Trade Act*,<sup>158</sup> the Panel ruled that article 23 (1) of the DSU:

‘... imposes on all Members [a requirement] to have recourse to the multilateral process set out in the DSU when they seek the redress of a WTO inconsistency. In these circumstances, Members have to have recourse to the DSU dispute settlement system to the exclusion of any other system, in particular a system of unilateral enforcement of WTO rights and obligations. This, what one would call ‘exclusive dispute resolution clause’, is an important new element of Members’ rights and obligations under the DSU’.

The WTO dispute settlement system is administered by the Dispute Settlement Body (DSB), which has authority to establish panels, adopt panel and Appellate Body Reports, ensure the implementation of rulings and authorise suspension of concessions and other obligations under the covered agreements.<sup>159</sup>

The current make-up of the DSU shows that the WTO treaty negotiators did not perceive potential conflicts of jurisdictions with RTAs. Since there is no general rule of primacy between WTO norms and RTA norms, RTAs may provide for their own dispute settlement mechanisms, which makes it possible for the states to resort to different dispute settlement mechanisms for different or even similar obligations. The choice of a dispute settlement forum will therefore be an expression of the importance that states give to the system of norms that may be enforced by the related dispute settlement mechanism.

## VI.2 Dispute Settlement within RTAs

RTAs provide for different dispute settlement mechanisms, such as referral to standing tribunals, *ad hoc* arbitration and standing judicial bodies.<sup>160</sup> Most RTAs provide for negotiation as a first step in the resolution of disputes, and *ad hoc*

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<sup>157</sup> Ibid.

<sup>158</sup> Panel Report *US - Section 301 Trade Act* par. 7.43. Panel Report United States - Sections 301-310 of the Trade Act of 1974 WT/DS152/R (27 January 2000) DSR 2000:2 at 815.

<sup>159</sup> See Article 23.1 of the DSU.

<sup>160</sup> A. Porges, ‘Dispute Settlement’ in J.P. Chauffour and J.C. Maur (eds.) *Preferential Trade Agreement Policies for Development: A Handbook*, Washington DC: The World Bank 2011, p. 467.

arbitration is the most popular choice of mechanism.<sup>161</sup> The current trend in RTAs around the world seems to be an arbitral model of dispute settlement based on panel review.<sup>162</sup>

Since most RTAs incorporate different kinds of dispute settlement mechanisms,<sup>163</sup> a 'web' of bilateral trade dispute settlement mechanisms has resulted.<sup>164</sup> According to Kwak and Marceau, the potential for conflicts of jurisdictions between the WTO and RTA dispute settlement mechanisms increases the more these RTA mechanisms are based on judicial and arbitral systems,<sup>165</sup> and it reaches the highest level if a standing judicial body is incorporated into the RTA.

Below is an examination of landmark cases where the WTO has clashed with RTAs dispute settlement systems. The case study survey has been limited only to the landmark disputes for two main reasons. First, it must be noted that, even though most RTAs incorporate dispute settlement provisions, RTA parties have relatively rarely invoked them. They generally choose instead to use the WTO to resolve issues that may also fall within the scope of their RTA.<sup>166</sup> Very few disputes have been resolved under RTA judicial bodies.<sup>167</sup> According to a 2011 World Bank report surveying RTAs, there have been only 25 known decisions of RTA dispute settlement panels relating to 16 disputes.<sup>168</sup> Secondly, since most RTAs are relatively new, there has been less time for major disputes to arise. Even where disputes do arise, RTA parties either resolve disputes via diplomatic means or simply prefer to bring them under the WTO dispute settlement system which, as it will appear below, does not readily decline jurisdiction.<sup>169</sup> Marceau and Kwak also argue that WTO adjudicatory bodies cannot decline to hear a dispute brought before them, even if all parties to the dispute had also signed an RTA priority clause in favour of an RTA dispute settlement system.<sup>170</sup>

### VI.3 Case Studies: Normative Conflicts and Overlaps of Jurisdiction

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<sup>161</sup> Ibid, p. 471.

<sup>162</sup> K. Kwak & G. Marceau, 'Overlaps and Conflicts of Jurisdiction between the World Trade Organization and Regional Trade Agreements' in L. Bartels and F. Ortino (eds.) *Regional Trade Agreements and the WTO Legal System*, Oxford: Oxford Scholarship Online 2006, p. 465-523.

<sup>163</sup> Porges 2011, supra note 160, p. 467.

<sup>164</sup> P. Drahos, 'Weaving Webs of Influence: The United States, Free Trade Agreements and Dispute Resolution', *Journal of World Trade*, 2007-41, p. 192.

<sup>165</sup> See generally Kwak & Marceau 2006, supra note 162.

<sup>166</sup> D. Morgan, 'Dispute Settlement under PTAs, Political or Legal?' in R.P. Buckley, V.I. Lo and L. Boule (eds.) *Challenges to Multilateral Trade: The Impact of Bilateral Preferential and Regional Agreements*, Alphen a/d Rijn: Kluwer Law International 2008, pp. 241-257. See also World Trade Organization 'The WTO and Preferential Trade Agreements: From Coexistence to Coherence' *World Trade Report*, 2011, p. 176.

<sup>167</sup> Idem.

<sup>168</sup> Porges 2011, supra note 160, p. 464.

<sup>169</sup> See case discussion (*Mexico- Soft Drinks dispute*) below.

<sup>170</sup> K. Kwak & G. Marceau, 'Overlaps and Conflicts of Jurisdiction between the World Trade Organization and Regional Trade Agreements' *Canadian Yearbook of International Law*, 2003-41, p. 83.

The most direct kind of conflict between dispute systems is where an RTA party challenges a measure before an RTA dispute settlement body, and then, that same measure is challenged in the WTO dispute settlement mechanism.<sup>171</sup> According to Davey and Sapir, these situations involve a ‘double breach’ of both an RTA obligation and a WTO obligation, such that both dispute settlement systems have jurisdiction over the exact same measure.<sup>172</sup> A conflict of jurisdiction then occurs. This is exactly the same kind of conflict that was illustrated earlier in paragraph 5: in the *Mox Plant* case the UK’s operation of a nuclear fuel reprocessing plant on the Irish Sea was ultimately challenged in three different jurisdictions operating under three separate international regimes.<sup>173</sup> In international trade law, this double breach situation is addressed in the *Mexico Soft Drinks* case, discussed below.

A second kind of conflict occurs where conflicting decisions on similar facts are handed down by RTAs and the WTO. The issue of conflicting decisions not only involves divergent interpretations of international trade obligations, but also raises the important question of whether the WTO system is hierarchically superior to RTAs’ dispute settlement systems. The *Brazilian Tyres* dispute is the classical case relating to these issues. This case is also analysed below. Another example of a distinct conflict (problem) is the attribution of exclusive jurisdiction to both the WTO dispute settlement forum (under article 23(1) DSU) and the NAFTA (under article 2005 NAFTA).<sup>174</sup> The exclusive jurisdiction clauses coexist, hence again bringing forth grounds for forum shopping.

### (1) Jurisdictional overlaps: The *Mexico Soft Drinks* dispute

The issue of jurisdictional tensions between the WTO dispute settlement system and dispute settlement systems established by RTAs was raised in the *Mexico Soft Drinks* case.<sup>175</sup> In this case, the U.S. in 2004 had complained about certain tax measures imposed by Mexico on soft drinks and other beverages that use any sweetener other than cane sugar. The U.S. considered that these taxes were inconsistent with Article III of GATT 1994, in particular, Article III (2), first and second sentences, and Article III (4) thereof. After unsuccessful consultations with

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<sup>171</sup> G. Marceau & J. Wyatt, ‘Dispute Settlement Regimes Intermingled: Regional Trade Agreements and the WTO’, *Journal of International Dispute Settlement*, 2010, p. 68.

<sup>172</sup> W. Davey & A. Sapir ‘The Soft Drinks Case: The WTO and Regional Agreements’ *World Trade Review*, 2009-1 p. 23.

<sup>173</sup> Counter-Memorial of the United Kingdom, *MOX Plant (Ireland v. United Kingdom)*, at 21 (Perm. Ct. Arb. Jan. 9, 2003) at <http://www.pca-cpa.org/PDF/UK%20Counter%20Memorial.pdf>.

<sup>174</sup> Article 2005 (1) of the NAFTA states that ‘dispute regarding any matter arising under both this Agreement and the General Agreement on Tariffs and Trade, any agreement negotiated there under, or any successor agreement (GATT), may be settled in either forum at the discretion of the complaining Party.’ This means that Parties are allowed to choose a jurisdictional forum. Under Article 2005(3) the NAFTA forum is imposed on environmental forums in relation to disputes between NAFTA and environmental treaties.

<sup>175</sup> *WTO Mexico-Tax Measures on Soft Drinks and Other Beverages* Dispute DS308, Panel Report circulated on 7 October 2005, and Appellate Body Report circulated on 6 March 2006. On 24 March 2006, the DSB adopted the Appellate Body report and the Panel report, as modified by the Appellate Body report, at [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds308\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds308_e.htm).

Mexico, the U.S. instituted dispute settlement proceedings before the WTO against Mexico.<sup>176</sup> In its defence, Mexico raised a point *in limine* concerning the issue of jurisdictional competition. Mexico argued that the dispute involved two NAFTA states and concerned NAFTA provisions, and should, therefore, be treated as a NAFTA dispute rather than a WTO dispute.<sup>177</sup> Therefore, Mexico requested the WTO panel to decline to exercise its jurisdiction, in favour of an Arbitral Panel under Chapter Twenty of the North American Free Trade Agreement (NAFTA).<sup>178</sup>

The WTO panel made a preliminary ruling stating that under the WTO DSU the panel had no discretion to decide whether or not to exercise jurisdiction on a matter properly presented before it. The panel thereby rejected Mexico's request. In its reasoning the panel referred to Article 3.2 and Article 19.2 of the DSU and stated that, if a WTO panel were to decide not to exercise its jurisdiction in a particular case, it would diminish the rights of the complaining member under the DSU<sup>179</sup> and other WTO-covered agreements.<sup>180</sup> Regarding the issue of jurisdictional competition between the two dispute settlement systems (WTO and NAFTA), the panel refrained from making any findings or ruling.<sup>181</sup> This is because the panel considered that:

‘Any findings made by this panel, as well as its conclusions and recommendations in the present case only relate to Mexico's rights and obligations under the WTO-covered agreements, and not its rights and obligations under other international agreements, such as the NAFTA, or other rules of international law’.<sup>182</sup>

The case proceeded on appeal before the WTO Appellate Body. The Appellate Body addressed the issue whether the panel should have declined to exercise jurisdiction with respect to the American claims under Article III of the GATT 1994. The Appellate Body recalled from the *EC-Hormones* case<sup>183</sup> that WTO panels have a ‘margin of discretion to deal with specific situations that are not explicitly regulated’.<sup>184</sup> The Appellate Body made the example that WTO panels may exercise judicial economy by refraining from ruling on certain claims when

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<sup>176</sup> *Idem*.

<sup>177</sup> Mexico claimed that it had adopted the measure in question in order to force the US to cooperate in finding a resolution to the dispute within the framework of NAFTA. Accordingly, they argued that a NAFTA panel would be better placed to deliberate this dispute.

<sup>178</sup> WTO Panel Report Mexico-Tax Measures on Soft Drinks and Other Beverages Di, supra note 175, para.7. 1.

<sup>179</sup> Rights contained in Article 23 of the DSU which states that a WTO Member who considers that any of its WTO benefits have been nullified or impaired as a result of a measure adopted by another Member has the right to bring the case before the WTO dispute settlement system. WTO DSU, supra note 149, Art. 23

<sup>180</sup> WTO Panel Report Mexico-Tax Measures on Soft Drinks and Other Beverages 2005, supra note 175, para. 7.9.

<sup>181</sup> *Ibid*, par 7.10.

<sup>182</sup> *Ibid*, par. 7.15.

<sup>183</sup> WTO Appellate Body Report EC- EC-Hormones (US, EC), adopted 16 January 1998, WTO Doc. WT/DS48/AB/R DS26, at: [http://www.wto.org/english/tratop\\_e/dispi\\_e/cases\\_e/ds48\\_e.htm](http://www.wto.org/english/tratop_e/dispi_e/cases_e/ds48_e.htm) (accessed on 2 June 2015).

<sup>184</sup> *Ibid*, paras.138-152.

such rulings are not necessary to resolve the matter at issue in a dispute.<sup>185</sup> The Appellate Body held however that:

‘Although panels may enjoy some discretion establishing their own working procedures, this discretion does not extend to modifying the substantive provisions of the DSU [...] Nothing in the DSU gives a panel the authority either to disregard or to modify [...] explicit provisions of the DSU’.<sup>186</sup>

This means that a WTO member may initiate a WTO dispute, and is always entitled to a WTO ruling upon suffering an impairment of benefits accruing to it by another member. Therefore, according to the Appellate Body, a decision to decline validly established jurisdiction would diminish the right of a complaining member to seek redress of a violation of obligations within Article 23 of the DSU, and to bring a claim pursuant to Article 3.3 of the DSU.<sup>187</sup> Declining jurisdiction would be inconsistent with a WTO panel’s obligations under Articles 3.2 and 19.2 of the DSU.<sup>188</sup>

Like the panel, the Appellate Body in this case chose to abstain from making any ruling with regard to the issue of competing jurisdiction. This reflects an attitude of conflict avoidance. But, most importantly, it reflects the reality that, once a WTO panel has jurisdiction, it must exercise it, regardless of whether any other court or tribunal might have jurisdiction, or might be better suited to deal with the dispute.

## (2) Divergent interpretations: the *Brazilian Tyres* dispute<sup>189</sup>

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<sup>185</sup> WTO Appellate Body Report US- US-Wool Shorts and Blouses (US, India), adopted 23 May 1997, WTO Doc. WT/DS33/AB/R DS33, p. 19 para. 340.

<sup>186</sup> WTO Appellate Body Report India- India - Patents (US, India), adopted 16 January 1998, WTO Doc. WTDS50/AB/R DS50, p. 9 para. 92.

<sup>187</sup> WTO Mexico-Tax Measures on Soft Drinks and Other Beverages 2005, *supra* note 175, p. 51.

<sup>188</sup> Article 3.2 of the DSU provides that ‘Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements’; and Article 19 (2) provides that ‘... in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements.’ WTO DSU, *supra* note 149, Art. 19 (2).

<sup>189</sup> This dispute was deliberated at three levels starting at the MERCOSUR Arbitral Tribunal, to the WTO panel and finally to the WTO Appellate Body.

Remoulded Tyres 9 January 2002 (Uruguay v. Brazil), MERCOSUR *ad hoc* Arbitral Tribunal, at <http://www.mercosur.int/msweb/portal%20intermediario/pt/controversias/VI%20LAUDO.pdf> (accessed on 8 June 2015).

WTO Panel Report Brazil - Measures Affecting Imports of Rethreaded Tyres (Brazil, EC), adopted 12 June 2007, WTO Doc. WT/DS332/R, at [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds332\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds332_e.htm) (accessed on 8 June 2015).

Appellate Body Report Brazil- Measures Affecting Imports of Rethreaded Tyres (Brasil, EC), adopted 3 December 2007, WTO Doc. WT/DS332/AB/R 3 December 2007, at [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds332\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds332_e.htm) (accessed on 8 June 2015).

This dispute has its background in the scourge caused by a disease called dengue fever in Brazil. Dengue fever is a fatal disease transmitted by *Aedes* mosquitoes and has no specific treatment or preventive vaccine.<sup>190</sup> To combat this health crisis, the Brazilian government adopted legislative measures<sup>191</sup> aimed at curbing the import of breeding sites for the *Aedes* mosquito. Used tyres and retreaded tyres were the most popular and widespread breeding sites. The legislation banning the import of these tyres was challenged in both the MERCOSUR and the WTO dispute settlement Bodies.<sup>192</sup> At issue in both MERCOSUR and WTO litigations was the consistency of the import ban imposed by Brazil on retreaded tyres with the MERCOSUR Treaty.

Uruguay<sup>193</sup> initiated arbitral proceedings within MERCOSUR in 2001 claiming that the import ban (SECEX 8/2000) violated its right to free trade as guaranteed by the MERCOSUR Treaty.<sup>194</sup> Under these laws, remoulded tyres from Uruguay no longer had access to the Brazilian market, as guaranteed by the MERCOSUR. The court found that Decision 22/2000 of the Common Market Group prohibited new *inter se* restrictions of trade. Because this decision was adopted prior to Portaria SECEX 8/2000, Brazil could not therefore introduce new restrictions affecting the trade in remoulded tyres. Such restriction was inconsistent with Brazil's existing MERCOSUR trade law obligations.<sup>195</sup> Brazil was then obliged to adopt new legislation in order to comply with the MERCOSUR Arbitral Tribunal's ruling.

Accordingly, Brazil enacted Portaria SECEX 2/2002 which eliminated the import ban of remoulded tyres originating in MERCOSUR countries. This meant that only remoulded tyres from member states of the MERCOSUR were exempt from the import ban. Brazil went on further to incorporate this MERCOSUR-exemption into Article 40 of Portaria SECEX 14/2004.

These measures implementing the MERCOSUR *ad hoc* Arbitral Tribunal's ruling prompted the European Communities to bring the dispute before the WTO.<sup>196</sup>

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<sup>190</sup> Dengue is a problem that has affected Brazil since the 19<sup>th</sup> Century. The last three national outbreaks were in 1986, 1991 and 2001 when more than two million cases were reported. See N. Lavranos, 'On the Need to Regulate Competing Jurisdictions between International Courts and Tribunals', *Heidelberg Journal of International Law* 2009-68, p. 592. See also L. Figueredo, 'Dengue in Brazil: Past, Present and Future Perspective', *Dengue Bulletin* 2003-27, pp. 25-33.

<sup>191</sup> The Ministerial Act Portaria DECEX 9/1991 prohibited the import of used tyres, and Portaria SECEX 8/2000 banned the importation of retreaded tyres.

<sup>192</sup> See the case analysis in N. Lavranos & N. Viellard, 'Competing Jurisdictions between MERCOSUR and WTO', *The Law and Practice of International Courts and Tribunals* 2008-2, pp. 205-234.

<sup>193</sup> Uruguay was a Member of the Southern Common Market Free Trade Agreement, and a major exporter of remoulded tyres to Brazil.

<sup>194</sup> Remoulded Tyres 9 January 2002 (Uruguay v. Brazil), MERCOSUR *ad hoc* Arbitral Tribunal, at <http://www.mercosur.int/msweb/portal%20intermediario/pt/controversias/VI%20LAUDO.pdf> (accessed on 8 June 2015).

<sup>195</sup> *Ibid*, para. 7.214.

<sup>196</sup> WTO Panel Report Brazil - Measures Affecting Imports of Rethreaded Tyres (Brazil, EC), adopted 12 June 2007, WTO Doc. WT/DS332/R, at [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds332\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds332_e.htm) (accessed on 8 June 2015).

Note that the majority of retreaded tyres imported by Brazil prior to the ban came from the EU, and as a result of the ban, EU exports of retreaded tyres to Brazil had dropped to zero by 2002.<sup>197</sup> The EC therefore claimed that the ban violated GATT Article XI, which prohibits quantitative restrictions. The EC also claimed that the MERCOSUR exemption discriminated against the EC hence violating the GATT Articles I and XIII (MFN requirements). In essence, the EC's contention before the WTO panel was the conformity of Brazil's import ban and the MERCOSUR exemption with WTO law.

In its reasoning, the WTO panel accepted that the MERCOSUR exemption was an implementation of the Arbitral Tribunal award, and was not motivated by 'capricious and unpredictable reasons'.<sup>198</sup> The panel found that, since Article XXIV of GATT provides for preferential treatment to members of an FTA to the detriment of other countries, the MERCOSUR exemption was justified under Article XXIV.

On appeal before the WTO Appellate Body,<sup>199</sup> it was found that the import ban was indeed necessary in order to comply with the MERCOSUR Arbitral Tribunal's ruling, and was thus not to be viewed as capricious or random.<sup>200</sup> The Appellate Body held, however, that the import ban was discriminatory. This was because 'the MERCOSUR *ad hoc* Arbitral Tribunal's decision was not an acceptable rationale for discrimination against imports from the EC, because it bore no relationship to the legitimate objective to be achieved by the import ban, and actually went against it'.<sup>201</sup> It was also applied in a manner constituting arbitrary and unjustifiable discrimination: 'a disguised restriction on international trade.'<sup>202</sup> The Appellate Body found therefore that the MERCOSUR exemption infringed the chapeau of Article XX of GATT.

From this ruling, it can be noted that by reviewing the MERCOSUR decision, the WTO Appellate Body exerted the supremacy of WTO law over RTAs or decisions rendered by RTA dispute settlement bodies. The Appellate Body in effect advocated that RTA dispute settlement bodies should render their decisions in conformity with WTO law. The implication of this is that the Appellate Body has shifted the horizontal relationship between the WTO and RTAs towards a vertical relationship, by placing the WTO legal order at the very top.<sup>203</sup>

### (3) Regulatory conflicts: The *Turkey - Textiles case*

Upon the formation of the customs union between Turkey and the EC, India challenged the quantitative restrictions imposed by Turkey on Indian textiles and

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<sup>197</sup> Ibid, para. 4.20.

<sup>198</sup> Ibid, para. 7.272.

<sup>199</sup> Appellate Body Report Brazil- Measures Affecting Imports of Rethreaded Tyres (Brasil, EC), adopted 3 December 2007, WTO Doc. WT/DS332/AB/R 3 December 2007, at [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds332\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds332_e.htm) (accessed on 8 June 2015).

<sup>200</sup> Ibid, para. 232.

<sup>201</sup> Ibid, para. 228.

<sup>202</sup> Ibid, para. 239.

<sup>203</sup> Lavranos 2009, *supra* note 190, p. 32.

clothing before the WTO panel. In its defence, Turkey argued that the quantitative restrictions did not violate relevant provisions of the GATT and the WTO Agreement on Textiles and Clothing.<sup>204</sup> Turkey argued that the restrictions were justified by GATT rules on regional trade agreements (Article XXIV of the GATT), which provide exceptions to the GATT provisions as long as the customs union in question is justified under the Article. In Turkey's view this constituted a *lex specialis* for the rights and obligations of WTO members at the time of formation of a customs union.<sup>205</sup>

This meant that the panel had to determine the consistency of a regional trade agreement with Article XXIV. In addressing Turkey's defence, the panel first referred to Jenks's strict definition of conflict stating that:

'There is no conflict if the obligations of one instrument are stricter than, but not incompatible with, those of another, or it is possible to comply with the obligations of one instrument by refraining from exercising a privilege or discretion accorded by another'.<sup>206</sup>

This definition clearly denies the very existence of conflict in such instances. Nonetheless, the panel proceeded to examine whether Article XXIV authorises measures which the GATT and the Agreement on Textiles and Clothing 'otherwise prohibited'.<sup>207</sup> Upon analysing Article XXIV, the panel concluded that this provision does not permit a departure from relevant obligations contained in the GATT and the Agreement on Textiles and Clothing.<sup>208</sup>

The kind of conflict we see in this case shows that RTA parties can and do construe the terms of Article XXIV very narrowly. The main contention, as it appeared in this case, was that if regional trade agreements really violated the provisions of Article XXIV, the CRTA would have requested them to make changes to their agreements. Therefore, by not making such recommendations, it could be taken that an RTA is WTO-consistent. Turkey argued that since the CRTA had not made any recommendations regarding the customs union agreement between it and the EC, the agreement could be taken to be in conformity with Article XXIV:

'Turkey considered that, though the CRTA had not yet concluded its examination of the Turkey - EC customs union, there was no indication, two and a half years after the completion of the customs union, that it would recommend to the parties, under Article XXIV:7 (b), that modifications be made to the Agreement ... No country had asked for compensatory adjustment with respect to any tariff bindings that might have been affected by the Turkey - EC customs union'.<sup>209</sup>

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<sup>204</sup> The pertinent provisions were Arts XI and XIII of the GATT and Art. 2.4 of the Agreement on Textiles and Clothing. Art. XI prohibits quantitative restrictions; Art. XIII requires non-discriminatory administration of quotas; Art. 2.4 prohibits new restrictions on trade in textiles.

<sup>205</sup> Panel Report Turkey – Turkey- Restrictions on Imports of Textile and Clothing Products (Turkey, India), adopted 31 May 1999, WTO Doc. WT/DS34R, at para. 9.88.

<sup>206</sup> Ibid, para. 9.92.

<sup>207</sup> Ibid, para. 9.95

<sup>208</sup> Ibid, paras. 9.188–9.189.

<sup>209</sup> Ibid.

The most important issue in this case, which also came up on appeal before the WTO Appellate Body, was the question of whether the consistency of a regional trade agreement with Article XXIV could be examined in WTO dispute settlement. The Appellate Body held that panels do have the authority to examine whether a regional trade agreement meets the requirements of Article XXIV. The Appellate Body found that the burden of establishing that the RTA meets the requirements of Article XXIV falls on the respondent WTO member to the extent that it invokes the regional agreement as a defence to justify a discriminatory measure.

The Appellate Body explained that a party invoking Article XXIV to justify an otherwise WTO-inconsistent measure must establish that the following two conditions have been fulfilled. First, it ‘must demonstrate that the measure at issue is introduced upon the formation of a customs union that fully meets the requirements of sub-paragraphs 8(a) and 5(a) of Article XXIV’.<sup>210</sup> Secondly, it must show that ‘the formation of that customs union would be prevented if it were not allowed to introduce the measure at issue’.<sup>211</sup>

Commentators have expressed mixed opinions on this decision. It remains arguable whether the availability of WTO dispute settlement to challenge regional trade agreements is proper. Roessler<sup>212</sup> has argued for example that the examination of the consistency of regional trade agreements was a matter that should have been reserved exclusively to the WTO's political organs, and specifically to the CRTA.<sup>213</sup> However, Davey<sup>214</sup> suggests that WTO dispute settlement could be used to further clarify Article XXIV.

## VII. Managing the Interface Between RTAs and the WTO: Concluding Observations

This paper has established that the WTO was created as the universal institution for regulation of world trade. However, the core objectives of this organisation have become impeded by the proliferation of preferential trade areas and regional trade agreements. The core function of the WTO, to provide a common institutional framework for the conduct of trade relations among its members, has been overtaken by preferential RTAs. The study therefore finds that the poor regulation of the multiplication of regional trading blocs seriously fragments WTO law and that it frustrates the multilateral trading system. It has been established that RTAs

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<sup>210</sup> Appellate Body Report Turkey – Turkey-Textiles (Turkey, India), adopted 22 October 1999, WTO Doc. WT/DS34/AB/R, at para. 58.

<sup>211</sup> Ibid.

<sup>212</sup> F. Roessler, ‘The institutional balance between the judicial and political organs of the WTO’ in Bronckers, M. & R. Quick (eds.), *New Directions in International Economic Law - Essays in Honour of John H. Jackson*, Boston: Martinus Nijhoff Publishers 2011, pp.200-338.

<sup>213</sup> Ibid.

<sup>214</sup> W.J. Davey, ‘A model article XXIV: are there realistic possibilities to improve it?’ in K. Bagwell & P.C. Avroidis (eds.), *Preferential Trade Agreements*, Cambridge: Cambridge University Press 2011, p. 234.

are inherently inconsistent with the objectives of the multilateral trading system of facilitating non-discriminatory trade among all nations, because they preserve exclusive preferences among their members.

The proliferation of RTAs presents both challenges and opportunities to member states of the WTO. By promoting free trade through preferential agreements, states create opportunities of trade liberalisation and economic development to the benefit of developing countries which are easily integrated into the world economy through RTAs. However, the increase of non-MFN trade communities will increase discrimination. Trade regionalism can therefore undermine transparency and predictability in international trade relations.

The weaknesses of Article XXIV contribute to the proliferation of RTAs. The WTO rules governing RTAs have significant gaps. The absence of the regulation of rules of origin has also been noted. The regulation of rules of origin by the WTO is crucial in shaping the conditions of competition within preferential trade areas.

Cases such as the *Mexico-Soft Drinks* case have illustrated the problems that arise in cases of conflict of jurisdiction, that is, when a claimant has recourse to several dispute settlement fora. The situation facilitates forum shopping and legal uncertainty increases. International trade law also faces a threat of incoherent jurisprudence when conflicting decisions may be pronounced.

The actual benefits of the new transparency mechanisms remain uncertain: commentators believe that because every WTO member is party to at least one RTA, WTO members are under pressure to refrain from being critical of RTAs.<sup>215</sup> Even if the Committees evaluating these RTAs remain efficient, the prospective increase of RTAs may well overwhelm the process of evaluation.<sup>216</sup>

There are benefits of regional integration in trade which must not be overlooked. Some economists argue that WTO law should not stand in the way of such processes of attaining free trade and lowering of barriers within regional groupings. Some analysts generally believe that the emergence of RTAs has provided avenues for trade liberalisation in areas not yet addressed by the WTO. And in addition, RTAs provide for the advancement of areas in trade that are difficult to address and enforce at global level.<sup>217</sup>

It is submitted, however, that a balance must be struck between the interests of countries pursuing closer economic integration among a select group of countries and interests of other countries excluded from that group.<sup>218</sup> As it is expressed in the preamble of the Understanding on Article XXIV:

‘The purpose of [regional trade] agreements should be to facilitate trade between the constituent territories and not to raise barriers to the

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<sup>215</sup> D. Gantz, *Regional Trade Agreements: Law, Policy and Practice*, Durham: Carolina Academic Press 2009, p. 57.

<sup>216</sup> S.J. Powell & P.C. Perez ‘Global Laws, Local Lives: Impact of the New Regionalism on Human Rights Compliance’, *Buff. Hum. Rts. L. Rev.* 2011-11, pp.117-156, at p. 121.

<sup>217</sup> *Ibid.*

<sup>218</sup> Van Den Bossche 2005, *supra* note 7, p. 651.

trade of other Members with such territories ... in their formation or enlargement the parties to them should to the greatest possible extent avoid creating adverse effects on the trade of other Members’.

A balance thus needs to be struck to avoid the fragmentation of the multilateral trade system. The importance of the role of RTAs has also been recently entrenched in Paragraph 4 of the Doha Declaration, where WTO members stressed their;

‘Commitment to the WTO as the universal forum for global trade rule-making and liberalisation, while also recognizing that regional trade agreements can play an important role in promoting the liberalisation and expansion of trade, and in fostering development’.<sup>219</sup>

It is submitted that whatever benefit derives from RTAs, they should not compromise the coherence of the WTO legal system. Instead, regional arrangements must be compatible with the rules of the multilateral agreements admitting them. In order to avoid conflicts, fundamental consistency with all WTO agreements must be assumed. Where conflict arises, it must be capable of being reconciled by application of the rules regulating RTAs, and in the light of the WTO Agreement's overall object and purpose.

Convergence instead of divergence should be sought between RTAs and WTO disciplines. That is to be done by ensuring that regional arrangements are brought in line with the objectives of the multilateral trading system. Once convergence is achieved, regionalism can be managed *within* the objectives of the WTO, thence avoiding the undesirable consequences of fragmentation. It is of systemic importance for the global trade system that the WTO addresses RTA inconsistencies to ensure that RTAs are designed and implemented so as to complement and not undermine the multilateral process.<sup>220</sup>

Even though scholars may view the WTO and RTAs as complementing each other or think that the multilateral system is simply superior to the regional approach, they broadly agree that ‘the case for strengthening the ability of the WTO to discipline RTAs, or at least to blunt their more exclusive and distorting features, remains strong’.<sup>221</sup>

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<sup>219</sup> WTO Ministerial Declaration- Doha 2001, adopted 14 November 2001, WT/ MIN (01)/ DEC/ 1, at Preamble para. 4.

<sup>220</sup> In this regard, WTO Director General Lamy has stated that: ‘Regional Trade Agreements [...] it is difficult to see why such deep concessions and commitments are undertaken today in the context of preferential agreements, without any consequences in the multilateral context. [...] if we are serious about the prevalence of the MFN principle, we should collectively think about some way of gradually ‘multilateralising’ concessions made in free trade agreements. Food for thought for Article XXIV negotiators.’ See D.G. Lamy, ‘Strengthening the WTO as the Global Trade Body, Statement by WTO Director General P. Lamy to the WTO General Council on 29 April 2009’, at: [https://www.wto.org/english/news\\_e/news09\\_e/tnc\\_chair\\_report\\_29apr09\\_e.htm](https://www.wto.org/english/news_e/news09_e/tnc_chair_report_29apr09_e.htm).

<sup>221</sup> World Trade Report 2011-The WTO and preferential trade agreements: From co-existence to coherence, adopted 2011, at p. 187.

There are a number of proposals that have been put forward for remedying the problems covered in this study. Srinivasan, an economist, suggested, for example, in a 1999 WTO high-level symposium on Trade and Development, that a 'sunset clause' should be introduced to regional agreements whereby preferences available to the agreement's members are extended to all WTO members in five years.<sup>222</sup> This proposal allows members of the existing RTAs to maintain exclusive trade preferences temporarily, but after the expiration of this fixed period these preferences will no longer be 'exclusive' *vis-à-vis* other WTO members. This proposal is in some sense a reassertion of the MFN principle, which has been waived for the formation of a customs union / free trade area under Article XXIV. The possibility of the adoption of this plausible proposal will require willingness from the RTA members to give up their exclusive trade benefits.

Pauwelyn and Salles, on the other hand, explore domestic law analogies of remedies. They evaluate the suitability of principles such as *res judicata*, *lis pendens* and *forum non conveniens*.<sup>223</sup> Mitchell and Heaton focus primarily on the inherent jurisdiction of WTO tribunals and ask whether it extends to 'utility and comity' or to a form of estoppel which would preclude an already litigated claim from being brought again.<sup>224</sup>

The latest proposal advocated by Baldwin<sup>225</sup> and Thornton<sup>226</sup> is to multi-lateralise regionalism. Baldwin<sup>227</sup> describes a process of multi-lateralisation as the extension of existing preferential arrangements in a non-discriminatory manner to non-members. This author also suggests the fusion of distinct RTAs. This translates into a number of multi-lateralisation initiatives both at the regional and at the multilateral level.

In order to effectively manage the interface between regional trade agreements and the multilateral trading system, measures have to be taken at all levels: national, regional and multilateral. At the multilateral level it is very important that the rules regulating RTAs be strengthened and clarified so as to ensure that RTAs are, in reality, instruments for promoting trade liberalisation, as opposed to the protectionist systems that they are today. At the same time, the WTO rules need to allow for special and differential treatment for developing countries to benefit from close co-operation.

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<sup>222</sup> WTO, 'Summary of WTO High-Level Symposium on Trade and Development' (1999), at: <http://www.wto.org/english/tratop-c/devele/summhle.htm> (accessed on 29 June 2015).

<sup>223</sup> J. Pauwelyn & L.E. Salles, 'Forum Shopping Before International Tribunals: (Real) Concerns, (Im)Possible Solutions', *Cornell International Law Journal* 2009-1, pp. 102-113.

<sup>224</sup> A. D. Mitchell & D. Heaton 'The Inherent Jurisdiction of WTO Tribunals: The need for a Principled Approach', *University of Melbourne Legal Studies Research Paper* 2009-416, pp. 32-46.

<sup>225</sup> R. Baldwin, 'Multilateralising regionalism: spaghetti bowls as building blocks on the path to global free trade', *The World Economy* 2006-11, pp. 1451-1518.

<sup>226</sup> R. Baldwin & P. Thornton, *Multilateralising Regionalism: Ideas for a WTO Action Plan on Regionalism*, London: CEPR 2008.

<sup>227</sup> R. Baldwin 'Big-think regionalism: a critical survey' in A. Estevadeordal, K. Suominen & R. Teh (eds.), *Regional Rules in the Global Trading System*, Cambridge: Cambridge University Press 2009, pp. 17-95.

For most developing countries, regional integration remains an important aspect or strategy of development. It is therefore undesirable that regional integration becomes constrained by the WTO. Developing countries that are members of the WTO can gain much from an equitable, predictable and non-discriminatory multilateral trading system. The major challenge remaining is to maintain the coherence and compatibility of RTAs with multilateralism, a challenge which presents an opportunity for the ongoing Doha round of negotiations to address.

The United Nations Centre for Trade and Development (UNCTAD) can make a significant contribution to public knowledge of the interface between RTAs and the WTO through its programmes, namely: intergovernmental deliberations, consensus building, as well as research and analysis.<sup>228</sup> Through these programmes, research can be undertaken to explore the implications of the WTO-RTA interface on development and trade liberalisation. Policies can then be adopted to provide proper support and guidance to regional integration initiatives.

At the regional level, states concluding preferential trade agreements have to cautiously tailor these RTAs, so as to make them instruments for development and trade liberalisation. The awareness of that objective ideally starts at national level, where state governments have to make a clear assessment of the implications of norms and disciplines being entered into for trade integration.

Lastly, it is advisable that the Doha negotiations adopt the ‘sunset policy’<sup>229</sup> in terms of which RTAs will be formally merged with WTO disciplines by extending RTA preferences to all WTO members within a given time-frame. A resolution or decision at the WTO Assembly level is necessary to put this policy into effect. The sunset policy will motivate WTO members to focus more on multilateral round negotiations.

This paper has also highlighted the problem of self-containment of the WTO system. It established that the WTO has compulsory and exclusive jurisdiction. This makes the dispute settlement mechanism applicable whenever a member of the WTO is involved in a dispute that has a trade element. Parties to that dispute will then be required to define and litigate that dispute in terms of WTO law, even where the matter may cover environmental or rights issues. It is suggested that the WTO Panels should exercise their inherent power to abstain from exercising jurisdiction whenever there is a matter of parallel or competing jurisdiction. This would be an exercise of *comity*. Additionally, WTO Panels have the right to procure information on the interpretation of international treaties from other regimes under article 13 of the DSU. For example in the *EC-Biotech Products* matter, the Panel consulted the Secretariat of the Convention on Biological Diversity, the UNEP and the FAO to establish or procure information necessary to enable the Panel to make a proper decision.<sup>230</sup>

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<sup>228</sup> UNCTAD, ‘About UNCTAD’, at: <http://unctad.org/en/Pages/AboutUs.aspx> (accessed on 8 August 2015)

<sup>229</sup> Y.S. Lee, ‘Reconciling RTAs with the WTO Multilateral Trading System: Case for a New Sunset Requirement on RTAs and Development Facilitation’, *Journal of World Trade* 2011-3, pp. 629-651, at p. 648.

<sup>230</sup> Panel Dispute Settlement *EC- Approval and Marketing of Biotech Products (US, EC)*, adopted 29 December 2006, WTO Doc. WT/DS291/R.

It is advisable that applying this practice more will ensure that the WTO Panels and the Appellate Body hand out decisions that are in harmony with the rest of international treaty law, and the applicable law in each case. RTA tribunals can adopt a similar practice.