

PROLIFERATION OF REGIONAL TRADE AGREEMENTS: COMPLEMENTING OR SUPPLANTING MULTILATERALISM?

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I. INTRODUCTION

With the creation of the World Trade Organization (WTO) in 1995, the pyramidal design of the international trading system placed multilateralism at the top of the pyramid, regionalism/bilateralism in the middle, and the domestic trade and economic policies of WTO Member States at the bottom of the pyramid. This article questions whether this vertical structure is still the case today, given the tremendous proliferation of regional trade agreements (RTAs) in recent years and the fact that the WTO is losing its centrality in the international trading system.² The thesis of this article is that the multilateral trading system's single undertaking³ is no longer feasible because the WTO has more Members than ever (and WTO membership is an ongoing process, with more Members to come in the near future) and covers more topics than ever, which, in turn, are more complex than ever.⁴ This explains RTA proliferation as the *modus operandi* for trade liberalization. This article also argues that RTA proliferation implies the erosion of the WTO law principle of non-discrimination and endangers the multilateral trading system. RTAs can help countries integrate into the multilateral trading system, but are also a fundamental departure from the principle of non-discrimination. This raises the question of whether RTAs are a building block for further multilateral liberalization or a stumbling block.⁵

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² See for example, *A Survey of Talent: Everybody's Doing It*, *The Economist* (Oct 5, 2006), online at <http://www.economist.com/node/7961878> (visited Nov 30, 2010).

³ Single undertaking is a provision that requires countries to accept all the agreements reached during a round of multilateral trade negotiations as a single package, as opposed to on a case-by-case basis. It basically means that nothing is agreed until everything is agreed.

⁴ If ultimately successful, the Doha Round, as of 2010 with 153 countries at the negotiating table, would be the ninth Round since the Second World War. The previous rounds were, in chronological order: Geneva Round (1948), with 23 countries; Ancey Round (1949), with 13 countries; Torquay Round (1951), with 38 countries; Fourth Round (1956), with 26 countries; Dillon Round (1962), with 26 countries; Kennedy Round (1967), with 62 countries; Tokyo Round (1979), with 102 countries; and Uruguay Round (1994), with 123 countries. See Rafael Leal-Arcas.

⁵ For further analysis on the link between regionalism and multilateralism, see generally Sungjoon Cho, *Breaking the Barrier between Regionalism and Multilateralism: A New Perspective on Trade Regionalism*, 42 *Harv Intl L J* 419 (2001).

This article is divided into seven sections. After the introduction in Section I, Section II provides an overview of RTAs. Section III discusses the WTO rules that deal with RTAs (Article XXIV of the General Agreement on Tariffs and Trade (GATT), the 1979 GATT decision on differential and more favorable treatment, reciprocity and fuller participation of developing countries (that is, the so-called Enabling Clause), and Article V of the General Agreement on Trade in Services (GATS)). Section IV focuses on the main trends identified in RTAs, whereas Section V deals with the economic and political reasons why WTO Members engage in RTAs so frequently, and Section VI analyzes the positive and negative effects of regionalism on multilateralism. By doing so, this article investigates whether RTAs or multilateralism is the center of gravity of the international trading system, or whether we have a symbiosis between regionalism and multilateralism and, if not, how we can get there. In Section VII, the article concludes that the proliferation of RTAs implies the erosion of the WTO law principle of non-discrimination and wonders whether this means the beginning of the end of multilateralism.⁶

II. OVERVIEW OF RTAs

Regional trade agreements have a general and a specific meaning. The general meaning is that RTAs may be agreements concluded between countries not necessarily located in the same geographical region. The specific meaning is that the parties to an RTA offer to each other, by definition, more favorable treatment in trade matters than to the rest of the world, including WTO Members.

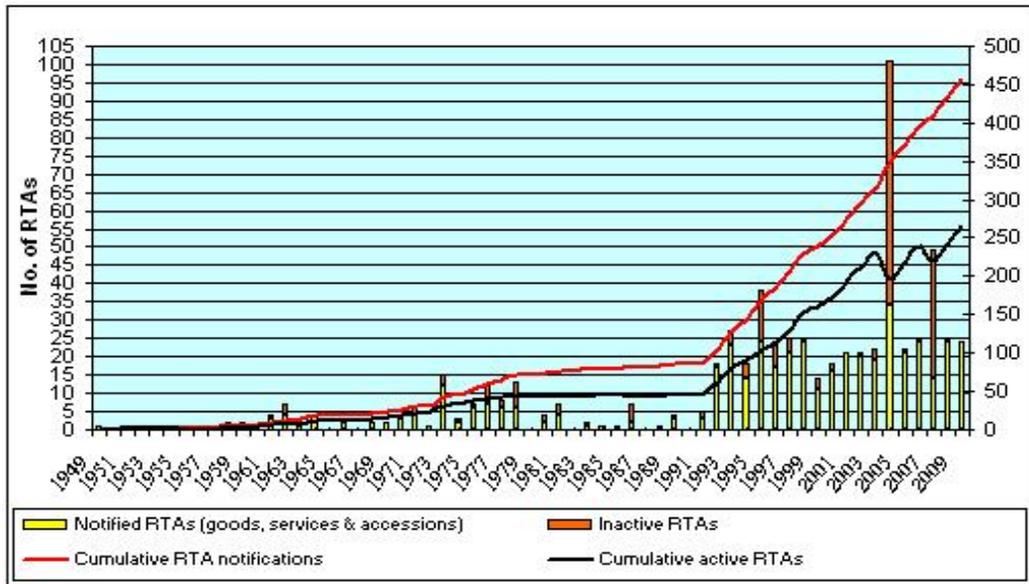
Bilateral trade agreements and regional attempts at economic integration are facts that cannot be wished away, even though they complicate the rules that govern international trade. RTAs have become a distinctive feature of the international trading landscape. As a result, more and more international trade is covered by such preferential deals, to the extent that one wonders whether RTAs are becoming the norm rather than the exception.⁷ Many RTAs contain obligations

⁶ See Peter Sutherland, *Political Challenges to the World Trading System*, in Ernst-Ulrich Petersmann, ed, *Reforming the World Trading System: Legitimacy, Efficiency and Democratic Governance* 42 (Oxford 2005); Kenneth W. Dam and Cordell Hull, *Reciprocity and the WTO*, in Ernst-Ulrich Petersmann, ed, *Reforming the World Trading System: Legitimacy, Efficiency and Democratic Governance* 90 (Oxford 2005).

⁷ See Chapter II and Report by the Consultative Board to the Director-General, *The Future of the WTO: Addressing Institutional Challenges in the New Millennium* 79–83 (World Trade Organization 2004), online at http://www.wto.org/english/thewto_e/10anniv_e/future_wto_e.htm (visited Oct 8, 2010).

that go beyond existing multilateral commitments (that is, the so-called WTO plus)⁸, whereas other RTAs deal with areas not yet included in the WTO agenda, such as investment and competition policies, as well as labor and environmental issues.⁹ The drive toward the conclusion of RTAs continues to be very prominent (see figure 1).

Figure 1: Evolution of RTAs in the world (1948-2009)



Source : WTO Secretariat

If one examines the share of international trade occurring under RTAs, one notes that already in 2005, around 50 percent of world trade came from RTAs, which demonstrates the quantitative relevance of RTAs in the international trading system (see figure 2). There are three types of RTAs: customs unions (CUs); free trade agreements (FTAs); and preferential trade agreements (PTAs). Already in the GATT era, there were 123 RTAs notified.¹⁰ Since the WTO's creation

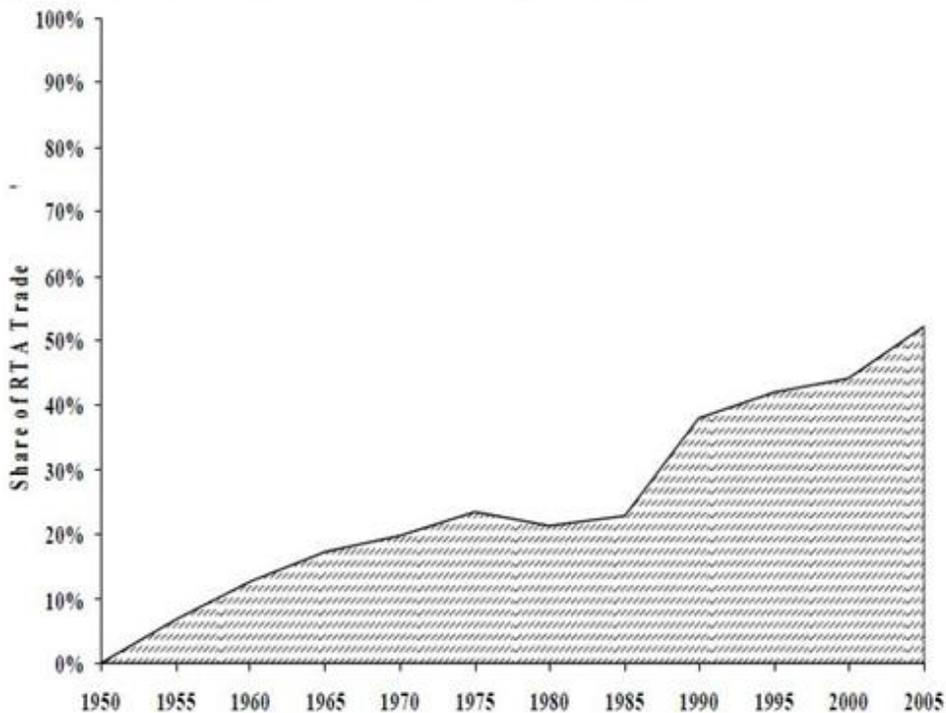
⁸ The term “WTO plus” is used especially for provisions in Free Trade Agreements (“FTAs”) and other economic cooperation agreements that go beyond the WTO framework of rules. For example, an agreement may contain provisions on competition policy. Although this expression is often used with great conviction, one may wonder whether an FTA is worth doing if it does not go beyond the WTO framework of rules. See Walter Goode, *Dictionary of Trade Policy Terms* 488 (Cambridge 5th ed 2007).

⁹ Ghosh and Yamarik have studied the impact of RTAs on the environment. They found that membership in an RTA reduces the amount of environmental damage by increasing the volume of trade and raising per capita income. They did not, however, find that RTAs directly impact the environment. These results suggest that the recent surge of regional trading arrangements will not increase the amount of pollution, but in fact may help the environment. See Sucharita Ghosh and Steven Yamarik, *Do Regional Trading Arrangements Harm the Environment? An Analysis of 162 Countries in 1990*, 6 *Applied Econometrics & Intl Development* 15 (2006).

¹⁰ See *Regional Trade Agreements* (World Trade Organization 2010), online at http://www.wto.org/english/tratop_e/region_e/region_e.htm (visited Sept 30, 2010).

in 1995, more than 300 additional RTAs have been notified to the WTO Secretariat, of which about 90 percent are FTAs and around the remaining 10 percent are CUs.¹¹ As of October 15, 2009, 457 regional trade agreements had been notified to the WTO, 266 of which are currently in force.¹²

Figure 2: Share of International Trade Occurring Under RTAs



Source: WTO Secretariat

RTAs can help countries integrate into the multilateral trading system, but at the same time they are a fundamental departure from the WTO principle of non-discrimination that obliges WTO Members to grant unconditionally to each other any benefit, favor, privilege, or immunity affecting customs duties, charges, rules, and procedures that they give to products originating in or destined for any other Member country. So RTAs are a fundamental departure from the WTO principle of non-discrimination because, by definition, they provide preferential treatment to the parties to the agreement.¹³ This means that a WTO Member would be in breach of its WTO

¹¹ Ibid.

¹² Report of the Committee on Regional Trade Agreements to the General Council, WTO Doc WT/Reg/20 at 1 4 (2009).

¹³ General Agreement on Tariffs and Trade (1947), Art I, 61 Stat A-11, TIAS 1700, 55 UN Treaty Ser 194 (hereinafter “GATT”)

obligations if it were to grant preferential treatment to products originating only from a selected group of countries. However, the WTO does allow its Members to enter into RTAs under three basic rules: (1) GATT Article XXIV:4–10, (2) the Enabling Clause, and (3) Article V of the General Agreement on Trade in Services (GATS). Therefore, the question is whether RTAs are a building block for further multilateral liberalization (one of the fundamental principles of WTO law) or a stumbling block.¹⁴

All WTO Members except for Mongolia participate in at least one RTA. The composition of RTAs can be bilateral, plurilateral, or arrangements in which one or more of the parties to the agreement is an RTA itself, such as the European Community-Mexico FTA¹⁵ or the European Community-CARIFORUM¹⁶ Economic Partnership Agreement.¹⁷ This last RTA, the EC-CARIFORUM Economic Partnership Agreement, is a pioneering agreement in the international trading system. It is the first genuinely comprehensive North-South trade agreement that promotes sustainable development, builds a regional market among developing countries, and helps eliminate poverty.¹⁸

In 1996, the WTO's General Council established the Committee on Regional Trade Agreements (CRTA).¹⁹ The CRTA's main duties are: (1) to examine RTAs, (2) to consider how the reporting on the operation of agreements should be carried out and make recommendations in this regard, (3) to develop procedures to facilitate and improve the examination process, and (4) to provide a forum for the consideration of the systemic implications of RTAs, regional initiatives for the multilateral trading system, and the relationship between them.

III. THE MANDATE OF REGIONAL INTEGRATION

Suffice it to say that RTAs are an exception to the most-favored nation (MFN) rule of non-discrimination.²⁰ Nevertheless, they are WTO-consistent as exemplified by GATT Article

¹⁴ General Agreement on Trade in Services ("GATS"), Art XVII, 1869 UNTS 183, 33 ILM 1167 (1994). See generally Richard Baldwin and Patrick Low, eds,

¹⁵ EC-Mexico Joint Council, Free Trade Agreement Between the European Communities and Mexico, WT/REG109 (Mar 23, 2000).

¹⁶ The Caribbean Forum of African, Caribbean and Pacific States ("CARIFORUM") is a regional grouping of fifteen Caribbean countries: Antigua and Barbuda, Bahamas, Barbados, Belize, Dominica, the Dominican Republic, Grenada, Guyana, Haiti, Jamaica, Saint Lucia, Saint Vincent and the Grenadines, Saint Christopher and Nevis, Surinam, and Trinidad and Tobago.

¹⁷ European Union-Caribbean Economic Partnership Agreement (European Communities 2006), online at http://www.delbrb.ec.europa.eu/en/epa/epa_docs/epa_2006_EU-ARIFORUM_EPA_Brochure.pdf (visited Sept 30, 2010).

¹⁸ For further information on Economic Partnership Agreements, see Economic partnerships (European Commission 2010), online at <http://ec.europa.eu/trade/wider-agenda/development/economic-partnerships/> (visited Sept 30, 2010).

¹⁹ For the CRTA's terms of reference, see World Trade Organization, Committee on Regional Trade Agreements Decision of 6 February 1996, WTO Doc WT/L/127 (Feb 7, 1996).

²⁰ GATT, Art I (cited in note 12).

XXIV,²¹ the Enabling Clause, and GATS Article V. Below I provide an analysis of each of the three rules in the WTO law dealing with RTAs.

A. GATT Article XXIV (Customs Unions and Free-Trade Areas)

It is largely accepted that GATT Article XXIV, which regulates regional trade agreements, lacks clarity. There have been several attempts to clarify it and, although an Understanding on the Interpretation of GATT Article XXIV (“Understanding”) has been reached,²² questions remain. Arguably, the Understanding brings significant clarification of the text of GATT Article XXIV through legislative action only to the internal trade requirement in relation to customs unions.²³

The basic principle of GATT Article XXIV is the deepening of the process of economic integration through the elimination of barriers to trade within the CU or FTA in question.²⁴ This is so, provided it does not raise barriers to trade for third countries. GATT Article XXIV requires that duties be eliminated on “substantially all the trade”²⁵ between the parties of a customs union²⁶ or

²¹ Note that when it comes to dispute settlement, the existence and nature of the dispute settlement provisions in many RTAs may raise questions about their consistency with the WTO, particularly DSU Article 23. For further detail, see generally Jennifer Hillman, *Conflicts between Dispute Settlement Mechanisms in Regional Trade Agreements and the WTO—What Should the WTO Do?*, 42 *Cornell Intl L J* 193 (2009).

²² World Trade Organization, *Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994*, (1994), online at http://www.wto.org/english/docs_e/legal_e/10-24_e.htm (visited Oct 8, 2010).

²³ Petros C. Mavroidis, *If I Don't Do It, Somebody See Else Will (Or Won't): Testing the Compliance of Preferential Trade Agreements With the Multilateral Rules*, 40 *J World Trade* 187 (2006).

²⁴ GATT, Art XXIV:4 (cited in note 12).

²⁵ GATT, Art XXIV:8 (cited in note 12). Regarding the locution, “substantially all the trade,” there is neither an agreed definition of the percentage of trade to be covered by a WTO-consistent agreement nor common criteria against which the exclusion of a particular sector from the agreement could be assessed. For more information, consider World Trade Organization, *Submission on Regional Trade Agreements by Australia*, WTO Doc TN/RL/W/173/Rev.1 (Mar 3, 2005); World Trade Organization, *Submission on Regional Trade Agreements by Australia* WTO Doc TN/RL/W/180 (May 13, 2005); World Trade Organization, *Submission on Regional Trade Agreements by the European Communities*, WTO Doc TN/RL/W/179 (May 12, 2005); World Trade Organization, *Submission on Regional Trade Agreements by China*, WTO Doc No TN/RL/W/185 (July 22, 2005); World Trade Organization, *Submission on Regional Trade Agreements by Japan*, WTO Doc No TN/RL/W/190 (Oct 28, 2005).

²⁶ “customs territory for two or more customs territories, so that duties and other restrictive regulations of commerce [...] are eliminated with respect to substantially all the trade between the constituent territories of the union or at least with respect to substantially all the trade in products originating in such territories.” GATT, Art XXIV:2 (cited in note 12) defines a customs territory as “any territory with respect to which separate tariffs or other regulations of commerce are maintained for a substantial part of the trade of such territory with other territories.”

free trade area,²⁷ or at least with respect to substantially all the trade in products originating in such territories. To qualify as a customs union, its members should apply “substantially the same duties and other regulations of commerce”²⁸ to trade with non-members of the customs union. This condition implies a common external tariff and trade policy.

An exception is made for developing countries. GATT Article XXIV applies under certain conditions, which appear in paragraph 5. GATT Article XXIV is a violation of the MFN principle, classified as a regional integration exception to WTO law, which allows WTO Members to adopt measures taken in the context of the pursuit of regional economic integration.²⁹

A number of elements of Article XXIV are unclear and therefore allow for divergent interpretations of its disciplines.³⁰ For example, there are two different views on the relationship between Article XXIV and other WTO provisions: (1) that Article XXIV should be considered as a derogation only from GATT Article I, which means that parties to RTAs must abide by all other WTO provisions; and (2) that Article XXIV should be considered as a derogation from all the provisions of the WTO and not just from the MFN principle.³¹

²⁷ GATT, Article XXIV:8(b) defines a free trade area as “a group of two or more customs territories in which the duties and other restrictive regulations of commerce [...] are eliminated on substantially all the trade between the constituent territories in products originating in such territories.” GATT, Art XXIV:8(b) (cited in note 12). So a free-trade area means a group of countries that have removed barriers to trade among them—barriers such as import tariffs and quotas. Several free trade areas have been established around the world: Mercosur in South America, NAFTA in North America, CAFTA in Central America, ASEAN in South-East Asia, and EFTA in Europe, for example. The EU is also a free trade area, but it is much more than that, because it is built on a process of economic and political integration, with joint decision-making in many policy areas. Not everyone agrees with the creation of free-trade areas. For an analysis in the global context, see Frank A. Haight, *Customs Unions and Free-Trade Areas under GATT: A Reappraisal*, 6 *J World Trade L* 391 (1972).

²⁸ GATT, Art XXIV:8(a)(ii) (cited in note 12). Regarding the locution “other regulations of commerce,” there is no commonly agreed upon definition of its scope. For example, it is not clear whether this locution includes rules of origin. Some commentators argue that the Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994 clarifies the issue of “the general incidence of duties and ORCs [other regulations of commerce].” See, for example, Jo-Ann Crawford and Sam Laird, *Regional Trade Agreements and the WTO*, 12 *N Am J of Econ & Fin* 193 (2001).

²⁹ See John McMillan, *Does Regional Integration Foster Open Trade? Economic Theory and GATT’s Article XXIV*, in Kym Anderson and Richard Blackhurst, eds, *Regional Integration and the Global Trading System* 292 (Harvester Wheatsheaf 1993).

³⁰ For an overview of systemic issues related to GATT Article XXIV, see World Trade Organization, *Synopsis of “Systemic” Issues Related to Regional Trade Agreements*, WTO Doc WT/REG/W/37 (Mar 2, 2000); World Trade Organization, *Compendium of Issues Related to Regional Trade Agreements*, WTO Doc TN/RL/W/8/Rev.1 (Aug 1, 2002).

³¹ The Appellate Body report on *Turkey-Textiles* states that “Article XXIV may justify a measure which is inconsistent with certain other GATT provisions” provided very specific conditions are fulfilled. World Trade Organization, *Report of the Appellate Body, Turkey-Restrictions on Imports of Textile and Clothing Products* 58, WTO Doc WT/DS34/AB/R (Oct 22, 1999).

As for the relationship between paragraph 4 of Article XXIV and other provisions in Article XXIV, one interpretation is that paragraph 4 is just a general principle that summarizes the criteria which must be met for a customs union or free-trade area to be WTO-consistent. This basically means that RTAs that fulfill the requirements of paragraphs five to nine of GATT Article XXIV are ipso facto WTO-consistent. The other main interpretation is that paragraph 4 is an additional requirement to those of paragraphs five to nine, and must also be satisfied.³²

Moreover, on the relationship between Article XXIV:8 and GATT Article XIX, it is pertinent to note that Article XXIV:8(a)(i) and (b) both indicate that the obligation to eliminate duties and other restrictive regulations of commerce with respect to substantially all the trade between the constituent territories of a customs union or free-trade area does not extend to trade-restrictive measures permitted under certain GATT Articles (XI, XII, XIII, XV, and XX).³³ It remains unclear whether this list is exhaustive or just illustrative.³⁴ The fact that GATT Article XIX is not mentioned as one of the exceptions in Article XXIV:8 may be interpreted to mean that, where a party to a customs union or free-trade area takes Article XIX safeguard action, it is entitled to exempt imports from partners in the customs union or free-trade area from the application of such trade-restrictive measures.³⁵

B. The Enabling Clause

One of the outcomes of the Tokyo Round, the so-called Enabling Clause—the 1979 GATT decision on differential and more favorable treatment, reciprocity, and fuller participation of developing countries—is another WTO rule that deals with regional trade agreements. In terms of applying the Enabling Clause, paragraph 2(c) states that developing countries may establish regional or global preferential arrangements for the mutual reduction or elimination of tariffs and, in accordance with criteria and conditions that may be prescribed by WTO Members, for the mutual reduction or elimination of non-tariff measures.

Before the Enabling Clause can be successfully invoked, certain conditions must be fulfilled, however. The deviation from the MFN obligation of GATT Article I:1 is allowed only when, and to the extent that, the conditions set out in paragraphs 3 and 4 of the Enabling Clause are met.

³² In *Turkey-Textiles*, the Appellate Body report states that Article XXIV:4 “does not set forth a separate obligation itself but, rather, sets forth the overriding and pervasive purpose for Article XXIV which is manifested in operative language in the specific obligations that are found elsewhere in Article XXIV.” *Id.* 57.

³³ Arguably, regulatory barriers are the main obstacles to trade. See Keith E. Maskus and John S. Wilson, eds, *Quantifying the Impact of Technical Barriers to Trade: Can it be done?* (Michigan 2001). As for what happens to restrictive or higher measures which come into practice after the formation of a given RTA, see Joost Pauwelyn, *The Puzzle of WTO Safeguards and Regional Trade Agreements*, 7 *J Intl Econ L* 109, 131–38 (2004); Raj Bhala, *The Forgotten Mercy: GATT Article XXIV:11 and Trade on the Subcontinent*, 2002 *New Zealand L Rev* 301 (2002).

³⁴ See, for example, Joel P. Trachtman, *Toward Open Recognition? Standardization and Regional Integration under Article XXIV of GATT*, 6 *J Intl Econ L* 459, 477 (2003).

³⁵ See World Trade Organization Institute for Training and Technical Cooperation, *Regionalism 7–8* (Geneva 2008).

Paragraph 3 of the Enabling Clause spells out two substantive requirements applicable to RTAs. First, RTAs “shall be designed to facilitate and promote the trade of developing countries and not to raise barriers to or create undue difficulties” for the trade of any other WTO Member. Second, RTAs “shall not constitute an impediment to the reduction or elimination of tariffs and other restrictions to trade on a most-favored-nation basis.” These two requirements are more flexible than those in Article XXIV, given that, for example, regarding trade liberalization among the parties, they permit the exchange of preferences on a subset of products as well as the partial reduction, rather than the elimination, of trade barriers.

Paragraph 4 of the Enabling Clause provides for the notification of RTAs and of any modification thereto, the submission of appropriate information, and the possibility of consultations with WTO Members.

The Enabling Clause can be divided into four categories: (1) the Generalized System of Preferences; (2) the special and differential treatment with respect to non-tariff measures, (3) regional arrangements between developing countries, and (4) special treatment for least-developed countries.

1. Generalized System of Preferences (GSP).

The Preamble to the WTO Agreement states that “there is a need for positive efforts designed to ensure that developing countries . . . secure a share in the growth in international trade commensurate with the needs of their economic development.” Almost all WTO agreements provide for special and differential treatment provisions for developing-country Members to facilitate their integration into the world trading system. An example of a special mechanism used by certain developed countries to provide preferential tariff treatment to products from developing countries. These are unilateral measures and consist of the elimination or reduction of access barriers on products from developing countries. The GSP mechanism is a violation of the MFN principle.

2. Special and differential treatment with respect to non-tariff measures.

Another category of the Enabling Clause refers to the special and differential treatment with respect to non-tariff measures for products from developing countries. Unlike the GSP, these are measures negotiated multilaterally in the WTO context. The idea is the elimination or reduction of barriers on products from developing countries. The special and differential (S&D) treatment with respect to non-tariff measures is a violation of the MFN principle.

3. Regional arrangements between developing countries.

The third category of the Enabling Clause is regional arrangements between developing countries (and not between developed and developing countries, as is the case of the first two categories of the Enabling Clause mentioned above) about tariff and/or non-tariff preferences. These arrangements may also be regional agreements outside the WTO membership, such as the

Russia-Ukraine FTA.³⁶ The aim is the elimination or reduction of access barriers on products from developing countries within the same region, and it is a violation of the MFN principle.

4. Special treatment for least-developed countries.

This category of the Enabling Clause is an additional special and differential treatment for the least-developed countries (LDCs). These are measures negotiated multilaterally, whose aim is the elimination or reduction of access barriers on products from LDCs. Such measures are also violations of the MFN principle.

C. GATS Article V (Economic Integration)

Regarding trade in services, GATS Article V:4 states the basic principle whereby any agreement liberalizing trade in services must be designated to “facilitate trade between the parties to the agreement and shall not in respect of any Member outside the agreement raise the overall level of barriers to trade in services within the respective sectors or subsectors compared to the level applicable prior to such an agreement.”

Article V:1(a) states the conditions that a regional economic integration agreement should provide for substantial sectoral coverage in terms of number of sectors, volume of trade, and modes of supply. There should be no a priori exclusion of any mode of supply. Moreover, GATS Article V:1(b) adds that regional or bilateral agreements liberalizing trade in services should provide for “the absence or elimination of substantially all discrimination” between or among the parties to the GATS through the elimination of existing discriminatory measures and/or the prohibition of new discriminatory measures. Furthermore, Article V:4 stipulates that an agreement should not lead to the erection of new barriers within the regional economic zone.

Articles V:2 and 3 provide some flexibility in evaluating whether all conditions by a given economic integration agreement are met. Paragraph 2 introduces flexibility by taking into account the “wider process of economic integration or trade liberalization among the countries concerned.” Paragraph 3 provides flexibility for economic integration agreements involving developing countries. This flexibility applies to the requirements contained in paragraph 1, in particular with respect to the absence or elimination of substantially all discrimination between the parties.

As in the case of GATT Article XXIV, GATS Article V is a violation of the MFN principle, classified as a regional integration exception to WTO law, which allows WTO Members to adopt measures taken in the context of the pursuit of regional economic integration.³⁷

³⁶ For further information on the Russia-Ukraine FTA, see World Trade Organization, Regional Trade Agreements Information System, online at <http://rtais.wto.org/UI/PublicShowMemberRTAIDCard.aspx?enc=KGX6+Y689oLHj5hwDR+2y224Vc8nZE6dvLuWA+VfURg=> (visited Oct 23, 2010).

³⁷ On China and international trade, see generally Deborah Z. Cass, Brett G. Williams, and George R. Barker, eds, *China and the World Trading System: Entering the New Millennium* (Cambridge 2003); XinGATS, Art V (cited in note 13). For further information on RTAs in the context of the GATS, see Rudolf Adong and Peter Morrison, *Less than the GATS: ‘Negative Preferences’ in Regional Services Agreements*, *J Intl Econ L* (2010), online at <http://jiel.oxfordjournals.org/content/early/2010/09/07/jiel.jgq021.full> (visited Jan 12, 2011).

IV. MAIN TRENDS IN RTAs

RTAs between countries at different stages of development have become commonplace, as have attempts to form region-wide economic areas, an objective that figures prominently in East Asian countries' trade strategies. In this sense, it has been argued that China's trade policy strategy is the creation of a powerful Asian trading bloc, given China's strong position in Asia³⁸ and how difficult it is to move forward multilaterally.³⁹

If multilateral trade continues to weaken, and given that there are already many common interests in the Asian region, there is a very high likelihood for an East Asia Free Trade Area⁴⁰ of a like-minded group of countries⁴¹ led by China acting as the *prima donna* or *prima inter pares*⁴² within the next decade as part of China's strategy of promoting regional identity.⁴³ Should this materialize, one could envisage a tripolar global trade regime with a new Asian pole to counteract the already existing power centers in the EU and the US. Moreover, it would most likely mean further deterioration of the multilateral trading system.⁴⁴ From a broader perspective, China's grand strategy is arguably about multi-polarity,⁴⁵ the acquisition of more power on the world stage, the protection of the Chinese national interest, and independence within interdependence.⁴⁶

There are four main trends identified in RTAs: (1) from MFN liberalization to RTAs, (2) a geographical shift to the Asia-Pacific region, (3) cross-regional RTAs, and (4) mega-bloc RTAs.

³⁸ See C. Fred Bergsten, et al, *China's Rise: Challenges and Opportunities* 16 (Peterson Institute for International Economics & Center for Strategic and International Studies 2008).

³⁹ Zhang, *International Trade Regulation in China: Law and Policy* (Hart 2006); Rafael Leal-Arcas, *China's Attitude to Multilateralism in International Economic Law and Governance: Challenges for the World Trading System*, 11 *J World Inv & Trade* 259 (2010).

⁴⁰ See Shujiro Urata, *Towards an East Asia Free Trade Area* (Organisation for Economic Co-operation and Development Centre 2004), online at <http://www.oecd.org/dataoecd/36/55/31098183.pdf> (visited Oct 8, 2010).

⁴¹ Here, I am referring to China, Japan, South Korea, and Vietnam.

⁴² On East and South Asian regionalism, see JiangYu Wang, *China, India, and Regional Economic Integration in Asia*, 10 *Singapore YB Intl L* 269 (2006); Masahiro Kawai and Ganesha Wignaraja, *Asian FTAs: Trends and Challenges* (Asian Development Bank Institute Working Paper Series 2009).

⁴³ C. Fred Bergsten, *China's Challenge to the Global Economic Order*, in Bergsten, et al, *China's Rise* at 16 (cited in note 37).

⁴⁴ According to Francis Snyder, China's policy towards regional trade agreements will have a major impact on the international trading system, the debate about regionalism and multilateralism, and the policy of the WTO concerning RTAs. See Francis Snyder, *China, Regional Trade Agreements and WTO Law*, 43 *J World Trade* 1 (2009); Francis Snyder, *The EU, the WTO and China: Legal Pluralism and International Trade Regulation* (Hart 2010).

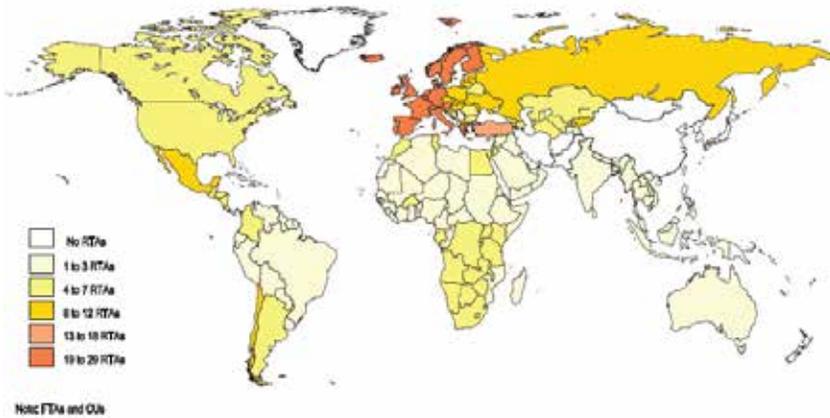
⁴⁵ On multi-polarity in the world trading system, see Amrita Narlikar and Brendan Wickers, eds, *Leadership and Change in the Multilateral Trading System* (Martinus Nijhoff 2009).

⁴⁶ On China's position in the multilateral trading system, see Leal-Arcas, 11 *J World Inv & Trade* at 259–73 (2010) (cited in note 38).

A. From MFN Liberalization to RTA

WTO Members that traditionally favored MFN liberalization are increasingly being drawn into RTAs. An example is Europe where, as of March 2010, almost one hundred RTAs were in force (see Map 1.)

Map 1: Participation in RTAs in Force (as of March 2002)



Source: WTO Secretariat

Regarding the EU's RTAs, Map 2 illustrates: (1) countries with which the EU has concluded preferential trade agreements, (2) countries with which the EU is currently negotiating preferential trade agreements, and (3) countries with which the EU is considering opening preferential negotiations.

Map 2: The EU's RTAs



Source: Directorate General for Trade, European Commission

B. Geographical Shift

1995 marked the year of entry into force of the Marrakesh Agreement Establishing the WTO (WTO Agreement).⁴⁷ Since then, the traditional trade actors—namely, the US, Japan, the EU, and Canada, commonly known as the original Quad⁴⁸—have retained much of their leading roles in the economic and political scene. While their influence on world affairs is irrefutable, over the years their dominance has waned. Since 1995, the world has undergone major geopolitical changes and has witnessed the rise of new state actors who have asserted their own role in shaping the world's economic and political environment. Today, developing countries constitute two thirds of the WTO's membership. The introduction of the “development” dimension of the Doha Round clearly attests to a growing awareness of the ascendancy of developing and least-developed countries in recent years. Alongside developed countries, a number of fast-growing developing economies have acquired significant influence in international trade relations—namely, Brazil, Russia, India, and China, commonly known as the BRIC countries.⁴⁹

Although most RTAs were traditionally in Europe, the largest concentration of RTAs has shifted away from Europe toward the Asia-Pacific region in the last few years,⁵⁰ where Asia-Pacific Economic Cooperation (APEC) Members, in particular, have been among the most active participants in RTAs (see map 3). One wonders whether the geopolitical shift of power in international politics has influenced the decision-making process at the WTO

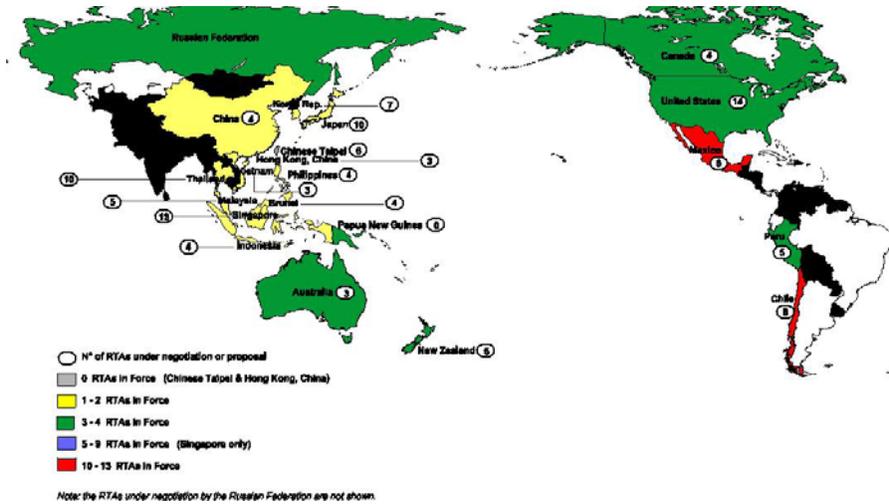
⁴⁷ The official version of the WTO Agreement and its Annexes is published by the WTO and Cambridge University Press as *World Trade Organization, The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts* (Cambridge 1999).

⁴⁸ The Quadrilateral Trade Ministers' Meeting (“Quad”), an informal forum created in 1982 to explore major trade and investment issues, has been an important consultative mechanism. The Quad trade ministers from Canada, Japan, the EU, and the US would meet twice a year. One purpose of the original Quad was to see how key trade and investment matters could be moved forward. It was instrumental in achieving significant progress leading to the successful conclusion of the Uruguay Round of multilateral trade negotiations. Today, though, the new Quad is composed of the EU, the US, the agriculture G-20 (a group of developing countries led by Brazil), and the G-90 (representing mostly very poor countries in Africa, Asia, and the Caribbean). See Leal-Arcas, *Theory and Practice* at 442–43 (Cameron 2008).

⁴⁹ For a very detailed analysis of the BRIC countries in the world trading system, see Rafael Leal-Arcas, *International Trade and Investment Law: Multilateral, Regional and Bilateral Governance* (Edward Elgar 2010).

⁵⁰ See, for example, Christopher Findlay and Shujiro Urata, eds, *Free Trade Agreements in the Asia Pacific* (World Scientific 2009), who argue that FTAs have proliferated in East Asia as regional economies rush to catch up with the rest of the world—but what difference do FTAs make? The book answers that question by providing an up-to-date assessment of the quality and impact of FTAs in the region and presents a contemporary analysis and insights into the evolution of recent FTAs.

Map 3: APEC Members' RTAs In Force, Under Negotiation or Proposal (as of October 2003)



Source: WTO Secretariat

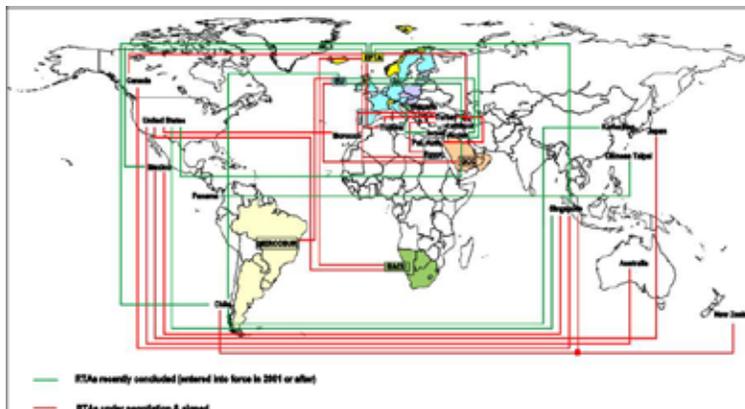
The following chart demonstrates that most RTAs are now concluded between developing countries:

Chart: RTAs notified to the WTO by type as of March 2007

C. Cross-regional RTAs

WTO Members that have been engaged in intra-regional RTAs for some time are now looking further afield for cross-regional partners (see map 4). This is a growing phenomenon in international trade law. By way of illustration, of the proposed RTAs as of 2005, 60 percent were cross-regional RTAs.

Map 4: Cross Regional RTAs Recently Concluded or Under Negotiation (2003)



Source: WTO Secretariat

Another recent trend in RTAs is the conclusion, or negotiation toward the conclusion, of mega-bloc RTAs. An illustration of this trend is the FTA between China and the Association of South East Asian Nations (ASEAN), the largest FTA in the world by population coverage, with nearly two billion people. This FTA is an example of China's strategy to shape a new regional structure of economic and political cooperation.⁵¹ This has partly been triggered by the fact that Americans have left the region and China sees an opportunity for market access. China-ASEAN cooperation has brought a new type of intra-Asian regional cooperation, which reflects China's commitment to good-neighbor diplomacy. In November 2001, China and ASEAN began negotiations to set up a free-trade area. In 2002, a framework agreement for the planned free-trade area was signed. The new Asian regionalism stimulated by the China-ASEAN free-trade agreement would dominate the future economic landscape of Asia, although doubts remain as to whether the deal will have real teeth, given that there is no rigorous mechanism for settling disputes.⁵² This China-ASEAN FTA took effect for China and six ASEAN countries (Brunei, Indonesia, Malaysia, the Philippines, Singapore, and Thailand) in January 2010, thereby eliminating barriers to investment and tariffs to trade on 90 percent of products, and will expand to the remaining four ASEAN countries (Myanmar, Cambodia, Laos, and Vietnam) by 2015.⁵³ The goal behind all these efforts is, *inter alia*, to facilitate water transport along the Upper Lancang/Mekong River covering China, Myanmar, Laos, Thailand, and Vietnam, as well as rail and road links between Yunnan Province of China and Chiang Rai in Thailand.⁵⁴

Other examples of China's interest in Asian regionalism include China signing a bilateral FTA with Singapore⁵⁵ in October 2008, investment agreements with the Philippines, harmonizing food safety standards with Thailand (to facilitate agricultural trade), and concluding many agreements with the Mekong Delta countries (China, Cambodia, Laos, Myanmar, Thailand, and Vietnam). Politics around the various agreements between China and ASEAN (whether as a bloc or its Member States individually) are delicate, as ASEAN Member States want to avoid China's domination, but at the same time build their economies by interacting with China.⁵⁶

Another example of a mega-bloc RTA is the Mercosur-India RTA. Moreover, the EU-ASEAN RTA was initially meant to be an inter-regional RTA. However, Myanmar (one of the ten ASEAN

⁵¹ See Rahul Sen, *New Regionalism in Asia: A Comparative Analysis of Emerging Regional and Bilateral Trading Agreements involving ASEAN, China and India*, 40 *J of World Trade* 553 (2006).

⁵² The development of infrastructure within China also has been a key focus for the Chinese government in its economic development initiatives. See *Infrastructure in China: Foundation for Growth* (KPMG 2009), online at http://www.kpmg.com.hk/en/virtual_library/Property_Infrastructure/Infrastructure_in_China.pdf (visited Oct 8, 2010).

⁵³ China-ASEAN (2009), online at <http://www.bilaterals.org/spip.php?rubrique95> (visited Sept 30, 2010).

⁵⁴ Greater Mekong Sub region Flagship Initiative: North-South Economic Corridor (Asian Development Bank 2005), online at <http://www.adb.org/GMS/Projects/1-flagship-summary-north-south.pdf> (visited Oct 8, 2010).

⁵⁵ Sino-Singaporean Free Trade Agreement, WTO Doc WT/REG262/N/1 (Mar 4, 2009).

⁵⁶ See China-ASEAN (cited in note 52).

Member States) was and continues to be in violation of human rights, which made the Europeans stop the inter-regional negotiations. Instead, the European Commission is conducting bilateral negotiations with individual Member States of ASEAN. EU-Singapore FTA negotiations are currently underway, and Vietnam has shown an interest in starting technical negotiations with the European Commission for the conclusion of an RTA.⁵⁷ A further example of a mega-bloc RTA under negotiation is the EU-India FTA. According to a communication of the European Commission, “the focus of [EU-India] relations has shifted from trade to wider political issues.”⁵⁸ However, trade continues to play a major role between the two parties. EU trade with India has more than doubled since 2000. India has significantly increased its number of trade diplomats in recent years, which shows its commitment to the world trading system.⁵⁹ The EU and India hope to increase their trade in both goods and services through negotiations for a free-trade agreement. The negotiations over an EU-India FTA, whose parameters were set out in the report of the EU-India High Level Trade Group,⁶⁰ commenced in June 2007.⁶¹ Parallel negotiations between the EU and India also include a maritime agreement, since maritime transport accounts for 53 percent of the total transportation transactions and is unequivocally the major mode of transportation.⁶² The main framework for trade dialogue between the EU and India is, nevertheless, the WTO. At the bilateral level, there is an India-EU Strategic Partnership⁶³ as well as its Joint Action Plan,⁶⁴ which outlines commitments to reciprocally tackle existing barriers to trade and increase bilateral trade flows.⁶⁵

⁵⁷ EU and Vietnam to Launch Free Trade Negotiations (Europa 2010), online at [http://europa.eu/rapid/press Releases Action.do?reference=IP/10/219](http://europa.eu/rapid/press_Releases_Action.do?reference=IP/10/219) (visited Sept 30, 2010).

⁵⁸ An EU-India Strategic Partnership (Commission of the European Communities 2004), online at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2004:0430:FIN:EN:PDF> (visited Oct 8, 2010).

⁵⁹ For an overview of India's recent impressive performance in world affairs, see generally Gucharan Das, *The Rise of India*, 85 *Foreign Aff* 2 (2006).

⁶⁰ Report of the EU-India High Level Trade Group to the EU-India Summit (European Commission 2006), online at http://trade.ec.europa.eu/doclib/docs/2006/september/tradoc_130306.pdf (visited Oct 8, 2010).

⁶¹ For further information on this, see Jim Rollo, *Spice Route to Europe? Prospects for an India-EU Free Trade Area* (Chatham House 2007), online at http://www.chathamhouse.org.uk/files/10167_bp1007euindia.pdf (visited Oct 8, 2010). See also Michael Gasiorek et al, *Qualitative Analysis of a Potential Free Trade Agreement between the European Union and India* (Centre for the Analysis of Regional Integration at Sussex and CUTS International, 2007) online at <http://www.cuts-citee.org/pdf/EU-IndiaStudyAnnex3May01.pdf> (visited Oct 8, 2010).

⁶² See Eurostat (European Commission 2010), online at <http://epp.eurostat.ec.europa.eu/portal/page/portal/eurostat/home/> (visited Sept 30, 2010).

⁶³ An EU-India Strategic Partnership (cited in note 57).

⁶⁴ The India-EU Strategic Partnership: Joint Action Plan (European Commission 2005), online at http://www.eeas.europa.eu/india/docs/joint_action_plan_060905_en.pdf (visited Oct 8, 2010).

⁶⁵ For an analysis of technical barriers to trade in the WTO context, see Rudiger Wolfrum, Peter-Tobias Stoll, and Anja Seibert-Fohr, eds, *WTO-Technical Barriers and SPS Measures* (Martinus Nijhoff 2007).

The potential EU-India FTA has been progressing increasingly slowly for some months, but continues to represent a major opportunity for European firms.⁶⁶ There are still some key barriers to doing business in concerns, which European companies wish to overcome.⁶⁷ In fact, in 2008 the World Bank ranked India 120 (out of 181 economies) in terms of “ease of doing business.”⁶⁸ This difficulty of doing India and national treatment⁶⁹ business with India is the case with telecoms and courier services, the latter being a service where India has not yet made any offers or commitments within the GATS. Several sectors, including maritime transportation, construction, and telecommunications, require the approval of the Foreign Investment Promotion Board⁷⁰ prior to establishment in India. In distribution services, where the EU has taken a leading role in advocating the liberalization of market access, there are currently no retail commitments, and in some sectors, including express delivery, draft legislation currently threatens existing market access.

⁶⁶ See Global Analysis Report for the EU-India TSIA (Ecorys 2008), online at http://trade.ec.europa.eu/doclib/docs/2008/may/tradoc_138968.pdf (visited Oct 8, 2010).

⁶⁷ See International Financial Services London, EU-India talks, IFSL to Consult on City Views, online at <http://bit.ly/aqMqW5> (visited Nov 8, 2010).

⁶⁸ See Doing Business (World Bank 2010), online at <http://www.doingbusiness.org/ExploreEconomies/?economyid=89> (visited Sept 30, 2010).

⁶⁹ In GATT/WTO law, national treatment is the principle of giving others the same treatment as one's own nationals. In other words, WTO Members must treat domestic and foreign goods, services and/or investors in the same manner for regulatory, tax, and other purposes. The treatment must be either formally identical or formally different, so long as it is no less favorable. The treatment is considered less favorable if it modifies the conditions of competition in favor of the services or services suppliers of the WTO Member. It is also referred to as “non-discriminatory” treatment. GATT Article III requires that imports be treated no less favorably than the same or similar domestically produced goods once they have passed customs. GATS Article XVII and Article 3 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPs”) also deal with national treatment for services and intellectual property protection. GATS, Art XVII (cited in note 13); Agreement on Trade-Related Aspects of Intellectual Property Rights, Art 3, 1869 UNTS 299, 33 ILM 1197 (1994). The GATS “national treatment” rule (Article XVII) not only prohibits treating foreign firms differently than domestic firms (non-discrimination), but it goes further to prohibit anything a government does that modifies the “conditions of competition” in favor of local service suppliers. While GATS proponents say the treaty is geared toward simply ensuring non-discriminatory treatment of domestic service providers and foreign providers, the problem is that the same non-discriminatory regulations—those that apply even-handedly to both foreign and local companies—could still be considered a violation of the national treatment rule. For instance, in the construction sector, the WTO Secretariat has said that even if the same controls on land use, building regulations, and building permits are applied to domestic and foreign service suppliers, “they may be found to be more onerous to foreign suppliers.” See World Trade Organization, Construction and Related Engineering Services 5, WTO Doc S/C/W/38 (June 8, 1998). Thus, permits, subsidies, and specific perks, such as road access, that are granted to one service provider, but not another, could be considered a trade barrier for altering the conditions of competition between foreign and domestic service suppliers.

⁷⁰ The Foreign Investment Promotion Board is the only governmental Indian agency dealing with matters relating to foreign direct investment (“FDI”) as well as promoting investment into the country. Its objective is to promote FDI into India undertaking investment promotion activities in India and abroad by facilitating investment in the country through international companies, non-resident Indians, and other foreign investors. See Rafael Leal-Arcas, *International Trade and Investment Law: Multilateral, Regional and Bilateral Governance* 93 (Edward Elgar 2010).

Another example of a potential mega-bloc RTA is the EU-Mercosur FTA. Since 2000, the EU and Mercosur have been in the process of negotiating a bi-regional Association Agreement,⁷¹ including a free-trade area. This will be the backbone of future bilateral trade relations.⁷² Substantial progress in the trade chapter of the agreement allowed both parties to realistically envisage a conclusion of negotiations by the end of October 2004. However, on October 20, 2004, at an EU-Mercosur trade negotiators meeting at the ministerial level in Lisbon, trade ministers concurred that the offers on the table did not reach the degree of ambition that both parties expected from this agreement and decided to give negotiations more time. Following a number of technical contacts in 2005 to discuss ways to re-engage the process, trade ministers met again on September 2, 2005 to discuss a way forward.⁷³

In 2005, Brazil represented 80 percent of Mercosur's GDP and is critical to Mercosur's further integration.⁷⁴ In my opinion, in addition to Brazil's interest in the EU's agricultural liberalization, this intra-Mercosur disparity is one of the reasons why the EU-Mercosur negotiations for the conclusion of a bi-regional Association Agreement, including a free-trade area, which began in April 2000, have not been successful. At the South American end, there is a tremendous imbalance of power within Mercosur; Brazil is an enormous market of 190 million people, whereas the Uruguayan market—the smallest in Mercosur—is of insignificant interest to Brazil, with a total population of 3.5 million people. This market asymmetry makes Mercosur's search for a common position vis-à-vis the EU very difficult. Another factor that has complicated Brazil's efforts to negotiate trade agreements with third parties is Mercosur's multiple tariffs policy on imports, which impedes the free flow of goods within the Mercosur's Members States. Imports into Mercosur are subject to the Mercosur common external tariff when they enter any Mercosur Member State and again if they are re-exported to another Mercosur Member State. The EU has explicitly stated that if Mercosur wishes to negotiate an FTA with the EU, the multiple tariffs policy on imports must be eliminated.⁷⁵ In 2010, the bilateral inter-regional negotiations were resumed.

⁷¹ For an overview of association agreements concluded by the European Communities with third parties, see Leal-Arcas, *Theory and Practice* at 282–88 (cited in note 3).

⁷² On the bilateral relations between the EU and Mercosur, see generally Mahrukh Doctor, *Why Bother With Inter-Regionalism? Negotiations for a European Union-Mercosur Agreement*, 45 *J Common Mkt Stud* 281 (2007).

⁷³ Mercosur (European Commission 2010), online at http://ec.europa.eu/trade/issues/bilateral/regions/mercosur/index_en.htm#top (visited Sept 30, 2010).

⁷⁴ World Development Indicators (World Bank 2010), online at <http://data.worldbank.org/data-catalog/world-development-indicators> (visited Sept 30, 2010).

⁷⁵ Paraguay Blocks Brazilian Proposal to End Mercosur's Multiple Import Tariffs, 242 *Daily Rep Exec A3* (BNA, Dec 17, 2008).

There are also mega-bloc RTAs under consideration, such as ASEAN + 3⁷⁶ and ASEAN + 6.⁷⁷

V. Motivations For RTA Conclusion

The world economy is currently striving to recover from its deepest economic crisis since the 1930s. The 2008 economic crisis led to an unprecedented contraction in trade flows that stands in contrast to the process of economic integration and the significant expansion of trade experienced since World War II. This expansion was partly driven by the process of globalization that relied on increased economic interdependence among nations, which was stimulated by a combination of technological advances, economic policy reforms, and geopolitical changes. The new geopolitical environment and the 2008 financial crisis are factors that have affected international trade in different ways.

The development of new technologies has also contributed toward shaping international trade by changing the way business is conducted and the way people interact. The rapid development of technology has generated both new challenges and new opportunities for economic agents worldwide. WTO Director-General Pascal Lamy recently said that “it now costs less to ship a container from Marseille to Shanghai—half way around the world—than to move it from Marseille to Avignon—100 kilometers away. A phone call to Los Angeles [from Europe] is as inexpensive as a phone call next door.”⁷⁸ What are then the main economic, political, and technological factors shaping world trade? What is the potential of technological progress and innovation for improving the trading position of the poorest countries? What is the role of the WTO rules-based multilateral system in contributing to the global economic recovery? Might these be reasons why countries engage in RTAs so frequently?⁷⁹

⁷⁶ ASEAN + 3 is comprised of ASEAN plus China, Japan, and South Korea.

⁷⁷ ASEAN + 6 is comprised of ASEAN plus China, Japan, South Korea, India, New Zealand, and Australia.

⁷⁸ Director-General Pascal Lamy, *The Doha Round Marks a Transition from the Old Governance of the Old Trade Order to the New Governance of a New Trade Order*, Speech at World Trade Institute in Bern (Oct 1, 2010), online at http://www.wto.org/english/news_e/sppl_e/sppl173_e.htm (visited Oct 23, 2010).

⁷⁹ For an analysis of why countries engage so frequently in RTAs and the relation of RTAs to multilateral negotiations at the WTO, see Ross P. Buckley, Vai Io Lo, and Laurence Boulle, eds, *Challenges to Multilateral Trade: The Impact of Bilateral, Preferential and Regional Agreements* (Kluwer Law International 2008).

There are both economic and political reasons why countries engage in RTAs so frequently. One of the economic reasons for the conclusion of RTAs is that countries are in constant search for larger markets since they feel the pressure of competitive regional liberalization. The negotiations of EPAs⁸⁰ between the African, Caribbean and Pacific (ACP)⁸¹ countries and the EU are of particular relevance in this process, not least because of their importance for LDCs. EPAs have been negotiated with ACP regions engaged in a regional economic integration process. EPAs are thus intended to consolidate regional integration initiatives within the ACP. They are also aimed at providing an open, transparent, and predictable framework for goods and services to circulate freely, thus increasing the competitiveness of the ACP and ultimately facilitating the transition toward their full participation in a liberalizing world economy— thereby complementing any initiative taken in the multilateral context.⁸² Formal negotiations started in September 2002 and EPAs entered into force on January 1, 2008.

Moreover, deeper integration is always much easier at the regional level than it is at the multilateral level. Furthermore, as we know from previous experience, multilateral negotiations can take a very long time and are very complex, whereas RTAs move much faster.⁸³ Despite repeated statements of support and of engagement, WTO Members seem incapable of marshalling the policies and political will needed to move the multilateral trade agenda forward. A worrying leadership vacuum has opened that has so far proven difficult to fill. A very good example is the Doha Round of multilateral trade negotiations, which started in November 2001 in the Qatari capital. A WTO mini-ministerial conference took place in July 2008 composed of a trade G-7.⁸⁴

⁸⁰ Economic partnership agreements are bilateral or plurilateral agreements. The content of such agreements varies greatly. Some merely promote voluntary economic cooperation between the partners. Others are proper free-trade agreements. See Goode, *Dictionary of Trade Policy Terms* at 145 (cited in note 7).

⁸¹ The African, Caribbean and Pacific countries (“ACP”) Group was formed when the first Lomé Convention was signed with the European Economic Community in 1975. In 2002, it encompassed seventy-eight states (forty-eight African states, sixteen Caribbean states, and fourteen Pacific states), which all had preferential trading relations with the European Community. See Leal-Arcas, *Theory and Practice* at 283 (cited in note 3).

⁸² Not everyone is of the view that EPAs are fair or beneficial for ACP countries. See Ronald Sanders, *A New Colonialism? EU Trade Demands and ACP Countries* (Huntington News 2007), online at <http://www.huntington-news.net/columns/070616-sanders-columnseutrade.html> (visited Sept 30, 2010); Paul Orengho, *East Africa: EPA Controversy Continues* (Trade Law Centre for Southern Africa 2007), online at http://www.tralac.org/cgi-bin/giga.cgi?cmd=cause_dir_news_item&news_id=42646&cause_id=1694 (visited Sept 30, 2010).

⁸³ On the issue that decision-making in the WTO has become ever more difficult as the number of WTO Members rises and the range of issues tackled broadens, see Patrick Low, *WTO Decision-making for the Future* (World Trade Organization 2009), online at http://www.wto.org/english/res_e/statis_e/tait_sept09_e/tait_sept09_e.htm (visited Oct 8, 2010).

⁸⁴ This trade G-7 should not be confused with the finance G-7 representing the most industrialized nations in the world. The trade G-7 has replaced the so-called “Quadrilateral Trade Ministers’ Meeting” or Quad and is composed of the US, the EU, Canada, Japan, China, India, and Brazil. Its purpose is to see how key trade and investment matters can be moved forward.

Governments' attempts to salvage a deal in the Doha Round of multilateral trade negotiations broke down on 29 July 2008, as trade ministers acknowledged that they were unable to reach a compromise after nine days of a WTO mini-ministerial summit. This raises the question of how to move forward in this complex international trade negotiations scenario.⁸⁵ Given how difficult it is to move forward multilaterally, there has been in recent years a proliferation of RTAs. Trade powers want to gain greater access to one another's markets but, at the same time, have struggled to lower their own trade barriers.⁸⁶

At the G8 Summit in Muskoka in June 2010, world leaders dropped a commitment to complete the troubled Doha Round in 2010 and vowed to push forward on bilateral and regional trade talks until a multilateral deal could be finalized.⁸⁷

This decision demonstrates that bilateralism/regionalism is the natural consequence of failed or troubled multilateralism.⁸⁸ This decision to move forward bilaterally regionally certainly has dangerous repercussions for weak economies.⁸⁹ Assuming that the Doha Round will be concluded in 2011, it will then take another four years to ratify the multilateral agreements that will come out of the Round, which means that it will have taken at least fourteen years for these new multilateral agreements to see the light of day.

⁸⁵ Brian Mercurio, *The WTO and its Institutional Impediments*, 8 *Melb J Intl L* 198, 200 (2007) (arguing that "institutional impediments still exist, which not only hinder the successful conclusion of the Doha Round, but also prevent effective long-term institutional governance and vision.").

⁸⁶ David Ljunggren, *G20 Leaders Drop Doha Target*, See *Smaller Deals* (Reuters 2010), online at <http://www.reuters.com/article/idUSTRE65P27P20100627> (visited Sept 30, 2010).

⁸⁷ See 2010 G8 Summit Muskoka Declaration: Recovery and New Beginnings (G8 Information Centre 2010), online at <http://www.g8.utoronto.ca/summit/2010muskoka/communique.html> (visited Sept 30, 2010).

⁸⁸ On the dilemma of bilateralism versus multilateralism, see Guido Glania and Jurgen Matthes, *Multilateralism or Regionalism? Trade Policy Options for the European Union* (Centre for European Policy Studies 2005). However, see views by Dahrendorf in the context of intellectual property protection, arguing that the strategy of forum-shifting suggests that bilateralism/regionalism and multilateralism alternate and will continue to do so. Despite alternation of fora, it is acknowledged that WTO law efficiency will suffer from the proliferation of preferential trade agreements ("PTAs"). Anke Dahrendorf, *Global Proliferation of Bilateral and Regional Trade Agreements: A Threat for the World Trade Organization and/or for Developing Countries?* (Maastricht Working Papers: Faculty of Law 2009), online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1382820 (visited Oct 8, 2010). See also Rafael Leal-Arcas, *The Resumption of the Doha Round and the Future of Services Trade*, 29 *Loyola LA Intl & Comp L J* 339, 409–15 (2007). It is therefore necessary to investigate further what the possibilities are to mitigate the negative effects of PTAs for the multilateral system. Some examples include the use of the WTO dispute settlement mechanism as a venue for resolving RTAs disputes and the development of a body of common law on RTAs. See generally Henry Gao and C.L. Lim, *Saving the WTO From the Risk of Irrelevance: The WTO Dispute Settlement Mechanism as a 'Common Good' for RTA Disputes*, 11 *J Intl Econ L* 899 (2008).

⁸⁹ Trakman, however, claims that bilateralism can actually help developing countries in the world trading system. See Leon Trakman, *The Proliferation of Free Trade Agreements: Bane or Beauty?*, 42(2) *J World Trade* 367, 383 (2008).

There are several political reasons for countries to engage in RTAs: they ensure or reward political support; regulatory cooperation is easier regionally than it is multilaterally; there is less scope for free riding on the MFN principle; and there are always geopolitical as well as security interests for the conclusion of RTAs. Thus, while most countries continue to formally declare their commitment to the successful conclusion of the Doha Round—which would contribute toward enhancing market access and strengthening the rules-based multilateral trading system—for many countries, bilateral deals have taken precedence and their engagement at the multilateral level is becoming little more than just a theoretical proposition. The emergence of rapidly growing economies and new forms of South-South relations, as illustrated by the case of China in Africa, further complicates the equation and renders the need for empirical research, information, and dialogues in this area even more acute.

VI. EFFECTS OF REGIONALISM ON MULTILATERALISM

The effects of RTAs on the multilateral trading system remain unclear, as is their impact on trade and sustainable development. While preferential deals can contribute to strengthening regional integration,⁹⁰ some RTAs have generated negative effects on regional integration schemes, as was the case of the Andean Community-US RTA⁹¹ and certain EPAs signed with individual countries and not with the region as a whole.

The effects of RTAs on the multilateral trading system are manifold. One of the positive effects is that RTAs allow for greater efficiency gains thanks to the elimination of barriers to trade, which is key to achieving economies of scale.⁹² RTAs are also laboratories for change (a very good example being that of the EU, whose transformation since its inception in the 1950s has been absolutely remarkable⁹³). In addition, RTAs provide competition and attract foreign direct

⁹⁰ For an analysis of RTA proliferation from the perspective of non-state actors, see Ann Capling and Patrick Low, eds, *Governments, Non-State Actors and Trade Policy-Making: Negotiating Preferentially or Multilaterally?* (Cambridge 2010).

⁹¹ For an analysis of RTA proliferation from the perspective of non-state actors, see Ann Capling and Patrick Low, eds, *Governments, Non-State Actors and Trade Policy-Making: Negotiating Preferentially or Multilaterally?* (Cambridge 2010).

⁹² CAN Acts, Declarations and Agreements (Comunidad Andina 2010), online at <http://www.comunidadandina.org/ingles/documentos/documents/ActEEUU.htm> (visited Sept 30, 2010).

⁹³ Jo-Ann Crawford and Sam Laird, *Regional Trade Agreements and the WTO*, CREDIT Research Paper, No 00/3 at 4 (2000) online at <http://www.tradeobservatory.org/library.cfm?refID=25329> (visited Nov 8, 2010).

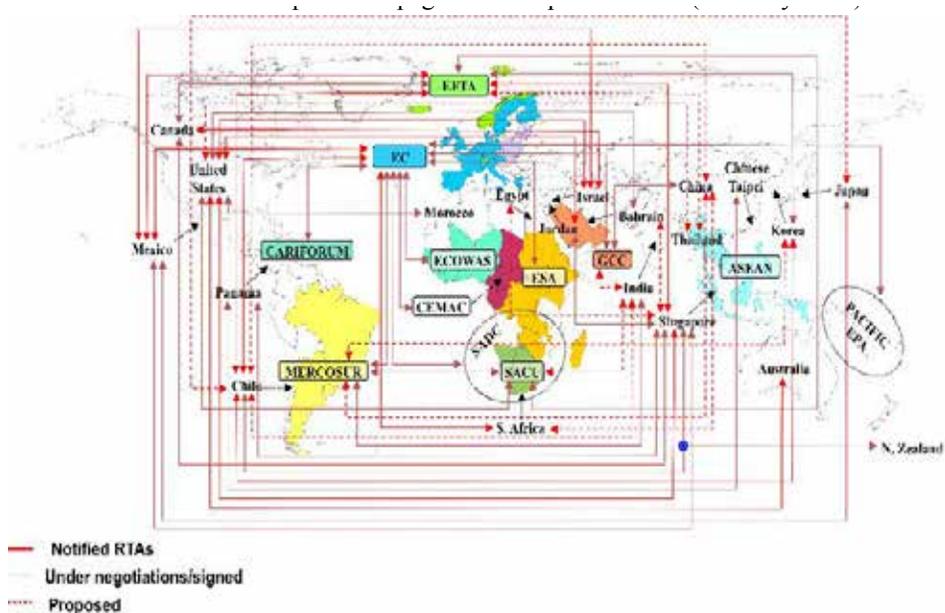
⁹⁴ For a historical account of the impact of the European integration project on the drafting of GATT Article XXIV, particularly the views expressed by the US, see Kerry Chase, *Multilateralism Compromised: The Mysterious Origins of GATT Article XXIV*, 5 *World Trade Rev* 1 (2006).

investment (FDI). An example of this last point is Spain in the case of the EU, or Mexico in the case of the North American Free Trade Agreement (NAFTA).⁹⁴ In both cases, Spain and Mexico benefited very much from FDI thanks to the EU and NAFTA, respectively.

⁹⁴ The North American Free Trade Agreement (“NAFTA”) was a radical experiment in rapid deregulation of trade and investment among the US, Mexico, and Canada. Since 1995, NAFTA has been considered the symbol of the failed corporate globalization model, because its results for most people in all three countries have been negative: real wages are lower and millions of jobs have been lost; farm income is down and farm bankruptcies are up; environmental and health conditions along the US-Mexico border have declined; and a series of environmental and other public interest standards have been attacked under NAFTA. NAFTA’s agricultural provisions have been so extreme that Mexican family farmers are demanding a re-negotiation or nullification of the treaty, after its first phase of initial implementation led to the displacement of millions of Mexican farmers. See Lori Wallach, Public Citizen Pocket Trade Lawyer: The Alphabet Soup of Globalization (Public Citizen’s 2005), online at <http://www.citizen.org/publications/publicationredirect.cfm?ID=7408> (visited Oct 8, 2010).

However, there are also negative effects of RTAs on the multilateral trading system. There is less enthusiasm for multilateral trade negotiations (like that of the Doha Round) when regionalism is doing well, which is currently the case. The current proliferation of RTAs also creates less transparency in the multilateral trading system and rules (that is, the so-called spaghetti bowl, as can be seen in map 5 below), because it is not clear who is doing what with whom, given that everyone is concluding RTAs with everyone.⁹⁵ This lower level of transparency in the multilateral trading rules results in traders being subject to multiple, sometimes conflicting, requirements.

Map 5: The spaghetti bowl phenomenon (February 2005)



Source: WTO Secretariat

Trade and investment diversion could be another negative effect of RTAs on the multilateral trading system. However, some scholars argue that regional trade liberalization may create (rather than divert) significant economic growth within a region, which can, in turn, generate

⁹⁵ Much literature has argued that RTA proliferation may undermine the multilateral trading system. See, for example, Jagdish Bhagwati, *Termites in the Trading System: How Preferential Agreements Undermine Free Trade* (Oxford 2008); Baldwin and Low, *Multilateralizing Regionalism* (cited in note 13); Richard Baldwin, *Multilateralizing Regionalism: Spaghetti Bowls as Building Blocks on the Path to Global Free Trade*, 29 *The World Economy* 1451 (2006); Henrik Horn, Petros C. Mavroidis, and Andre Sapir, *Beyond the WTO? An Anatomy of EU and US Preferential Trade Agreements* (Bruegel Blueprint Series 2009), online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1411066 (visited Oct 8, 2010); Jennifer Hillman, *Saving Multilateralism: Renovating the House of Global Economic Governance for the 21st Century* (The German Marshall Fund of the United States 2010), online at <http://www.gmfus.org/brusselsforum/2010/docs/BF2010-Paper-Hillman.pdf> (visited Oct 8, 2010).

more trade with the rest of the world.⁹⁶ In this respect, after analyzing a report by the Asian Development Bank published in 2008,⁹⁷ Masahiro Kawai and Ganeshan Wignaraja found “that business in the [Asian] region tend to view FTAs as a benefit rather than a burden, and that they use them to expand trade to a far greater degree than had been previously thought.”⁹⁸ That said, economic studies of FTAs have shown that the trade-creation effects may often be smaller than the trade-diversion effects, given that trade between the participants replaces trade between the participants and non-participants. It seems, therefore, that it is not clear whether RTAs create or divert trade.⁹⁹

Another effect of RTAs is arguably that the weakest countries tend to be left out. Furthermore, there is a risk of polarization in the international trading system with the tremendous proliferation of RTAs currently taking place. As such, four large regions appear to emerge as a result of RTA proliferation: (1) the European RTA network,¹⁰⁰ (2) the Western hemisphere RTA network (NAFTA, Mercosur,¹⁰¹ the Andean Community,¹⁰² the Caribbean Community (CARICOM)¹⁰³), (3) the Asia-Pacific RTA network,¹⁰⁴ and (4) the African RTA network.

⁹⁶ Peter van den Bossche, *The Law and Policy of the World Trade Organization: Text, Cases and Materials* 696 (Cambridge 2d ed 2008).

⁹⁷ *Emerging Asian Regionalism: A Partnership for Shared Prosperity* (Asian Development Bank 2008).

⁹⁸ Masahiro Kawai and Ganeshan Wignaraja, *Free trade Agreements in East Asia: A Way Toward Trade Liberalization?*, Asian Dev Bank Briefs, No. 1, 5 (June 2010).

⁹⁹ See, for example, the views expressed in the Report by the Consultative Board to the Director-General (cited in note 6).

¹⁰⁰ Assessing the compatibility of the Treaty of Rome with the requirements of GATT Article XXIV was politically complicated. See Armin von Bogdandy and Tilman Makatsch, *Collision, Co-existence or Co-operation? Prospects for the Relationship between WTO Law and European Union Law*, in Grainne De Búrca and Joanne Scott, eds, *The EU and the WTO: Legal and Constitutional Issues* 131, 137 (Hart 2001).

¹⁰¹ MERCOSUR stands for Mercado Común del Sur (Common Market of the Southern Cone) and is composed of Brazil, Argentina, Paraguay, and Uruguay. On December 9, 2005, Venezuela was accepted as a new member, but not scheduled to be made official until later. It was founded in 1991 by the Treaty of Asunción, which was later amended and updated by the 1994 Treaty of Ouro Preto (Dec 17, 1994). Its purpose is to promote free trade and the fluid movement of goods, peoples, and currency. See Rafael Leal-Arcas, *International Trade and Investment Law: Multilateral, Regional and Bilateral Governance* 88 (Edward Elgar 2010).

¹⁰² The Andean Community is a trade bloc comprised of, until recently, five South American countries: Venezuela, Colombia, Peru, Ecuador, and Bolivia. In 2006, Venezuela announced its withdrawal, reducing the Andean Community to four Member States. The trade bloc was called the Andean Pact until 1996, and came into existence with the signing of the Cartagena Agreement in 1969. Its headquarters are located in Lima, Peru. See Leal-Arcas, *International Trade and Investment Law* at 28 (cited in 48).

¹⁰³ The Caribbean Community (“CARICOM”) is a regional grouping of fifteen Caribbean countries: Antigua and Barbuda, Bahamas, Barbados, Belize, Dominica, the Dominican Republic, Grenada, Guyana, Haiti, Jamaica, Saint Lucia, Saint Vincent and the Grenadines, Saint Christopher and Nevis, Surinam, and Trinidad and Tobago.

¹⁰⁴ On the new trend of bilateralism and RTAs in the Asia-Pacific region, see John Ravenhill, *The New Bilateralism in the Asia Pacific*, 24 *Third World Q* 299 (2003) (arguing that this new interest in bilateralism is explained by: an increasing awareness of the weakness of existing regional institutions and initiatives; perceptions of positive demonstration effects from regional agreements elsewhere; and changing configurations of domestic economic interests).

Having said all this, multilateralism and regionalism/bilateralism are not mutually exclusive. As a matter of fact, several countries in different regions of the world work intensively on regional treaties about integrating regional markets and free trade. The EU is one example. Even though European countries have worked for European integration in several areas, such as market integration, for more than fifty years, European countries—with the European Community on the sideline with wide influence in the GATT and now the EU as a Member of the WTO—have worked to improve the multilateral system.¹⁰⁵

In the case of Africa, there is the African Economic Community (AEC)¹⁰⁶, and in South America, there is the Union of South American Nations (Unión de Naciones Suramericanas—UNASUR),¹⁰⁷ the Andean Community, and Mercosur. Those organizations all work for a deeper integration of regional markets, but the various countries that belong to these regional organizations are making serious efforts on the multilateral level as well. Although the Doha Round has been quite challenging, making only slow progress since its inception, it must be noted that several agreements are being negotiated, and 153 WTO Members, all with different interests, are taking part in these multilateral negotiations. Looking historically at the GATT/WTO, the number of multilateral agreements has increased, even as regional agreements have been concluded by GATT/WTO Members.

One possible way to bridge the gap between multilateralism and regionalism/bilateralism is by making more use of plurilateral agreements,¹⁰⁸ which allow smaller groups of WTO Members to move forward, outside the single undertaking, on issues important to them. An example of a successful plurilateral agreement is the 1996 Information Technology Agreement—dependent on a critical (but not universal) mass of signatories. Another example is the plurilateral Government Procurement Agreement,¹⁰⁹ which is one of the most relevant agreements in the WTO today, with potential for membership expansion.

¹⁰⁵ For an overview of the EU in the world trading system, see generally Leal-Arcas, *Theory and Practice* (cited in note 3); Rafael Leal-Arcas, *50 Years of Trade Policy: Good Enough or as Good as it Gets?*, 15 *Irish J of Eur L* 157 (2008).

¹⁰⁶ For more information, see *Abuja Treaty* (Economic Commission for Africa 1991), online at <http://www.uneca.org/itca/ariportal/abuja.htm> (visited Sept 30, 2010).

¹⁰⁷ For more information, see *South American Community Nations* (Comunidad Andina 2010), online at <http://www.comunidadandina.org/ingles/sudamerican.htm> (visited Sept 30, 2010).

¹⁰⁸ For further details on plurilateralism, see Leal-Arcas, *International Trade and Investment Law* at 63–68 (Edward Elgar 2010).

¹⁰⁹ An agreement on Government Procurement was first negotiated during the Tokyo Round and entered into force on January 1, 1981. The present agreement and commitments were negotiated in the Uruguay Round. The new agreement took effect on January 1, 1996. This is a plurilateral agreement—only some countries (Members of the WTO) are parties to the agreement. Its purpose is to open up as much of the government procurement business as possible to international competition. It is responsible for improving the transparency of the government procurement laws, regulations, procedures, and practices. It also has to ensure that these laws do not protect domestic products or suppliers, or discriminate against foreign products or suppliers. See Leal-Arcas, *Theory and Practice* at 170 (cited in note 3).

VII. CONCLUSION

One wonders whether RTAs are the center of gravity of the international trading system, whether the multilateral trading system is the center of gravity, or whether we have a symbiosis between regionalism and multilateralism in the international trading system and, if not, how we can get there given that they coexist. RTAs might certainly allow developing countries to secure preferential treatment vis-à-vis their competitors. An example is the European Community-Mexico RTA, whereby the Europeans provide preferential treatment to Mexico.¹¹⁰ This may provoke the Brazilians to try to conclude an RTA with the EU in order to obtain preferential treatment from the Europeans.

RTA partners make concessions that they would not extend to other WTO Members in multilateral trade negotiations, because coming to an agreement regionally is easier than multilaterally. A good example is the US-Singapore FTA, which includes clauses on competition, thereby going beyond the WTO agenda. However, the US found it very difficult to make concessions to India on agriculture in the multilateral context as evidenced by the July 2008 WTO mini-ministerial conference. RTAs nevertheless have limitations, such as the fact that RTA negotiations tend to be asymmetrical. This asymmetry often results in imbalanced deals, such as the case between Mexico and the US in the context of NAFTA.

This article concludes that the proliferation of RTAs implies the erosion of the WTO law principle of non-discrimination and wonders whether this means the beginning of the end of multilateralism. It also concludes that the single undertaking—which seems too ambitious in today's multilateral trading system—is no longer feasible because the WTO has more Members than ever (and WTO membership is an ongoing process, with more Members to come in the near future) and covers more topics than ever, which are more complex than ever. As an alternative, this article suggests variable geometry (that is, the idea that only a few WTO Members will benefit from plurilateral agreements on several topics on the agenda) and sectoral agreements (that is, all WTO members participate in negotiations and benefit from the agreed outcomes, but only one topic is discussed at a time, as was the case of the WTO Telecoms Agreement) as a way forward to unblock the multilateral trading system. The variable-geometry approach has the advantage of removing the current frustration at the WTO negotiating table—and sometimes violent protests organized by civil society—with its slow negotiating pace. However, one disadvantage is that developing countries at the WTO might feel marginalized.

In relation to the Doha Round—or any round, for that matter—there is a need for serious political will if we want it to succeed. It is evident that there is currently an institutional fatigue. This article therefore proposes a Doha-light option—lowering the expectations of the Doha Round. This translates into less market opening for agricultural products. Nevertheless, it should

¹¹⁰ For further information on the EC-Mexico RTA, see Regional Trade Agreements Information System (World Trade Organization 2010), online at <http://rtais.wto.org/UI/PublicMaintainRTAHome.aspx> (visited Sept 30, 2010).

be made clear that the big trade challenges of today, whether climate change or energy resource scarcity, cannot be solved without multilateralism. Bilateral and regional agreements offer no substitute for global rule-making and coherent governance of a globalized economy. Moreover, bilateral and regional deals do not come close to matching the economic impact of agreeing to a global deal. Therefore, RTAs can be a complement but not an alternative to multilateralism.