# REGIONAL TRADE AGREEMENTS AND WORLD TRADE ORGANIZATION: LEGAL AND POLICY LINKAGES

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## DECLARATION

I declare that the thesis entitled "REGIONAL TRADE AGREEMENTS AND WORLD TRADE ORGANIZATION: LEGAL AND POLICY LINKAGES" submitted by me for the award of the degree of **Doctor of Philosophy** of Jawaharlal Nehru University is my own work. The thesis has not been submitted for any other degree of this University or any other university.

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## CERTIFICATE

We recommend that this thesis be placed before the examiners for evaluation.

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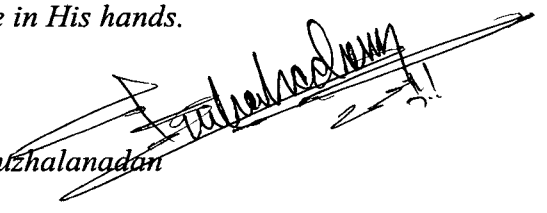

*Mathew A. Kuzhalangadan*

# ABBREVIATIONS USED

| | | |
|---|---|---|
| ACP | : | African-Caribbean-Pacific |
| AFAS | : | Asian Framework Agreement on Services |
| AFTA | : | ASEAN Free Trade Area |
| AGOA | : | Africa Growth and Opportunity Act |
| AIA | : | ASEAN Investment Area |
| ANZCERTA | : | Australia – New Zealand Closer Economic Relations Trade Agreement |
| APEC | : | Asia Pacific Economic Co-operation |
| APTA | : | Asia Pacific Trade Agreement |
| ASA | : | Association of Southeast Asia |
| ASEAN | : | Association of South East Asian Nations |
| ATC | : | Agreement on Textiles and Clothing |
| BENELUX | : | Belgium Netherlands and Luxembourg Customs Union |
| BIMSTEC | : | Bay of Bengal Initiative for Multi Sectoral Technical and Economic Co-operation |
| BISD | : | Basic Instruments and Selected Documents |
| BIT | : | Bilateral Investment Treaty |
| BTA | : | Bilateral Trade Agreements |
| CACM | : | Central American Common Market |
| CAFTA | : | Central American Free Trade Agreement |
| CARICOM | : | Caribbean Common Market |
| CARIFTA | : | Caribbean Free Trade Area |
| CBI | : | Caribbean Basin Initiative |
| CCT | : | Common Customs Tariffs |
| CEAO | : | West African Economic Union |
| CECA | : | Comprehensive Economic Co-operation Agreement |
| CECPA | : | Comprehensive Economic Co-operation and Partnership and Agreement |
| CEEC | : | Central and East European Countries |
| CEPA | : | Comprehensive Economic Partnership Agreement |

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|---|---|---|
| CEPT | : | Common Effective Preferential Tariff |
| COMESA | : | Common Market for Eastern and Southern Africa |
| CRTA | : | Committee on Regional Trade Agreements |
| CSME | : | Caricom Single Market Economy |
| CTH | : | Change of Tariff Heading |
| CU | : | Customs Union |
| DSB | : | Dispute Settlement Body |
| DSU | : | Dispute Settlement Understanding |
| EC | : | European Community |
| ECOWAS | : | Economic Community of West African States |
| ECSC | : | European Coal and Steel Community |
| ECU | : | European Currency Unit |
| EEC | : | European Economic Community |
| EFTA | : | European Free Trade Area |
| EIA | : | Economic Integration Agreements |
| EU | : | European Union |
| Euratom | : | European Atomic Energy Community |
| FTA | : | Free Trade Agreement |
| GATS | : | General Agreement on Trade in Services |
| GATT | : | General Agreement on Tariff and Trade |
| GCC | : | Gulf Co-operation Council |
| GDP | : | Gross Domestic Product |
| GSP | : | Generalized System of Preferences |
| GSTP | : | Generalized System of Trade Preferences |
| IBSA | : | India-Brazil-South Africa initiative |
| ICSID | : | International Centre for Settlement of Investment Disputes |
| ILM | : | International Legal Materials |
| IMF | : | International Monetary Fund |
| IOARC | : | Indian Ocean Association for Regional Cooperation |
| IP | : | Intellectual Property |
| IPR | : | Intellectual Property Rights |

| | | |
|---|---|---|
| ISFTA | : | Indo-Sri Lanka Free Trade Agreement |
| ITO | : | International Trade Organization |
| JSG | : | Joint Study Group |
| JTF | : | Joint Task Force |
| JWG | : | Joint Working Group |
| LAFTA | : | Latin American Free Trade Association |
| LAIA | : | Latin American Integration Association |
| LDC | : | Least Developed Countries |
| MEA | : | Mutual Economic Assistance |
| MERCOSUR | : | Southern Core Common Market |
| MFA | : | Multi Fibre Agreement |
| MFN | : | Most Favourable Nation |
| MoU | : | Memorandum of Understanding |
| MRA | : | Mutual Recognition Agreements |
| NAFTA | : | North American Free Trade Agreement |
| NGO | : | Non Government Organization |
| NT | : | National Treatment |
| OPEC | : | Organization of Petroleum Exporting Countries |
| ORC | : | Other Regulations of Commerce |
| ORRC | : | Other Restrictive Regulations of Commerce |
| PICE | : | Argentina – Brazil Integration and Economic Cooperation Programme |
| PTA | : | Preferential Trade Agreement |
| QR | : | Quantitative Restriction |
| RTA | : | Regional Trade Agreement |
| SAARC | : | South Asian Association for Regional Co-operation |
| SACU | : | South African Customs Union |
| SADCC | : | South African Development Co-operation Conference |
| SAEU | : | South Asian Economic Union |
| SAFTA | : | SAARC Free Trade Agreement |
| SAPTA | : | South Asian Preferential Trade Agreement |
| SPS | : | Sanitary and Phytosanitary |

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|---|---|---|
| TBR | : | Trade Barriers Regulation |
| TBT | : | Technical Barriers to Trade |
| TCRO | : | Technical Committee on Rules of Origin |
| TMB | : | Textiles Monitoring Body |
| TPRM | : | Trade Policy Review Mechanism |
| TRIMS | : | Trade Related Investment Measures |
| TRIPS | : | Trade Related aspects of Intellectual Property Rights |
| UK | : | United Kingdom |
| UNCITRAL | : | United Nations Commission of International Trade Law |
| UNCTAD | : | United Nations Conference on Trade and Development |
| UN-ESCAP | : | United Nations Economic and Social Commission for Asia and Pacific |
| UNTS | : | United Nations Treaty Series |
| UPOV | : | International Convention for the Protection of New Varieties of Plants |
| US | : | United States |
| USTR | : | United States Trade Representative |
| WIPO | : | World Intellectual Property Organization |
| WTO | : | World Trade Organization |

# GLOSSARY

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| **Commonwealth Preferences** | The preferences extended by the United Kingdom to its colonies during the colonial period. |
| **Economic Nationalism** | The unwillingness of the countries to share their economic policy space internationally. This is usually led by protectionist interests of countries. Policies like import substitution is a common feature in economic nationalism. |
| **Free Trade** | A theoretical concept that assumes international trade unhampered by government measures such as tariffs or non-tariff measures. |
| **Enabling Clause** | The expression is used to describe the *Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries,* adopted in 1979, in the GATT (L/4903 dated 28 November 1979). The aim of this clause was to allow the developed countries to derogate from the requirements of MFN in order to stimulate trade with developing countries. |
| **Generalised System of Preferences (GSP)** | A trading system allowed under the Enabling Clause whereby developed countries offer preferential treatment to products originating in developing countries without the requirement that the developing country reciprocate these measures. The countries granting GSP unilaterally choose what product ranges and which countries can benefit. |
| **Market Access** | Permission to a foreign product to enter into a domestic or local market and to compete with the comparable domestic product on a non-discriminatory basis. In other words, it is the willingness of government to allow imported goods and services to compete with similar domestic goods and services. |
| **Mode 1 – Cross-Border Supply** | The service is delivered within the territory of the consumer from the territory of the service supplier. Cross-border supply may entail the conveyance by mail, telecommunication or the |

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| | physical movement of merchandise embodying a service from one country to another. The service supplier is not present in the territory where the service is delivered. |
| **Mode 2 – Consumption Abroad** | The consumer receives a service outside his country either by moving or being situated abroad. Repair services done on equipment shipped to a different country, foreign exchange students, people seeking medical treatment abroad and tourism fit into mode 2. |
| **Mode 3 – Commercial Presence** | A service establishes any type of business or professional enterprise in the foreign market for supplying a service. Practically, the mode involves granting a right to a foreign interest to establish an investment within the territory of another country. In brief, it means right of establishment that is, through foreign direct investment. |
| **Mode 4 – Movement of Natural Persons** | The service is delivered by one individual acting alone or as an employee of a service supplier by being present in a foreign market to provide the service. |
| **Mode of Supply** | The means of delivering services to foreign consumers. Modes of supply are defined based on the origins of the service supplier and the consumer, and the type of territorial presence that both have when the service is delivered. There are 4 modes of supply – (i) cross-border supply; (ii) consumption abroad; (iii) commercial presence; and (iv) presence of natural persons. |
| **Most Favoured Nation (MFN) Treatment:** | A commitment by a country to extend the same treatment it accords to its most-favoured trading partner to all its trading partners. |
| **National Treatment (NT)** | A commitment by a country to treat foreign products in the same manner as they would treat domestic products (provided that the foreign products are 'like' their domestic counterparts. |
| **Singapore Issues** | The four issues introduced to the WTO agenda at the December 1996 Ministerial Conference in Singapore namely, trade and investment, trade |

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| | and competition policy, transparency in government procurement and trade facilitation. |
| **Trade Creation** | It occurs when liberalization results in imports that displace less efficient local production or less efficient imports and/or in expanding consumption that was previously depressed by artificially high prices due to protection. |
| **Trade Diversion** | It occurs when a trade reform measure discriminates between different trading partners and a less efficient (higher cost) source displaces a more efficient (lower cost) one. It can arise whenever some preferred suppliers are freed from barriers but others are not. |
| **TRIPS-Plus** | The provisions which go beyond the TRIPS standards as agreed in the WTO. This includes new disciplines, areas and subject matter which are not covered by the TRIPS Agreement. |
| **Uruguay Round** | The multilateral round of trade negotiations that began in 1986 and concluded at the Marrakesh Ministerial meeting in April 1994. The Uruguay Round had many significant outcomes including the creation of WTO. |
| **WTO-Plus** | Some standards in RTAs which go beyond what WTO standards envisage. |

# Chapter I

# Introduction

## I.1. Background

The fundamental principle regulating trade patterns under the General Agreement on Tariffs and Trade (GATT) and its successor the World Trade Organization (WTO) is the principle of unconditional non-discrimination enunciated in Article I General Most Favoured Nation Treatment (MFN). As a rule basic to the whole edifice of the international trading system, it requires that if one signatory state grants to another country "more favourable treatment," it must immediately and unconditionally give the same treatment to the imports from all other signatories. However, the high sounding ideal of MFN found a number of exceptions within the GATT itself. Most of the exceptions were allowed out of certain compulsions at the negotiating stage and under the presumption as well as understanding that recourse to these exceptions shall not be so frequent and consequential so as to undermine the principle of MFN. The important GATT exception to MFN is found in the provisions for customs union and free trade areas under Article XXIV of the GATT. In the beginning itself the GATT 'grand fathered' a number of preferential trade systems which were in existence at the time. The multilateral framework also envisages within itself the exemptions for Regional Trading Agreements[1] (RTAs). Countries are required to meet certain preconditions laid down by the GATT/WTO while forming the RTAs.

There are different forms of trade arrangements which fall within the ambit of RTAs. Though broadly classified as Free Trade Areas and Customs Unions in the legal text, there also exists trading arrangements with much higher economic integration.[2] In fact, regional economic integration has many names, shapes and forms, each with different implications and nuances. The depth and breadth of RTAs vary from one agreement to another. Classification of regional trade agreements and arrangements can be based on the nature (legality) of the agreement as well as on the range of

[1] In this study, the term 'Regional Trade Agreements' (RTAs) is generally used which also includes Customs Unions (CUs), Free Trade Agreements (FTAs), Preferential Trade Agreements (PTAs), Interim Agreements leading to CUs or FTAs and other Economic Integration Agreements (EIAs) in relevant contexts.

[2] Economic Unions like the European Union (EU), Common Market like MERCOSUR are examples.

integration of the agreements. Regional economic integration under various agreements occurs on a variety of levels ranging from loose cooperative arrangements to tightly structured agreements. They differ in their degree of institutionalization as well as integration. While it is difficult to categorise regional trade organizations or arrangements, some generally accepted classifications have been developed (Winters 1996).

Free Trade Areas (FTAs) are regional trade arrangements which have substantially eliminated internal barriers between members for all or groups of goods, while member countries maintain individual external trade barriers and commercial policies towards non-member countries.

Customs Unions (CUs) share the same characteristics as FTAs, with the addition of a common external commercial and trade policy. This means that all imports entering the customs union are subject to the same barriers to trade regardless of the country of entry. A customs union also has a central administrative body to aid in policy coordination, facilitate communication and oversee operations.

Common Markets (CMs) incorporate the features of a CU plus the free movement of labour and capital. The harmonization of taxation and many domestic regulations must be undertaken to prevent the creation of false trade flows to ensure 'a level playing field' for businesses across all member countries.

Economic Unions require, in addition to the features incorporated into a common market, the complete harmonization of government spending and procurement as well as the coordination of the operation of central banks (WTO 1995a).

Various regional trade arrangements are often interchangeably referred to as RTAs, FTAs or PTAs by various scholars irrespective of their nature or characteristics.

Strictly speaking, these terminologies do not bear any rational difference in the content and character of the trading arrangements.[3]

Irrespective of the nomenclature, there has been a surge in the number of RTAs. It is said that one of the most significant developments in the world economy since the Bretton Woods Conference in 1944 has been the emergence of a number of regional trade agreements. Preferential treatment in trade and such arrangements existed among nations even well before this. Today almost all the Members of the WTO are party or going to be party to one or more RTAs.[4] Over the years, the RTAs have graduated to continental trading blocs. The EU, NAFTA and the Asian trade bloc (ASEAN etc.) occupy an increasingly prominent role in the creation of continental trade blocs and cast serious doubts on the robustness of the concept of multilateralism. According to a number of economists and political scientists,[5] commitment to the multilateral framework underpinning globalization is weakening (Michalak and Gibbs 1997: 264). Krueger (1995) has observed that even after the successful conclusion of the Uruguay Round and new provisions contained in the WTO, the trading blocs are capable of dividing world markets into exclusive and potentially hostile camps through unilateral protectionist trade policies (Michalak and Gibbs 1997: 264).

With the powerful re-emergence and unprecedented proliferation of RTAs towards the end of the 20th century,[6] attempts were made to study the impact of regionalism in trade. This opened the wide room of debate on the effects of regionalism on multilateralism. The debate is polarized. On one side, an influential group of economists and political scientists[7] argued that regional trading blocs, by the very fact of their existence, threaten the spirit of multilateral trade liberalization. On the other side are those who argue that the regional trade blocs contribute to the freeing of world trade. There are scholars who hold yet another view that impact of RTAs on the

[3] A reference may be made to Article 2 (use of terms) of the *Vienna Convention on Law of the Treaties* (11 UNTS 331 (1969)) which provides that an international agreement concluded between States in written form and governed by international law, irrespective of its particular designation, is a treaty.
[4] As per the latest reports, Mongolia, who is the only WTO Member not party to any PTA, is currently studying the feasibility of a PTA with Japan and other states (Baccini et al. 2011).
[5] See, Preeg 1989; Belous and Hartley 1990; Bhagwati 1990, 1991, 1993; Schott 1990.
[6] See discussion in Chapter II on the evolution and growth of RTAs.
[7] See, generally the views of Bhagwati (1991), Srinivasan (1999) and the views of Summers (1991), Krugman (1993), Zahrnt (2005).

multilateral trading system depends on the nature and characteristics of each individual RTA.[8]

### I.2. Case for Regionalism

It is interesting to note that there is hardly any hypothesis outrightly rejecting either regionalism or multilateralism. One of the major debates in this regard is, to what extent regionalism promotes or erodes multilateralism. The concept of 'trade creation' and 'trade diversion,' the argument enunciated by the Canadian economist and scholar Jacob Viner,[9] more than sixty years back, finds a universal acceptance among the scholars of international trade. Viner (1950) provided a more or less definitive analysis of the trading bloc issue. In precise words, according to Viner, a preferential trading arrangement promoted 'trade creation' when a country's more expensive domestic production is replaced by cheaper products from a participating country. Greater domestic consumption generated additional trade and welfare in the process. Conversely, 'trade diversion' occurred when imports of inexpensively manufactured goods from non member countries were replaced by more expensive imports from participating countries. The resulting increase in intra regional trade took place at the direct expense of imports from outside the bloc; hence trade diversion reduced or, at best did not increase global welfare in this scenario. To put in other words, regional trade bloc promoted global trade liberalization when it promoted trade creation, and hindered global trade liberalization when it created trade diversion. With the emergence and re-emergence of regionalism in the sixties and, later in the eighties, the debate has grown more complex. Jackson (1993: 121) took a double sided view and approach in analyzing the impact of regionalism on global trade liberalization. According to him, trading blocs can actually promote global free trade if the MFN principle is applied.

Scholars have observed that regional trade arrangements can serve as stepping stones for building political support and strengthening the will for negotiating free trade worldwide. Summers (1991) and Krugman (1993) observed that trading blocs merely formalize the already existing trade practice of geographical proximate countries or in

[8] See, discussions below.

[9] Jacob Viner (1892-1970) in his 1950 book "The Customs Union Issue" introduces the distinction between the trade creating and the trade diverting effects of customs unions.

other words "natural partners" that are expected and bound to trade with each other more than with distant or "unnatural" partners. In other words, countries that trade with each other in larger volume than with other nations are "natural" trading partners and hence that PTAs among them are likely to be welfare enhancing. A related assertion is that regional PTAs are likely to improve welfare by minimizing transport costs (Krugman 1991; Krugman 1991a).

It is observed by some scholars that a universalistic approach towards all kind of regional groupings is not desirable. In his classic work on the Charter of International Trade Organization, Wilcox (1949) noted logical inconsistency in using the same yardstick for all kind of regional trade arrangements. He emphasized the difference between the impact of a Customs Union and a Preferential Trading Arrangement in multilateral trade liberalization (Wilcox 1949: 70). He explained the view in favour of customs union as follows:

> A customs union creates a wider trading area, removes obstacles to competition, makes possible a more economic allocation of resources, and thus operates to increase production and raises planes of living. A preferential system on the other hand, retains internal barriers, obstructs economy in production, and restrains the growth of income and demand. It is set up for the purpose of conferring a privilege on producers within the system and imposing a handicap on external competitors. A customs union is conducive to the expansion of trade on a basis of multilateralism and non discrimination; a preferential system is not (Wilcox 1949).

The thrust of Wilcox's argument favouring customs union was out of the belief that any expansion of area within which all trade is free of barriers is desirable in the sense of improving welfare of one or more of its members while hurting no other country, as long as barriers to trade in the countries outside the area are not raised (Srinivasan 1999: 331).

Summers (1991) took a positive outlook towards regionalism. He explained his view by stating that "economist should maintain a strong but rebutable, presumption in favor of all liberal reductions in trade barriers, whether they are multi-, uni-, bi-, tri-, plurilateral. Global liberalization may be the best, but regional liberalization is very likely to be good" (Srinivasan 1999: 336). In this context, Barfield (1996) observed that, "Summers and other proponents of regionalism base their case on a belief that total trade creation will out weigh trade diversion in most cases, that the multilateral

process is too slow to produce substantial progress toward further trade liberalization, and that regional free trade arrangements will allow some nations to speed up liberalization and ultimately produce a self-reinforcing process toward more open markets."

Winters (1996), referred to many scholars who argued that the creation of the European Economic Community (EEC), that is, regionalism, led directly to the Dillon and Kennedy Rounds of multilateral trade negotiation. It is also argued by some, though denied by others, that the Seattle APEC Summit in November 1993 was perceived by the EU as a threat by the United States to go the route of regionalism and prompted the EU for a compromise in the Uruguay Round negotiations to be successfully concluded in December 1993. But Winters (1996) concluded after an analysis of the empirical evidence that "regrettably it seems as ambiguous as the theory, at least (so) far as the issues of current policy are concerned." Thus, neither theory nor evidence provides a robust guide to the choice between regionalism and multilateralism. A similar view is shared by Bagwell and Staiger (1996) by observing that "our analysis suggests that the consequences of regional arrangements for multilateral tariff cooperation need not be clear cut: effects exist under which regional agreements complement multilateral liberalization efforts, and effects also exist under which regional agreements undermine the multilateral liberalization process."

One of the widely received arguments in favour of RTAs is their experimental or laboratory effect vis-à-vis multilateral trade liberalization (Jackson 1993; Cho 2001: 432). As on date, the WTO has 153 members[10] which indicates that negotiation processes will be slow and cumbersome especially when it comes to new areas such as services, information technology, government procurement, investment, etc. In this context negotiation among a smaller number of regional participants is likely to produce better results, that too in less time. [11] Further more, once agreements are adopted and implemented at a regional level, the experience and lessons gained through trial and error will serve as a knowledge base (Bergsten 1997: 545, 548). This knowledge base, in turn will serve as a valuable foundation on which subsequent multilateral agreements can be built. From an internal point of view, a process such as

[10] As per the WTO website, URL: www.wto.org [Accessed on 21 May 2011].
[11] Bhagwati (1999) refutes this view. See, discussion below.

this often serves to educate government officials, helping them to adapt to new practices of trade liberalization and enabling them to move on to a multilaterally binding track. From an external point of view, RTAs can "ratchet up" multilateral liberalization process by creating an incentive for other regions or countries to emulate successful initiatives (Bergsten 1997: 548). In summing up the above arguments, it is worth quoting Jackson (1993: 121) that 'RTAs tend to provide test laboratories for the multilateral trading system.' In support of this view it can be found that most countries involved in RTAs are also active and committed participants in the WTO (Sampson 1996: 17). Some scholars observed that in long term, intra-regional trade becomes relatively less significant vis-à-vis inter regional trade (Cho 2001: 433). Others offered detailed evidence regarding the success of regional agreements for global trade liberalization: contributions from NAFTA and the EU to the WTO (Zahrnt 2005: 684-86). Some scholars emphasized that RTAs often "lock in" previous liberalization records or reforms in a manner that prevents subsequent backsliding. In this context, a plausible argument for NAFTA was that it locked in Mexican reforms so that future political authority in Mexico could not reverse them (Frankel 1997). While scholars favouring RTAs argued this as a positive aspect of regionalism, some others termed it as hegemony of major economic powers such as United States to use the formation of RTAs to extract far superior terms in negotiations with less powerful participants; empirical confirmation of this 'hegemonic strategy' could be found in trade talks on intellectual property rights between the United States and Mexico (Bhagwati 1999: 309).

Favouring the trend of Regionalism, Zahrnt (2005) argued that 'deep integration can better and faster be attained on a regional level with smaller and more homogeneous membership. He further argued that deep regional integration can be contributory for the effective functioning of the WTO.' In support of this view, he observed that regionalism extends the zone of agreement in WTO negotiations. It offered a way to cope with the complexity of WTO negotiations as it reduces the number of participants and fewer policy proposals which are conducive for a deeper integration. Further, overlapping free trade areas which created webs of free-trade agreements reduce the risk of participating in WTO (Zahrnt 2005: 695-696).

Rejecting all the views favouring regionalism, Bhagwati, 'perhaps the most out spoken critic of regionalism' (Michalak and Gibbs 1997: 269) argues that the recent proliferation of trading blocs signals the breakdown of multilateralism, at least as the first best options (Bhagwati 1993).[12] Even rejecting the new concept of 'open regionalism'[13] he found that

> (t)he popular argument that free trade agreements at least where led by the United States, will be of the "open regionalism" variety so that, with steadily increasing members, we shall arrive at full multilateralism... is naïve for several reasons. Free Trade agreements are as hard as multilateral trade treaties to negotiate.

Taking the case of speed of negotiations, Bhagwati points out that, after a decade, there are three countries in NAFTA; by contrast the Uruguay Round took over seven years to negotiate with over 115 nations on old and new issues (Srinivasan 1998: 63,64).

Going a step further it is stated that

> free trade arrangements seriously damage the multilateral trade liberalization process by facilitating the capture of it by extraneous demands that aim, not to reduce but to increase trade barriers (as when market access is sought to be denied on grounds such as "eco dumping" and "social dumping") (Srinivasan 1998).

Bhagwati observes that the current rise and proliferation of regionalism is likely to endure and gain strength. He finds reason for the same in the changed attitude of key players EU and especially the United States towards Article XXIV of GATT. It is argued that there is a major shift in the balance of force towards regionalism.[14] So far, this observation is proved correct in the wake of American urge to enter into more

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[12] According to Bhagwati, the largest challenge in regionalism is to resist the temptation of protectionism. He further adds that, although trading blocs do not necessarily lead to a trade war, they certainly increase the possibility of hostile unilateral actions.

[13] Open Regionalism refers to plurilateral agreements that are nonexclusive and open to new members to join. It requires that plurilateral initiatives be fully consistent with Article XXIV of the GATT, which prohibits an increase in average external barriers. Beyond that, it requires that plurilateral agreements do not constrain members from pursuing additional liberalization either with non-members on a reciprocal basis or unilaterally.

[14] He observes that, this shift has taken place in the context of a growing perception in the American Congress that the GATT is inadequate and the "regional card should be played" as a threat to those who will not move fast enough to change the GATT to suit America's desires and interests. Since the process of change at the GATT is necessarily going to be slower than American impatience would dictate, the regional card is likely to be played again and again reinforcing the American shift in policy (Bhagwati 1991: 72).

regional arrangements around the globe (Bhagwati 1991: 72). In the context of changed policy and strategy of US towards regionalism, it is pointed out that, regionalism would be America's new weapon if GATT/WTO were not amended and bent to American demands for reconstitution and reform, and combined with actual resort to regional arrangements, it will produce the negative perception that regionalism is anti ethical to the GATT and that proliferation of Article XXIV sanctioned free trade areas is somehow the nemesis of the GATT/WTO (Bhagwati 1991: 74).

The advocates of regionalism do not agree that there exists the possibility of regionalism becoming a protectionist tool and could develop into a welfare diminishing entity. Thus, both the proponents and detractors of regionalism would agree that if you must live with regionalism then, if put in Bhagwati's words, ' it is best to contain it and shape it in a way so that it becomes maximally useful and minimally damaging and consonant with the objective of arriving at multilateral free trade for all.'

### I.3. Encompassing Regionalism within Multilateralism

For the opponents of regionalism, the reason for opposing is its potential for trade diversion. It is the discriminative capacity of the RTAs which leads to trade diversion. If multilateralism and trade liberalization are to be fostered, the principle of non-discrimination should be adhered to and trade diversion minimized. Though the Article XXIV which regulates regionalism is intended to avoid or minimize discrimination, the inherent weakness and ambiguities[15] allows the regional trade arrangements to practice discrimination and hence, trade diversion takes place. The discrimination occurring need not be explicit or proactive: 'as is evident to trade economists, maintaining external tariffs unchanged (that is, not raised) is not the same as eliminating trade diversion' (Bhagwati 1994: 156). Hence, the lower the external barrier, the less is the scope of trade diversion. On this *hypothesis*, one suggestion is that regional trade arrangements shall be required to lower external barriers simultaneously on a *pro rata* basis as a price to be paid for the gains from internal liberalization. If this principle is enshrined in the WTO, it would go a long way to

[15] See detailed discussions in Chapter III.

strengthening the multilateral system and ensuring the 'global building block' role of regional trading arrangements. Alternatives suggested for accomplishing this goal is the outright banning of FTAs and allowing only CUs. The CUs could be forced to make the lowest tariff of any of its members on any individual good the common external tariff. Put in other words, all tariffs would have to be reduced to the lowest common denominator amongst the members with higher rates. As these tariffs become the 'bound' tariffs, this would ensure that a substantial degree of liberalization would occur vis-à-vis non-members (Yeung et al. 1999).

Non-tariff barriers also have a greater potential of being used in a discriminatory fashion. Article XXIV or the present mechanisms in place is no way adequate to stem the use of non-tariff barriers. Effective controls, surveillance and regulations by the WTO regarding the non-tariff barriers are of utmost importance in ensuring non-discrimination in regionalism. The WTO's provisions banning voluntary export restraints and strengthening rules regarding the use of contingent protection are viewed as initial steps in this direction. However, countries make use of the ambiguities in the GATT legal text to continue with the practice. It could be said that an overall strengthening of the WTO regarding discrimination and protection, including Article XXIV, is required to deal with the new challenges of regionalism.

The concept of a partnership between regionalism and multilateralism enjoys growing support amongst trade economists from both sides of the debate. The belief that regionalism is an effective supplement to the WTO and multilateralism evolve from the perception that any reductions in barriers to trade, be they through, the multi-, tri-, bi- or plurilateral negotiations should be presumed favourable. According to Drysdale and Garnaut (1994: 42)

> The argument for regional economic cooperation identifies the value of regional arrangements which serve collective ends but not at the price of discrimination in commercial policy. It does not follow that multilateral collective action to secure the regime for economic exchange is the only feasible or efficient route to closer economic integration. Regional economic cooperation, within a framework of multilateral economic relations, offers the potential for joint provisions of a stronger trade regime – a trade regime which also raises confidence in the international economic specialization and promotes closer world economic integration.

These principles more or less point to the concept of open regionalism. The assumption is that regionalism does not necessarily preclude support for and maintenance of the multilateral trading regime. A regional arrangement could be formed as it is 'nested' into the overall multilateral system, so long as the region maintains and promotes practices of non-discrimination and openness with external parties. Such regional arrangements could be viewed as building block for multilateralism.

It is also noted that regional trade arrangements, on their own, have had little effect on liberalizing their external trade. The multilateral system provides a mechanism for wide-ranging reciprocity, while regionalism provides a supplementary regional reciprocity. Both are mutually beneficial and complementary. Often one may be more effective in certain areas than the other. Together, they are effective across a broader spectrum of trade-enhancing activities (Yeung et al. 1999).

In sum, classical economic analysis as well as the trade theory is ambiguous about the outcome of regionalism. Under certain favourable circumstances regionalism is found complementary to the global free trade while in some unfavourable circumstances regionalism complicate and damage the multilateral trade liberalization process. The traditional debate on the subject was focused on the question of whether the RTAs supplement or supplant multilateral trade liberalization. Various economists have analyzed the economic theory of RTAs[16] and offered divergent opinions on the economic efficiency of RTAs. The consensus so far reached among the scholars is that the RTAs can have both trade creating and trade diverting effects. However, the legal challenges that RTAs present have not received the same attention as the economic challenges in empirical and theoretical scholarship. This is precisely because of the misconception that the issue of RTAs is rather economical and political rather than legal, so the best way to address the issue is through economical as well as political analysis.

### I.4. Legal and Policy Challenges

Over the time, the nature and scope of RTAs have undergone tremendous change and modern RTAs have attained a very different and distinctive face in their formation

[16] See discussion in Chapter II.

and operation. The coverage and depth of preferential treatment varies from one RTA to another. Modern RTAs are not that exclusively linking the most developed economies, but goes well beyond the tariff cutting exercises. They provide for preferential regulatory framework for mutual services trade. The modern sophisticated RTAs go beyond traditional trade policy mechanisms to include regional rules on investment, competition, environment, labour and many other WTO-Plus standards.[17] The proliferation of RTAs, especially as their scope broaden to include policy areas not regulated multilaterally, increase the risk of inconsistencies in the rules and procedures among RTAs themselves and between RTAs and the multilateral framework. The possibility of such inconsistencies is high, given the fact that countries are members to one or more RTAs, at the same time when they are members to WTO. This is likely to give rise to regulatory compulsions, distortion of regional markets and other implementation problems. It is in this context that the legal examination of the relevant provisions regulating the formation and operation of RTAs in the multilateral trading system assumes importance.

First and foremost, the principles and rules pertaining to regional integration and preferential trade agreements is of paramount importance for any one who attempts a legal study on the topic. They shape the conditions, requirements and limitations for such agreements on the basis of the GATT and the GATS. Members of the WTO negotiating and concluding RTAs are obliged to comply with a number of principles and rules of the multilateral system. Since preferential agreements by definition restrict the application of MFN, the WTO rules only exceptionally allow for sectoral, bilateral or regional arrangements. The WTO law provides the framework within which Members may conclude preferential arrangements between themselves and with third countries. In the field of goods, the provisions for RTAs are set forth in Article XXIV of the GATT and the Understanding on the Interpretation of Article XXIV GATT. In the field of services, a largely parallel provision contained in Article V of GATS and Article V *bis* GATS allows for Regional Integration Agreements. The Enabling Clause also contains provisions for forming preferential arrangements between developing countries. The above provisions seek to balance multilateralism and the needs of the RTAs by setting out a number of conditions which these agreements are required to meet.

[17] For detailed discussion see Chapter VI.

The legal question here is how to effectively exert these disciplines on RTAs while recognizing the existence of a large number of RTAs. The challenge for Members of the WTO is to ensure that these WTO disciplines are effectively applied to prevent RTAs from being too exclusive and discriminatory in relation to outside partners. From a legal perspective, a coherent body of disciplines, its effective implementation and strict compliance would ensure that exception provisions are not abused or misused. The relative inefficiency of legal disciplines governing RTAs has already found its place in the existing legal scholarship. The WTO has also recognized the need to strengthen these disciplines governing RTAs. During the Uruguay Round, the soon-to-be WTO Members attempted to strengthen the disciplines in GATT Article XXIV. They rendered explicitly RTAs subject to the WTO dispute settlement system. The WTO Panels and Appellate Body have already addressed some legal issues arising under GATT Article XXIV and RTAs, though in limited scope. The WTO has also initiated various steps in its attempt to deal with the challenge of regionalism. The Understanding on the Interpretation of Article XXIV of the GATT 1994 sought to clarify the criteria and procedures for the assessment of new or enlarged agreements and to improve the transparency of notified agreements. The WTO also established the Committee on Regional Trade Agreements (CRTA) to assess and examine the compliance of the various regional trade agreements with the relevant WTO rules and to consider the implications for the multilateral trading system. Faced with clear difficulties in the surveillance function of the WTO and concerned with the increasing number of RTAs, the WTO Members agreed on negotiations aimed at "clarifying and improving disciplines and procedures under the existing WTO provisions applying to regional trade agreements." The negotiations are progressing in two tracks, viz., "substantive" issues and holding consultations on procedural issues related to the transparency of the RTAs. As a first outcome, the WTO's General Council established a new WTO Transparency Mechanism for all RTAs on a provisional basis which could be reviewed and replaced with a permanent mechanism later. Still, the WTO cannot claim RTAs are now strictly disciplined. The present study largely focuses on the inherent weakness of legal disciplines governing RTAs and its impact on the multilateral trading system.

Apart from addressing the above referred legal issues, the study also looks into the policy concerns raised by modern RTAs. The various WTO-Plus commitments and

disciplines appearing in the RTAs are raising concerns especially for the developing world. The bilateral and regional setting of trade standards, norms and disciplines fails to take into consideration the various developmental aspects and flexibilities for the developing countries. Including trade regimes that are not governed multilaterally, increases the possibility of conflicts of interest and approach. The legal challenge posed by these policy matters could not be overlooked. The present study looks into this modern trend in various RTAs in selected areas as a case study, and their impact for the developing countries and the multilateral trading system at large.

All these points to the fact that, if left unregulated, the proliferation of bilateral and regional agreements may cause erosion of the WTO disciplines which could, in effect, weaken the multilateral trading system. But given the fact that a large number of RTAs do exist and continue to increase in their numbers and broaden their scope and ambit, the WTO needs to co-exist with them. The challenge here is how to minimize the conflict, and complement the co-existence of these two trade regimes. This requires a new legal paradigm capable of effectively regulating RTAs well within the multilateral framework. An effective legal regime and its proper compliance will be capable of minimizing the conflict and maximizing the complementarity between the WTO and RTAs which is required for a robust multilateral trading system capable of addressing the regional aspirations of its Members.

### I.5. Review of Literature

The literature on regionalism and multilateralism is vast and several volumes have appeared with almost all conceivable issues being discussed from several perspectives; economic theory; domestic and international political economy; systematic aspects, including legal aspects; and empirical evidence. The available literature focuses broadly on the issues discussed below.

The desirability of RTAs is a central question debated in the literature on the impact of RTAs on multilateral trading system even more than fifty years back. The debate is still on in the trade circles since the Canadian economist and scholar Jacob Viner came out with an authoritative work, 'The Customs union Issue' in 1950 in which he provided a more or less definitive analysis of the trading bloc issue. The pertinent question in the debate is, to what extent regionalism promotes or erodes trade

liberalization. Since then, scholars have expressed divergent views regarding the impact of regionalism on the multilateral trading system. The debate has grown through various theoretical and empirical arguments producing various terms now familiar in the academic circle like trade diverting, trade creating, stumbling bloc, building bloc, etc. Scholars who argue that the regionalism can complement multilateral trading system build their argument on the logic that as RTAs are formed with a view of further lowering the tariffs, it directly or indirectly promotes trade liberalization. On the other hand, scholars who are critic of regionalism base their argument on the logic that as being an exception to MFN principle which is the corner stone of multilateral trade liberalization, regionalism hampers the multilateral trade liberalization. Several arguments have been put forward as to why regionalism can complement and hamper multilateral trading system.

Over all, it is possible to distinguish two schools of thought as to the dynamic impact of discriminatory liberalization: one school highlights 'discrimination' and provides a pessimistic prognosis on the effects of regionalism on multilateral liberalization (Bhagwati 1999; De Melo and Panagariya 1992), thus suggesting that regionalism represents a threat to the development of a global economy. Proponents of this view stress (i) the risks that RTAs may promote trade diversion rather than trade creation, thus reinforcing vested interests to maintain preference margins and raising concerns against multilateral liberalization on the ground of preference erosion; (ii) that RTAs may provide bargaining tool to exchange preferential market access with concessions on non-tariff issues (such as standards), thus reducing the enthusiasm of MFN liberalization; (iii) that the proliferation of RTAs may crowd out negotiating resources necessary to achieve further multilateral liberalization; (iv) that the competing RTAs may lock-in incomparable regulatory structures and standards; (v) the fact that RTAs, by creating alternative legal systems and dispute settlement mechanisms, may weaken the enforcement system of the discipline of the multilateral trading system; (vi) that the proliferation of a maze of different regulatory systems undermines the principles of transparency and predictability of the WTO.

The other school highlights 'liberalization' and predicts a benign effect of regionalism on multilateralism (Summers 1991; Krugman 1993; Lawrence 1991), reaching the conclusion that regionalism can serve as a catalyst for further liberalization.

Proponents of this view have highlighted that: (i) the proliferation and expansion of RTAs *de facto* erode existing preferences, thus reducing the opposition to multilateral liberalization; (ii) RTAs act as laboratories of international co-operation, whereby co-operation can be tested among small number of countries before being extended multilaterally. This helps to build up the political consensus for further liberalization and may make multilateral liberalization politically viable and (iii) the network of overlapping RTAs including trade diverting RTAs may act as a positive force for the multilateral system by generating the need of rationalizing the system.

Bhagwati (2001) who is the originator of several felicitous phrases in this area of literature has contributed substantially to the debate on the desirability of regionalism in the backdrop of multilateralism. In an earlier work (1993) he raised the question whether trade blocs, that is, PTAs regional and others are 'stumbling' or 'building' towards free trade for all. Bhagwati's work provides a wide understanding on the conceptual framework of regionalism and skull out some of the core concerns and potential conflicts in this area. These concerns and issues evolved in his work provide much food for thought for scholars working in this area. Though the work is one of the earliest enriched literature appeared, still its relevance is unabated.

Thus theoretical literature has provided contrasting answers to the question of whether RTAs are building blocs or stumbling blocs to the multilateral trading system.

The other studies on conceptual framework of regionalism like Viet De Do and William Watson (2006) who address regionalism with an economic perspective concludes that although results are mixed, the proliferation of RTAs does not yet seem to have created a world trading system dominated by trade diversion. They also raise the question that if member-nations could summon the will to restrict RTAs in any meaningful way, would they not also have the political will to provide the multilateral liberalization that would make such an action necessary. Michealak and Gibb (1997) consider that the classical economic analysis of trading blocs is inconclusive and regionalism cannot be understood in economic terms alone. Regionalism and multilateralism represent competing, but not mutually exclusive, principles underpinning economic integration and trade in global economy. Trading blocs will surely plan an increasingly significant role in shaping the new form of international governance. Ethier (1998) who outlines the emergence of New

Regionalism holds that new regionalism reflects the success of multilateralism and not its failure.

De Melo (2007) discusses regionalism from the standpoint of developing countries arguing that it is multilateralism which protect best the interest of developing countries. He asserts the importance of partner choice in trade agreements and suggests that North-South agreements are beneficial for developing countries than South-South RTAs. Pascal Lamy (2002), writing from an EU perspective expresses the view that multilateralism and regionalism are not mutually exclusive, but are complementary instruments to manage the complexities of an inter-dependent world. He states that EU favours the model of 'deep integration' and concludes with the assessment that EU has a policy of 'multilateralism first' but will continue to be an active player in regional trade policy. Among several case studies of regional integrations within the debate, Paul J Davidson (2005) examines the role played by international legal framework in regulating the formation of RTAs/ FTAs in the Asia Pacific region and the contribution that RTAs/FTAs are making to broaden the international legal framework with an emphasis to the role of APEC.

There are several studies on the concept of regionalism and the GATT/WTO linkages. Lorand Bartels and Fedrico Ortino's (2006) work on Regional Trade Agreements and the WTO Legal System in the context of the great proliferation of a wide variety of agreements which pose considerable concern to the multilateral trading system is a classic work on the subject. According to them, many of these agreements can perform useful functions in a world that is hobbled by difficult 'constitutional' problems of making timely decisions so as to keep abreast of rapid paced economic developments frequently described as 'globalisation'. There are some advantages for the RTAs, partly because with a limited number of members decisions often can be made more easily, more efficiently and in a timely manner. On the other hand, other concerns like the possibility of RTAs developing protectionist measures which discriminate against non-member can be significant. The work analyses various issues like framework issues, constitutional issues, WTO-plus and dispute settlement issues involved in these agreements as against multilateral trading system in considerable detail, however it fails to give a definite solution for many of the issues raised.

One of the most significant observations is from Jackson (1997) who gives a comprehensive evaluation of Regionalism and GATT through a legal analysis of GATT Article XXIV and its regional clauses. It indicates that the legal criteria for permissible regional arrangement remained ambiguous and the reconciliation between the political and economic motives of regional integration is largely ignored. The arguments and consultations on regionalism would positively influence the arrangements to soften its impact on multilateral trade. A thorough review of regional arrangements with out cutting on its form or nature, before providing it as a departure from the MFN and other obligations is suggested. With the trend towards freer trade on the rise, it is suspected that the over all debate on preferential arrangements is reducing. The literature is limited to a detailed purview of Article XXIV and excludes the more recent issues on proliferation of FTAs.

Chimni (2004) argues that the significance and role of present day International Institutions, political economic and social has passed through different stages of renewal and that a novel approach in the light of contemporary developments is the need of the time. In analyzing the WTO, he argues that, countries are required to shed their sovereign economic space in this multilateral forum. He expresses the concern that, while the developing countries are also required to do so, there is no substantial special and differential treatment given for them which runs against the spirit of WTO. This argument goes well with the case of modern RTAs, which tend to treat its partners at par.

Srinivasan (1999) observes that the enabling clause in effect exempted developing countries from many GATT obligations and allowed them to engage in preferential trade among themselves as well as to receive preferential treatments by developed countries. In this context he observes that far from helping developing countries integrate with the world economy, these departures from MFN in fact slowed such integration. Further he examines the logical inconsistency in the Article XXIV and its implementation. He makes it abundantly clear that the procedures laid down in Article XXIV to examine the consistency of FTAs with WTO have not worked. He also critically examines the concept of 'open regionalism.'

Mathis (2002) makes a detailed examination of Article XXIV right from the evolution and focuses on the many aspects of the provision. He attempts to enlist and analyse

the internal trade requirement for meeting the criteria laid down in Article XXIV, and delves into the jurisprudence on the interpretation of Article XXIV emerging under the GATT Working Party as well as the WTO Panel and Appellate Body decisions. Though an effective examination of the legal provision under Article XXIV, the wider spectrum of issues to be addressed in the debate surrounding regionalism is lacking.

Zakir Hafez (2003) offers another comprehensive review of RTAs and GATT Article XXIV while discussing the historical background of the Article, types of RTAs permitted and the legal requirements for its formation. He examines the special criteria for RTAs among developing countries under Part IV of GATT on Trade and Development and explores the disciplining of RTAs under the GATT/WTO. His observation of a weak discipline and negligible jurisprudential development in regulation of RTAs concludes with strong remarks on the need for improving the existing discipline and considers the responsibility of CONTRCTING PARTIES or WTO members to ensure proper discipline for RTAs under the GATT/WTO.

Sungjoon Cho (2001) makes a detailed and comprehensive analysis of various dimensions of regionalism. He examines the origins of trade regionalism through various theoretical lenses. Further he discusses the absence of legal discipline of trade regionalism under the GATT 1947 system and explores how it was finally achieved under the WTO framework in legislative as well as judicial terms. He suggests a potential solution to this problem by describing a new paradigm consisting of converging trade blocs as structure and *jus gentium* of international trade as a unified operational norm.

Daniel Yuichi Kono (2002) also examines the question whether free trade agreements (FTAs) help or hinder multilateral liberalization. He observes that there is no consensus on the impact of FTAs on the multilateral trading system. He argues that given the diversity among FTAs and their members the universalistic arguments on its effect on multilateral trading system is tenuous. He places his arguments on two hypotheses that FTAs are building blocks for members whose intra-FTA and extra-FTA comparative advantages converge and FTAs are stumbling blocks for members whose intra-FTA and extra-FTA comparative advantages diverge. His analysis however draws facts and figures from European Free Trade Association which is limited in analyzing the impact of FTAs. Matsushita (2004) observes that spread of

FTAs may undermine the basis for the multilateral trading system and it would be the task for members of WTO to ensure that WTO disciplines are effectively applied to prevent FTAs from being too exclusive and discriminatory in relation to outside parties. He concludes that many of the legal problems surrounding the relationship between the WTO rules and FTAs are still unresolved. According to him, there should be a way in which the multilateral trading system represented by WTO and the FTAs can co-exist and complement each other. However, he fails to suggest how to achieve the same.

On the other end, Valentine Zahrnt (2005) observes that enhancement of the effectiveness of the WTO negotiations by regionalism are not sufficiently appreciated. He argues that regionalism extends the zone of agreement in WTO negotiations, helps reducing and managing the complexity of WTO negotiations and curbs the risks of participation in the WTO. Also, Hung Lin (2003) favours regional integration as a catalyst for multilateral trade liberalization with a positive impact in providing solutions for developmental problems and role in conflict prevention. At the same time, he cautions that regionalism in the absence of strong multilateral system may generate protectionist pressures.

Further, the GATT law and practice and the WTO Yearbook for various years provide volumes of information on the interest and practice of state parties on this subject. The WTO analytical index provides the existing and emerging case law as well as the legal jurisprudence on the subject.

Apart from the conventional debates on the topic, scholars have written extensively on other dimensions of the study. A study by Prabhash Ranjan and Aparna Sivpuri (2005) focuses on the implications of Regional and Bilateral Trade Agreements with respect to Bio-Diversity. The paper exposes the inherent contradictions between UPOV and Convention on Biological Diversity (CBD) and thus shows how the signing of RTAs and BTAs between developed and developing countries is converting CBD in to a dead treaty for the latter. The scholars argue for the need to bring UPOV in conformity with CBD so that RTAs and BTAs would not be able to render CBD ineffective. Bryan Mercurio (2006) skull out various TRIPS-Plus provisions negotiated and included in many US RTAs and gives an illustrative study of its impact on the pharmaceutical sector and public health as an attempt by the US

to push TRIPS-Plus at multilateral level. However the possible legal incompatibility arising out of different parameters at multilateral and regional levels is overlooked by the author. The issues under multilateral and regional service liberalizations are sketched in the study by Krajewski (2006) who also examines the disciplines on domestic regulation, government procurement, subsidies and emergency safeguard measures under selected regional arrangements to arrive at some lessons for negotiating in the GATS context. Antonio Rivas (2006) illustrates the FTA Rules of Origin as another issue determining the flow of trade and hence the necessity to ensure strict interpretation of Article XXIV to minimize the trade-diverting effects of origin rules. In the abundant literature on non-conventional issues arising in contemporary RTAs, however, a comprehensive study to identify the areas of conflicts existing and likely to arise in the two parallel legal regimes, is seriously lacking.

From a perusal of the above-mentioned literature it is to be understood that various scholars have written on the subject matter of regionalism and multilateralism and that ample secondary sources including books, articles and discussion papers are available. Though they have dealt with the various aspects and implications of the subject, a concrete study has not been done from an Indian perspective. At a time when RTAs are mushrooming rampantly in the global trade and in view of the increased role these RTAs play in the global economy such a study on the legal and policy approach towards regionalism seems to be pertinent.



**I.6. Scope of the Study**

The conventional debate on multilateralism versus regionalism has changed considerably over the time. With the ever expanding nature and scope of modern RTAs, the issues involved, its depth and inclusiveness also changed. The tension between the multilateral and regional ethos continues to create new and interesting debates in the academic circle. The recent shift of focus of the major trading economies from multilateralism to regionalism has further intensified the debate. Several volumes of literature have been produced on the above subject. Till recently the regionalism was considered as more or less contained within the legal and political framework of the GATT/WTO. With the standstill in WTO negotiations, countries are eagerly pushing RTAs and it is interesting to note that trading blocs are

emerging with vigour. In their efforts to liberalize trade, countries go much beyond the WTO framework to create rules and disciplines in new areas and sectors often not governed by WTO. Thus multilateralism and regionalism have created two parallel legal regimes operating in the same plane. The legal complexities involved in the co-existence of these legal regimes are high, given the fact that countries are members to one or more RTAs at the same time when they are members of WTO. These complexities give rise to regulatory confusions and other inherent and inevitable conflicts.

The present study examines the existing legal framework for RTAs under the GATT/WTO and its weakness in exerting the disciplines. In this attempt, the study explores the historical evolution of the disciplines and the subsequent legislative developments in the GATT/WTO. The important GATT/WTO cases are also discussed for an understanding on the emerging jurisprudence on the subject. The study also examines some of the policy issues associated with modern RTAs and its implications. In this regard, the study is limited and focused on some of the policy issues surfacing in RTAs. The attempt is to identify the legal and policy challenges raised by RTAs and its larger impact on the multilateral trading system. The study also covers the Indian approach and practice to RTAs. However, the study is focused and has not addressed all the legal issues related to RTAs. The constitutional as well as the jurisdictional issues could be themes for in depth studies. The present study in its legal examination has limited itself to issues associated with the legal text of the discipline, its interpretation and practice. In the policy front, the present study has identified two major areas – TRIPS and GATS – to test the hypothesis of 'WTO-Plus' in the RTAs and hence the examination is limited to these two broad areas. The issues are critically looked upon from a developing country perspective and have placed some suggestions towards the conclusion.

### I.7. Research Questions

1. Whether the Regional Trade Agreements supplement the multilateral trade liberalization or weaken it?
2. What kind of a comprehensive legal discipline could ensure co-existence and minimize conflicts between the multilateralism and regionalism?

3. What implications, if any, the present surge of regionalism will have on the existing legal framework of multilateral trading system?
4. Whether this surge of RTAs benefits and takes into account concerns of developing countries?

**I.8. Hypotheses**

1. The existing multilateral legal framework that incorporates provisions relating to RTAs as embodied primarily within World Trade Organization (WTO) requires new formulations and interpretations to validate the scope, applicability and legality of increasing number of RTAs.
2. The existing disciplines and procedures under WTO applying to RTAs require substantial clarification and strengthening.

**I.9. Research Methodology**

The Study is done on the basis of the available primary sources including the relevant legal texts of the WTO Agreement and the Covered Agreements, other multilateral/bilateral trade agreements, GATT/WTO documents, GATT/WTO Dispute Settlement Reports, relevant documents/briefs prepared by the Member States to the WTO and the policy papers published by the Government of India. The secondary sources include books, articles, institutional working papers, discussion papers and relevant Internet sources. The Study initially applies the historical method to understand the development of disciplines governing regional trade agreements through the legal texts, various documents and other available secondary sources. Also, it adopts comparative and analytical methods to study the features of multilateralism and regionalism and to examine the recent trends in modern RTAs. In view of limited literature on Indian approach to Regionalism, an attempt has been made to discuss and take views from authoritative sources including concerned Ministry officials.

## I.10. Overview of the Chapters

The study is divided into the following chapters.

Chapter I: Introduction – This chapter introduces the subject as well as the structure of the proposed study. It elaborates the background of regionalism in the multilateral framework and justifies the relevance and importance of the study. It also provides the overview of the chapters and its theme.

Chapter II: Evolution of Regional Trade Agreements: An Overview – This chapter provides a historical sketch on the evolution of regionalism in international trade. It further discusses the issues on desirability of regionalism enunciating the views of different scholars and considers the WTO position on the issue.

Chapter III: Shaping GATT/WTO Principles on RTAs: Content and Meaning – This chapter provides a brief analysis of the historical evolution and formation of GATT Article XXIV and its later interpretations. In the above attempt, the chapter briefly discusses the negotiating history and the gradual development of regional exception provisions in GATT/WTO. It explains the legal disciplines under Article XXIV of GATT, Article V of GATS and the Enabling Clause by discussing the key provisions and its applications. It also examines the significant legislative and jurisprudential aspects in interpretation of the provisions.

Chapter IV: GATT/WTO Jurisprudence on Regional Trade Agreements – This chapter deals with some of the important GATT/WTO disputes concerning regional trade provisions and elaborately discusses the arguments of the parties and the observations and findings of the Panel and Appellate Body with respect to Article XXIV.

Chapter V: Indian Approach to Regionalism – This chapter elaborates the Indian position on regionalism. It also discusses the Indian practice on regionalism and critically examines India's various RTAs. The nature, scope and compatibility of agreements are also examined in detail. The constitutional issues related to the Indian practice in RTAs are also briefly discussed.

Chapter VI: Regional Trade Agreements: Incorporating the WTO-Plus Agenda – This chapter generally looks at the WTO-Plus issues in RTAs and particularly the TRIPS-Plus and GATS-Plus trends as case studies. It also examines the legal intricacies of the regional rule making exercises undertaken in many modern RTAs and its impact for multilateralism.

Chapter VII: Conclusion – This chapter concludes the main findings of the study and suggests certain proposals.

## Chapter II

## Evolution of Regional Trade Agreements: An Overview

### II.1. Introduction

As of 15 May 2011, some 489 RTAs, counting goods and services notifications separately, have been notified to the GATT/WTO. Of these, 358 RTAs were notified under Article XXIV of the GATT 1947 or GATT 1994; 36 under the Enabling Clause and 95 under the Article V of the GATS. At the same date, 297 Agreements were in force (WTO RTA Database 2011). The recent proliferation of RTAs through the 'second'[1] and 'third'[2] wave of regionalism has triggered scholars to think on the impact of regionalism on the multilateral trading system. The debate on 'regionalism versus multilateralism' has produced immense literature on the subject. As already discussed, the two major schools of thought in this debate, one opposing regionalism and one in favour of regionalism are led by scholars from different disciplines. However, there are also views expressed as to that there could be no outright rejection or acceptance of regionalism but it depends on the scope and nature of individual agreements. The discourse on the desirability of regionalism is growing and an analysis and examination of the same is highly relevant in proceeding with the subject.

The major thrust of the debate on regionalism is its impact on the multilateral trading system under the WTO. It is often argued that regionalism has supplemented the multilateral trade liberalization in some manner while it has supplanted the process of multilateral liberalization being an exception to the MFN principle. The WTO also has approached regionalism with care and caution. While it has acknowledged the role of regionalism in liberalizing trade, it has cautioned on the unprecedented growth and changing nature of regionalism. The WTO endeavours to ensure that the regionalism is not trade diverting or at best to minimize the trade diverting effects of regionalism.

[1] The 'second wave' of regionalism, as Bhagwati (1999a) termed it, began in the mid-1980s and reached its apex with the launch and completion of the Uruguay Round of GATT negotiations. The important developments noted with second regionalism were the change in the attitude of the US in favour of preferential trading agreements and the planned and organized deepening of economic integration in Western Europe.

[2] The more recent literature identifies the 'third wave of regionalism' since the conclusion of the Uruguay Round (Carpenter 2009).

WTO has also taken legislative as well as institutional measures for improving the surveillance and regulation of the growing number of RTAs. In this background, this chapter attempts to examine the regionalism in trade, its evolution and impact on the multilateral trading system.

## II.2. Evolution and Growth of RTAs

While regional trade organizations have existed all through the GATT era, in the early post war period many were created more for political reasons than to truly foster regional economic integration. This trend has changed substantially over the period. There are a number of reasons for the recent spurge in the proliferation of RTAs. Some argue that there are three major reasons for the current prominence of regional trade arrangements (Yeung et al. 1999). The first is that the process of multilateral trade liberalization is too slow for countries anxious to benefit from the gains available from trade. They point out that, as the GATT-WTO system has grown in both the number of participating countries and in the diversity of the philosophical view points of its members, the negotiation process has been lengthened and the rate at which progress can be made has slowed. More countries clearly means more time, but the diversity of economic philosophies is probably more important. The diversity of interest represented at the GATT/WTO means that finding a consensus on an expanded role for the GATT/WTO becomes difficult and often appears impossible. Countries begin to look for alternatives to the GATT. Regional trade arrangements provide one alternative.

The second reason stated for the recent popularity of regionalism in trade is that since the late 1970s, economic growth in developed economies has slowed. This has meant budget deficits, cut backs to social programmes established on the basis of the growth rates of the 1960s and early 1970s, continuing and, in some countries, sustained high levels of unemployment. Governments have been desperate to find ways to rekindle economic growth. In the gloom of the 1980 and 1990s, the one aspect of developed economies which has shown continued growth is international trade. The long process of GATT tariff reductions yielded benefits from trade. Market complementarity in developed countries led to growing intra-industry trade. Regional trade avenues

appeared to provide the means to capitalize on trade's ability to act as an 'engine of growth' (Yeung et al. 1999).

The third argument for the popularity of regionalism in trade in the late 1980s and the 1990s is the generally admitted failure of the protectionist import substitution policy previously chosen by many developing countries as their economic strategy. While import substitution had initially fostered economic growth, once (often small) domestic markets for manufacturers were satisfied by local production, growth could not be sustained. Developing countries began to search for ways to open their economies and to access larger markets. Regional trade avenues were one means to accomplish this change. It also mattered as in regional trade arrangements, the pace of change could be controlled and the degree of economic differences was less compared to the developed countries. It added to the pace that the international organizations such as the World Bank and the International Monetary Fund encouraged the opening of economies and tied their assistance to reforms aimed at integrating isolated economies into international markets (Yeung et al. 1999).

Further, there are many other identified factors which have contributed for the recent renewed interest of countries in regionalism after the failure of the first regionalism in 1960s. The phenomenon of increasing flows of international investment and the geographic spread of manufacturing away from the North America and Western Europe as a result of globalization's technical changes is one factor. The effect of globalization demanded large adjustment costs for many nations as their economies were increasingly exposed to international pressures and competition. Countries have chosen regional trade arrangements as a potential means of slowing the effects of globalization. This move was under the presumption that regional trade arrangements will provide domestic economies with a sufficient period of adjustment to allow them to become more competitive. Hence they got the opportunity first to test and adjust regionally and then multilaterally. For developing countries and especially the newly industrialized countries, the growth and development of regional economies is well related to the process of regional economic integration and intra-regional economic cooperation. Consequently, they have shown greater interest in ensuring the integrity of these

interdependent links and relationships through regional trade arrangements (Yeung et al. 1999).

As the nature of international trade has changed substantially during the current era, the risks of possible trade diversion due to regionalism have also been reduced. This is because of the increased role and spread of transnational corporations. The likelihood of efficient producers being replaced by inefficient ones is less likely in the case of transnational corporations than when national firms engage in international transactions. As foreign direct investment is crucial in the success of transnational corporations, they welcome regional trading arrangements since they facilitate intra-regional investment (Yeung et al. 1999).

The success of the EU also triggered a belief among some nations that regional trading arrangements provide a means to secure countervailing power. The slow progress of multilateral trade liberalization coupled with the impatience of countries prompted nations to pursue regionalism. The failure of the GATT to effectively deal with the non-tariff barriers also spurred regionalism.

Developing countries also have shown greater interest in regionalism, since they view it as an opportunity for development. They hope that the economic growth potential of regional trade arrangements would provide a means of reducing domestic threats to stability (Mack and Ravenhill 1994; Singh and Bernauer 1993). Moreover, the shift in the attitude of the US was a major cause. The ultimate defender of multilateralism, actively pursuing regional agreements as a part of their trade policy influenced other nations. As Yeung et al. (1999) puts it,

> 'if the nation with the largest GDP in the world, which also enjoys economic and political hegemony (though in absolute terms this is gradually declining) chooses regionalism as a policy tool, others will follow.'

### II.2.1. Political Reasons for Proliferation

The proliferation of RTAs and the related developments in international trade have drawn considerable attention from scholars[3] including political scientists. They have explored both the political causes of the international economic phenomena and the economic causes of international political phenomena. Political scientists have attempted to theorize the motivation behind the formation of regional arrangements, from different perspectives. Functionalists[4] argue that governments establish Regional Trade Agreements in response to various functional demands from domestic quarters to enhance the economic welfare. Addressing these functional needs, RTAs gather necessary support from domestic constituencies and other groups, which enables for further integration. Another prominent political explanation for the formation of RTAs is the theory of 'constructivism' which argues that, above the functional and economic reasons, it is strong communal interest such as collective security which plays part in the formation of RTAs. This theory finds little acceptance among scholars.[5] The widely accepted view is that the key motivations behind the regionalism in trade are political and economical. Another set of political philosophers[6] highlight the power relations in international politics to explain the formations of RTAs. According to this view the political alliance influences the pattern of international trade and similarly that, the alliance reflects in the formations of RTAs. It is important to keep in mind that

[3] The views of economists are discussed in Section II.2.2 and that of the international lawyers are discussed in Section II.2.3.

[4] The functionalist school of international cooperation emerged in the post-war era as a response to the Realist School of thought which views that, due to the structure of the international system and the motivations of actors within that system, deep cooperation and integration among states is impossible. Adherents to the functionalist school of international cooperation argue that a limited, narrowly focused approach to cooperation will ultimately lead to more broadly defined cooperation in other important policy areas. Then cooperation in a seemingly technical issue area is carefully planned by technocrats and overseen by a supranational governing body, functionalists believe that the result will inevitably be deeper integration among the participating states. In other words, rather than attempting to coordinate directly on major policy areas (such as defense or security policy), states should first attempt to bridge the 'cooperative gap' by concentrating their efforts on cooperation in a non-controversial field. For the functionalist, narrowly tailored cooperation is seen as a means to a more beneficial, politically motivated end. Mitrany (1960), Lindberg and Scheingold (1971) are some of the functionalists and Nye (1971), Rosamond (2000) are regarded as neo-functionalists. See also, Abbott and Snidal (1998) and Moore (2005) for further reading.

[5] See generally the views of Kupchan (1997).

[6] See generally the views of political philosophers like Robert Gilpin (1975); Stephen D. Krasner (1976); Kenneth N. Waltz (1979); Joseph M. Grieco (1988); Mansfield and Milner (1997), etc.

particular theoretical approach is appropriate to particular circumstance. Hence it is difficult to subscribe to a single view and reject the rest.

Still, Ravenhill's (2005) authoritative classification of political motivations for RTAs contains seven important reasons drawn from the political economy literature. According to him, states enter into RTAs because of the fear of being left out or marginalized. It is observed that countries that are politically weak, geographically isolated and/or economically dependent are the most likely to succumb to this syndrome. This kind of motivation among countries could be found where regional competition is often intense and the fear of being left out is perceived to be very real. Governments often enter into RTAs as a way to enhance economic co-operation, which will in turn, create confidence within the region. This sort of confidence building exercise would be benefited from security aspects. Thus regions suffering from security problems (very broadly defined) are likely to engage in RTAs precisely out of the motivation to enhance security via economic means. In regions that have histories of conflict and lack traditions of inter-governmental partnership, the pursuit of economic co-operation can be a first step towards building security conference (Damro 2006).[7] New security threats, such as environmental damage, illegal migration, organized crimes, drug smuggling and international terrorism (Krause and Williams 1996) also act as political motivations for the formation of RTAs. This political motivation has recently been evident in the behaviour of developed regional partners. Regional economic co-operation agreements can address these new security threats either directly or indirectly.[8] States are also often motivated to enter into RTAs as a way to increase their bargaining power in international negotiations. States could use this bargaining power to increase leverage in negotiations with firms, other states and international organizations. RTAs can also increase members' leverage in negotiations

[7] The EU has received considerable scholarly attention, in this respect, as successfully used economic integration in attaining security. Many see the origin of EU as a conscious decision to build confidence among its members and help to ensure their security (Damro 2006). Scholars note similar motivations for the creation of ASEAN (Acharya 1997; Acharya 2001; Acharya and Goh 2005). Similar security motivations are found in the creation of other regional arrangements like South African Development Community in Africa (SADC, formerly South African Development Co-ordination Conference) (Karns and Mingst 2004); MERCOSUR in Latin America (Devlin and Davis 1998) and Gulf Cooperation Council (GCC) in the Middle East (Karns and Mingst 2004).

[8] These concerns of the countries are evident from the practice of countries by including environment, labour and human rights standards in their respective RTAs.

with transnational corporations (TNCs) and foreign investors.[9] RTAs are also used as instruments that lock-in domestic reforms. RTAs are capable of mobilizing regional solidarity and can lock-in reforms. When governments begin to adopt liberalization-trading agendas, their decisions can be 'locked-in' through RTAs so as to make it more difficult for future governments to reverse the pro-liberalization trading agenda (Frankel 1997). [10] It is viewed that RTAs allow politicians to satisfy domestic constituents when compared to the policy alternative of unilateral liberalization. Hence, politicians pursue regionalism (and multilateralism) to increase their chances of being re-elected. The reason is that the pursuit of an RTA can be sold more easily by politicians to their constituents because of the reciprocal nature of the agreement. [11] It is widely accepted that states often prefer RTAs because they are simply easier to negotiate compared to the multilateral negotiations. It is often argued that regional negotiations are easier compared to the multilateral ones since the number of states participating will be less. Larger the number of participants, lesser the chances for consensus.

### II.2.2. Economic Analysis of RTAs

Economists have attempted to theorize the phenomena of regionalism in trade well before the classic work of Viner in 1950.[12] A systematic body of literature on theory of customs union started to come out only after the pioneering work of Viner (1950). The prevailing view prior to that could be found in Heberler (1936) who noted that "customs unions are always welcomed... the economic advantage of customs unions can be proved by the theory of comparative costs." Viner challenged this view and

[9] Many regional economic arrangements established by developing states in 1950s-70s were intended to increase their bargaining power with the TNCs (Ravenhill 2005: 122). Developing states have also demonstrated their ability to increase their negotiating leverage in international organizations by pooling their diplomatic resources with other members of a regional economic agreement. Developed countries have also undertaken such measures for the same reasons (Ravenhill 2005: 122-123).

[10] The lock-in effects of RTAs are explicit from the observation of Milner that 'NAFTA provided a means to lock in the trade liberalization strategy that had been undertaken unilaterally. By joining a FTA, Mexico could not unilaterally change its policies and return to protectionism, at least not without incurring substantial costs...This increased the credibility of its policy moves and hence their effectiveness' (Milner 1998: 28-29).

[11] A number of RTAs had become subject of hot political debates in different countries. NAFTA offered economic and political benefits and became a politically charged issue during elections in the US and Canada (Milner 1998). The Indian agreement with ASEAN was a hot political topic during 2009 Parliament Elections especially in Southern states like Kerala.

[12] The early main works on the subject were those of List (1885), Gregory (1921), Haberler (1936) etc.

introduced the concept of 'trade creation' and 'trade diversion.'[13] Trade creating occurs when high cost products are replaced by low cost ones and trade diversions occurs when low cost products are replaced by high cost ones.

Meade (1956) elaborates on the theory of Viner and suggests that a fairly safe generalization about customs union possible is that the formation of a customs union is more likely to raise than lower economic welfare, the higher are the initial duties on each other's products which the partner countries remove. However, he criticizes Viner's analysis pointing out that his theory is silent on the aspect how to calculate the loss on the (uneconomic) trade diversion and gain on (economic) trade creation. He also suggests that the Viner's analysis tend to overlook the factor of trade expansion one which is favourable to the case for customs unions.[14] Immediately after Meade, Lipsey rejected the simple theory that trade creation is good and trade diversion is bad on the basis of terms of consumption effects. Lipsey (1957) puts forward the proposition that a change brought about by a customs union is in general good or bad necessarily implies a welfare judgment. But the effect of a customs union on welfare must be based on the effects on the 'utility' of world consumption. He argues that when consumption effects are allowed for, the simple conclusion that trade creation is 'good' and trade diversion is 'bad' are no longer valid.[15] Later, Shibata (1971) explains the economic theory and impact of the free trade areas. He rejects the popular hypothesis that customs unions are more welfare enhancing (trade creating) compared to free trade

[13] According to Viner's theory whether a particular customs union is a move in the right or in a wrong direction depends on which of the two types of consequences arise out of that customs union. Where the trade creating force is predominant, one of the members at least must benefit, both may benefit, the two combines must have a net benefit and the world at large benefits; but the outside world loses, in the short run at least, and can gain in the long run. Where the trade diverting effect is predominant one at least of the member countries is bound to be injured, both may be injured, two combined will suffer a net injury, and there will be injury to the outside world and to the world at large.

[14] According to Meade, a reduction in the import duty levied on the export of a partner country may totally divert existing trade from a cheaper outside source; but as it will reduce the market price of the product inside the importing partner country, there will be an expansion of the total imports of that country. The gain arising from the trade expansion effects of the formation of a customs union is overlooked by Viner and in all cases weighs the scales more heavily than he (Viner) allows in favour of the customs union (Meade 1956).

[15] According to Lipsey, a country may form a trade-diverting customs union and yet gain an increase in welfare in the sense that every consumer moves to a higher indifference curve and if the trade-diverting customs union raises welfare of member country, then it raises the world's welfare. Thus, he rejects the general hypothesis that trade creating customs unions are 'good' and trade diverting are 'bad' (Lipsey 1957)

areas.[16] He also observes that a group of countries having specialized economies tends to form a free trade area whereas a group of countries having diversified (protected) economies tends to form a customs union.

The distinct views and approaches of modern scholars on the theories and welfare effects of customs unions and preferential trade agreements have also been analyzed and classified in various works.[17] Some economists argue that the geographical or regional concentration of trade is attributable to the "natural factor of geographical proximity." Other economists reject this natural factor explanation and instead focus on the "artificial factor of preferential trade policy" of nations. These divergent views[18] on the source of trade regionalism among economists also lead to different positions regarding the desirability of RTAs (Cho 2001: 425).

The Proximity School economists contend that distance and resultant transportation costs create natural trading blocs.[19] Strong empirical confirmation of this thesis can be found in the special trading arrangements that exist between United States and Canada, and within Europe (Cho 2001). An interesting branch of this position is the "gravity model," which posits that trade between two countries is proportional to the volume of their Gross Domestic Product (GDP) and inversely related to the distance between them (Cho 2001). In other words trade increase with decrease in distance and is directly related to the GDP of countries. In a close analysis of the trends in RTAs, it can be found that the distance or geographical proximity alone is not the key criteria in the formation of RTAs. Instead of this proximity, Jagdish Bhagwati (1992: 534), finds reasons for the formation of RTAs in the discriminatory (preferential) trade policies, that is, the trade policies play a crucial role in the trade concentration in RTAs. It can

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[16] According to Shibata, there is no *a priori* ground for making a general statement as to which of the two systems (customs union or free trade areas) is better, even from the point of view of the welfare of the world as a whole, because the net effect of trade-diverting effects, trade-creating effects and consumption effects, arising from the formation of either of these type of economic union depends on a large number of unknown parameters and variables involved in a large number of demand and supply schedules of the commodities thus affected.

[17] Viner-Lipsey-Meade approach, Kemp-Wan approach, Cooper-Massell-Bhagwati approach, Brecher-Bhagwati approach. For more detailed discussion, see Bhagwati (1991).

[18] See, the views of Jeffrey A. Frankel (1997) and Fritz Machlup (1977).

[19] According to Proximity School, reducing transportation costs boosts trade volume and welfare. Yet, the distance between member countries should not be so close as to make a bloc meaningless, ("supernatural" trading bloc), not so far that the costs of forming the bloc overwrites the benefits ("unnatural" trading bloc) (Cho 2001: 425).

thus be found that there are different opinions among scholars regarding the origin and reasons of trade regionalism. Contrasting views, political as well as economic, points to the reality that the manifestations of trade regionalism are neither uniform nor so simple. With regard to the existing circumstances, the reasons for the formation of RTAs tend to vary from RTA to RTA. So it is not logical to conclude on a single theory either political or economic in defining the root cause of the formation of RTAs.

### II.2.3. The Legal Basis

It is also often argued that there are legal issues and reasons for the evolution and proliferation of the RTAs.

There existed a number of preferential trade arrangements[20] between countries well before the inception of the GATT which intended to establish a non preferential, non discriminatory trade system. Contracting Parties were not willing to give up these preferential arrangements which were in existence for a long time. The Commonwealth Preference was the central issue of negotiations during the Havana and ITO Charter. The US was so keen to dismantle all preferences while the UK wanted to continue with the Commonwealth Preferences. The Commonwealth Preferences was not the only inter-war preference that existed during the period. Thus the emergence of non-discrimination clause affected these systems as a determination on how to treat these other systems including Frontier Traffic, Customs Union, Tariff Assimilation, Regional Preferences and Low Tariff Clubs became inevitable (Mathis 2002: 25). This necessitated the drafters of the GATT to provide a legal framework to encompass the existing systems within the GATT. Hence, a number of proposals for providing exception for regional trade arrangements came up in the Preparatory Conferences.[21]

Though not all the proposals in this regard were accepted, the Geneva draft ITO and the original GATT incorporated clauses allowing exception for regional arrangements.[22] It is also to be noted that complete regional formations in the form of customs union

[20] It was mostly the Commonwealth Preferences. The growth of commerce in the fifteenth and sixteenth centuries is attributed to the network of trade relationships between European countries through a variety of trade treaties, particularly in Friendship, Commerce and Navigation Treaties.
[21] See generally, Jackson (1969) for a detailed study.
[22] See, GATT Final Act 1947 (hereinafter referred to as GATT 1947), Geneva 55 UNTS 194.

territories have long received exemption from the MFN principles in bilateral agreements. It could be found that this treaty practice was carried forward before Geneva and was retained through the Havana Conference and the final ITO Charter.[23]

Exemption for regional arrangements under GATT was also necessary to avoid the legal conflict arising out of obligations under regional and multilateral agreements.[24] Hence the ITO draft Charter Article on regional exceptions was incorporated into the GATT Final Act.[25] The purpose of the provision was to exempt the existing arrangements from the GATT obligations. It had never foreseen the possible proliferation of regional and other preferential arrangements that would have emerged later.

The following section looks into the history of trade regionalism which enables us to understand the gradual and steady growth of RTAs across the globe.

### II.3. Regionalism: A Historical Sketch

The concept or practice of regionalism is not a new phenomenon. The history of RTAs can be traced backed to 1660s. Though not organized into any determinable form and deficient of the present day characteristics of RTAs, regionalism was well identified in ancient days. The first form of organized regionalism is said to be found in Europe. Hence, regionalism is considered as a European invention (UNDP 2005: 18). In 1660, about twelve provinces in the Paris basin (*cinq grosses fermes*) erected a common tariff wall. During 1700s and 1900s, that is, in the colonial era, many European powers had preferential trade arrangements with each others' empires (UNDP 2005: 18). One of the earliest manifestations of a regionalism or regional trade alliance bearing the essential

[23] For a detailed discussion on the negotiating history of regional preference clauses (Article XXIV of the GATT), see Chapter III.

[24] Originally the regional agreements were entered into by group of countries which have agreed to reduce trade barriers among themselves. It favoured trade from within the group and discriminated against the trade flow from non-member countries. This departure from MFN was permitted by Article XXIV of GATT.

[25] See Special Protocol relating to Article XXIV of the GATT, 1948 which came into force on 7 June 1948, 62 UNTS 56, as well as the discussion in GATT Documents GATT/1/21 dated 11 March 1948; GATT/1/23 dated 12 March 1948.

features of contemporary RTAs was the German Zollverein.[26] The customs union formed in 1834 functioned as an important catalyst for a united Germany later in the century.

It is noted, however, that the efforts to reduce tariffs reciprocally largely failed during the 1830s and 1840s, as they had failed in the 1780s and 1790s. The impetus towards the open trade regime of the nineteenth century came from the bilateral Anglo-French commercial treaties of 1860. Britain adopted the MFN clause so that its tariff reductions benefited all nations while France adopted a two-tier system as the other countries faced the "conventional" tariff rates for their exports to France. Other European states quickly sought agreements with France to secure equal treatment for their own goods so that the impetus for the movement towards liberalization of world trade was the trade diversion that was to accompany the integration of Europe's two largest nations. By what turned out to be fortuitous circumstances, a single bilateral agreement to reduce tariffs blossomed into dozens of bilateral accords, resulting effectively in a multilateral arrangement.[27] Following the abrupt end of bilateralism with the advent of the First World War, there were no multilateral conferences except for some hosted by the League of Nations. The effort to replace unconditional MFN could not succeed and bilateralism continued (De Melo and Panagariya 1992).

After the political and economic turbulence, as a consequence of the World Wars in the first half of the twentieth century, a Customs Union was created in 1947 among Belgium, Netherlands and Luxembourg (hereinafter referred to as, BENELUX), followed by the Treaty of Rome that created the landmark European Economic Community (hereinafter referred to as EEC) in 1957. Thereafter, EEC continued to

[26] German Zollverein (1834-1870) was a customs union established to eliminate tariff barriers which were inhibiting trade among the numerous states of the German Confederation. In 1880, Prussia abolished internal customs and formed a North German Zollverein which in 1834 became the German Zollverein after merging with two similar unions, the South German Zollverein and the Central German Trade Union, both founded in 1828. A rival customs union, the Steuerverein of Central Germany was also organized in 1834. A series of treaties (1851-54) joined it to the Zollverein which then comprised nearly all the German States except Austria, the two Mecklenburgs and the Hanseatic towns. Prussia, despite the insistence of several states, was unwilling to admit Austria to the Union, but the two countries negotiated a separate tariff treaty. See, the details at the URL: http://encylopedia.com/html/z/zollvere.asp [Accessed 31 May 2010].

[27] In 1908, Britain had MFN Agreements with 46 countries, Germany with 30 countries and France with 20 countries.

expand its linkages to the east as well as to the Mediterranean in the South (UNDP 2005: 18). In the 1950s, with the approval of the United States, the European Community[28] (hereinafter referred to as EC) emerged onto the international scenario, ushering in a new wave of regionalism.

In the 1960s what was termed as the 'First Regionalism' flourished across the world.[29] First Regionalism neglected or perhaps misunderstood the economic aspects of their operation as they were motivated principally by political considerations. In other words, the driving force for the First Regionalism was political considerations rather than the economic benefits and other aspects involved. As a result of this attitude the trade generating effect of these regional blocs were very limited. Though some of these regional efforts achieved the desired object, the First Regionalism largely failed in integrating economies or generating large volumes of trade.

The 'Second Regionalism' (Bhagwati 1991) emerged much later, in the late eighties and early nineties, reaching its apex with the launch and completion of the Uruguay Round of GATT negotiations. The Second Regionalism, which was unprecedented in its intensity, gave rise to the emergence of strong regional trading blocs across the globe. This strong emergence was represented by powerful regional trade blocs such as the North American Free Trade Agreement (hereinafter referred to as NAFTA)[30], the European Union (hereinafter referred to as EU), the Southern Core Common Market (hereinafter referred to as Mercosur)[31], the Asia Pacific Economic Co-operation (hereinafter referred to as APEC)[32] and Association of South East Asian Nations

[28] Before 1991, the EC was a term applied collectively to three different international legal entities. These three legal entities were the European Coal and Steel Communities (ECSC), formed by the Treaty of Paris in 1951; the European Atomic Energy Community (Euratom), formed by the Treaty of Rome in 1957 and the European Economic Community (EEC) formed by a second Treaty of Rome in 1957. Of the three the EEC came to occupy a dominant position. Since the 1993 Maastricht Treaty, European Integration has been based on a different legal identity, the European Union (EU). For more discussion see, Shaw (1996).

[29] For an elaborate discussion, see Jagdish Bhagwati's works on regionalism especially, Bhagwati (1991).

[30] The legal text is available at 32 ILM 289 (1993).

[31] For details see, http://www.mercosur.int/msweb [Accessed on 6 February 2010].

[32] For details see, http://www.apec.org [Accessed on 6 February 2010].

(hereinafter referred to as ASEAN)[33] among others. The proliferation of RTAs still continues unabated.[34]

In the 1960s and 1970s, numerous attempts to promote regional trade arrangements faltered. The Central American Common Market (CACM)[35], the Andean Pact,[36] and a number of other efforts for regional integration through regional trade agreements between African countries failed to achieve desired intra regional liberalization and economic integration. The efforts towards regionalism gathered pace during the Uruguay Round negotiations in the 1980s and 1990s, despite such an experience. During the four year period between 1990 and 1994, no fewer than 33 new regional integration arrangements were notified to the GATT (WTO 1995b) and many other existing regional arrangements were deepened and widened. The collapse of the Communist Council for Mutual Economic Assistance (hereinafter referred to as MEA) in the Eastern and Central Europe in 1991 was an additional incentive for the expansion of regional integration in Europe. This surge of regionalism made the Uruguay Round negotiations very difficult and contributed to its compromise outcome (Michalak and Gibbs 1997: 266). The establishment of WTO in place of GATT[37] was hailed as a great success and proof that multilateralism was alive and well, though serious doubts remained over its ability to resolve trade disputes and to achieve the goal of global free trade.

### II.4. Regional Co-operation among Developing Countries

Since the multilateral trade and investment flows were biased in favour of the developed nations in the North, collective self-reliance through greater South-South co-

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[33] For details see, http://www.aseansec.org/15528.htm [Accessed on 6 February 2010].

[34] A number of Free Trade Agreements are under negotiations and many are in pipeline. The trend is likely to continue. For details see, WTO RTA Database (2011).

[35] CACM was established in 1960 as an economic trade organization of five Central American countries of Guatemala, El Salvador, Honduras, Nicaragua and Costa Rica, but it collapsed in 1969 due to conflict between Honduras and El Salvador, and was reinstated in 1991. It was made redundant by the Free Trade Areas of Americas and DR-CAFTA in 2005.

[36] The Andean Pact was originally founded in 1969 by Bolivia, Chile, Colombia, Ecuador and Peru. Venezuela which had joined in 1976 withdrew in 2006 alleging that the FTA signed by Colombia and Peru with US caused irreparable injury to the Pact. The Andean Community together with Mercosur comprises two main trading blocs of the South America.

[37] GATT was replaced by WTO on 1 January 2005. GATT 1994 which is annexed to the Marrakesh Agreement establishing the World Trade Organization (hereinafter, the WTO Agreement) consists of the provisions in GATT 1947 within it.

operation was considered an important means of reducing the dependence of developing countries on the global economic and political regime dominated by the industrialized countries. It was, therefore, not surprising to see continuing experimentation by developing-country governments with a number of regional arrangements formed between the sixties and the eighties.[38] Among developing countries, in particular, regionalism was a response to growing protectionist tendencies by the EU, NAFTA and the major markets of Japan and the United States. As a result most regions had witnessed the formation of one or more regional grouping during the past four or five decades. In this context the gradual growth and proliferation of RTAs in the different continents is examined hereunder.

### II.4.1. Africa

In the trade history of the African continent we can find a large number of groupings which have attempted economic integration. RTAs proliferated in Africa after independence from colonial rule. However, it could be found that in most cases the formal agreements in the region have not led to substantial trade liberalization. New agreements replaced the old ones in many cases, but without much success. The major reason for the failure of regional trade blocs in Africa was the general failure of the States in the region. Colonial heritage was one strong force in the formation of African trade blocs.[39]

The East-African Community[40] between Kenya, Tanzania and Uganda was one of the earliest customs unions among developing countries. It had features like common external tariffs, free trade within the area, common customs and income tax

[38] The Association of Southeast Asia (ASA, 1961), the Association of South-East Asian Nations (ASEAN, 1967), the Southern African Development Coordination Conference (SADCC, 1979), the East African Community (1967), the Preferential Trade Area for Eastern and Southern Africa (1981), the Gulf Cooperation Council (1981), the Central American Common Market (1960), the Latin American Free Trade Association (LAFTA, 1960), the Andean Pact (1969) and the Caribbean Common Market (CARICOM, 1973) are some of the examples of early attempts for regional cooperation among developing countries.

[39] Many of the countries in Sub Saharan Africa receive non-reciprocal preferences bases on GSP with a number of countries, the ACP-Lome Agreement, and other agreements with the European Union.

[40] The origin of the East African Community was in 1967 when free trade between Uganda and Kenya was established. Tanganyika (Tanzania), the third member of the Community joined gradually. The Community had unequal partners with Kenya being far more developed then Tanganyika (Tanzania) and Uganda. There were ideological, political and economic differences between Kenya and the other partners which ultimately resulted in the break up of the Community in 1977.

administrations, common currency and common communication services. Later, the East African Cooperation Agreement was launched in 1996 to reform an older regional bloc, the East African Common Market (EACM) which was later renamed as East African Economic Community. The former French Colonies in West Africa also made similar attempts to form regional blocs in trade. The countries of the former French Equatorial Africa namely, Congo (Brazzaville), Central African Republic, Chad, Cameroon and Gabon formed a customs union in January 1966.[41] The customs union was more strictly defined and far reaching compared to any other grouping in Africa. Another African grouping was the West African Economic and Monetary Union (hereinafter referred to as CEAO).[42] The Union was an attempt to form a common market in the agreeing nations and to harmonize some laws. With the slight change in membership, all member nations are now part of the CFA Franc Bloc (as are the nations of the Economic and Customs Union of the Central African States[43] (UDEAC)) and therefore use a common currency. In mid-1995 an interim scheme of preferential tariff was agreed to.

The South African Customs Union (hereinafter referred to as SACU),[44] established in 1910 is one of the oldest customs unions. A relatively integrated labour and goods market exists among member countries and common external tariffs and excise tax form the basis of a revenue-sharing programme for the bloc. All member countries except Botswana are members of the Common Monetary Area in which the South African rand serves as legal tender. The Free Trade Agreement of the SACU members with the United States in 2002 led to the creation of a South African Customs Union

[41] As former French colonies, they had special trading relationships with France and to a lesser extent the EEC countries. These countries continued to enjoy preferential treatment even after they introduced a common external tariff against third parties.

[42] The Customs Union of West African States (CUWAS, sometimes called West African Customs Union (WACU)) formed in 1959 and included 7 of the 8 states that emerged from French West Africa. 6 of the 7 (all except Mauritania) had a common currency and free trade in goods. Problems arose with the distribution of tariff revenue, and in 1966 the group was superseded by the West African Economic Community (CEAO). CEAO had little more success than CUWAS. In 1994, a new organization the West African Economic and Monetary Union (WAEMU or UEMOA) took the place of CEAO (WTO 1995a: 38).

[43] The Economic and Customs Union of the Central African States (UDEAC) in Central Africa grew out of the Equatorial Customs Union (ECU) formed in 1959 between the Central African Republic, Chad, Congo and Gabon. Incremental steps and expansion in the ECU during 1959-66 led to the formation of UDEAC (which included Cameroon) in 1966 (WTO 1995a: 38).

[44] SACU members are Botswana, Lesotho, Namibia, South Africa and Swaziland.

Free Trade Area. More recently, US initiative of the African Growth and Opportunity Act (AGOA) contains a comprehensive framework for commercial co-operation.

During the twentieth century, most African states have continued to confront colonial legacies of arbitrary territorial boundaries, weak and inefficient state structures, profound social and cultural cleavages along with high population growth rates and protracted violent conflicts. In spite of this we could see relatively extensive regional sub-groups and integration schemes in Africa.

The Economic Community of West African States (ECOWAS) is one of the major regional economic groupings in Africa. The ECOWAS was created by the 1975 Lagos Treaty incorporating sixteen West African countries.[45] ECOWAS is the largest group of African States besides the AEC in the continent. Unlike many of the African agreements, ECOWAS spans countries with French, English and Portuguese colonial ties. Political stability has been extremely precarious in the ECOWAS region with half of the successful coup d'etat between 1958 and 1989 occurring here. Economic security is little better, with 14 of the 16 earning 60 per cent of their export revenues from just a couple of crops (Frankel 1997: 272). ECOWAS members were keen to emulate features of the European Economic integration process and officially committed themselves to freeing the movement of goods, services, labour and capital, harmonizing fiscal and agricultural policy and eventually the removal of trade barriers and application of a common external tariff. However, little practical realization of these ambitious goals has emerged.

Arab Maghreb Customs Union was formed in the 1960s but was for the most part not implemented. In 1989 the member countries[46] formed the Arab Maghreb Union to "work gradually towards the realization of the freedom of movement of people, goods, services and capital." During the 1970s the European Community promoted greater cooperation within North Africa. During 1980s the EC became increasingly concerned for the socio-economic stability and population growth in the region and has thus supported the activities of the Arab Maghreb Union and the adjoining Mashreq group

[45] Benin, Burkina Faso, Cape Verde, Cote d'Ivoire, Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Mauritania, Niger, Nigeria, Senegal, Sierra Leone, Togo.
[46] Algeria, Libya, Mauritania, Morocco and Tunisia.

in diversifying economic activity, increasing intra-regional trade and reducing economic dependency. In 1991, the group agreed to an ambitious integration process, starting with an FTA in 1992, a Common Market by 2000 and eventually a Monetary Union.

The Common Market for Eastern and Southern Africa and the Preferential Trade Area for Eastern and Southern Africa (COMESA) comprises two smaller nations of the Economic Community of the Countries of the Great Lakes (CEPGL) plus all the nations of the SADC (except Botswana and South Africa) and few other nations.[47] It is the third largest group in Sub Saharan Africa, behind ECOWAS and AEC. As its name suggests, COMESA's goal is the formation of a common market and eventually an economic union. It started as the Preferential Trade Area for Eastern and Southern Africa formed in the 1980s to facilitate economic, agricultural and industrial cooperation and aimed eventually to introduce common market provisions amongst its members, but was revised and renamed in 1993.

South African Development Co-ordination Conference (SADCC)[48] was formed in 1980 by the 'frontline' or neighbouring states of the former Republic of South Africa in a response to the political and economical influence of the former Republic. The SADCC proclaimed the limited goal of economic cooperation among the member nations. Undertaking projects based mainly in infrastructure development, the union achieved its aim. In 1992, SADCC signed a Treaty that expanded the scope of the integration and changed its name to South African Development Community (SADC).[49] Strongly supported by the EU and the post-apartheid South African government, this grouping had taken important steps towards coherent regional industrial development strategies to bolster the weak as well as stronger members. The SADCC members also formed an important sub-group within the wider Lome Conventions, which brought together the EU and 70 developing states from Africa, the Caribbean and the Pacific.

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[47] Angola, Burundi, Comoros, Djibouti, Ethiopia, Kenya, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Rwanda, Somalia, Sudan, Swaziland, Tanzania, Uganda, Zambia and Zimbabwe.
[48] Members are Angola, Botswana, Lesotho, Malawi, Mauritius, Mozambique, Namibia, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.
[49] Namibia joined the group in 1990; South Africa joined the group in 1994 and Mauritius in 1995.

African Economic Community (AEC) is a large supra regional trade body calling for eventual integration and liberalization. The AEC Agreement has been signed, and it entered into force in 1994 (IMF 1994: 210). The AEC calls for tight integration among the 51 member countries. It strives more for an EU level of integration. It calls for an economic union in six stages: strengthening of regional arrangements, a Pan-African FTA, a customs union, a common market, and a monetary union with a transitional period of upto 34 years (IMF 1994: 210). Included in this agreement is a political establishment tightly linked to the Organization for African Unity (OAU) and closely resembling the European Union, with a Council of Ministers, Court of Justice, and a Pan African Parliament (Frankel 1997). There were also few other African agreements, past and present like the Economic Community of the Countries of the Great Lakes (CEGPL), the Cross Border Initiative, the Indian Ocean Commission (IOC), and the East African Cooperation Agreement which was a reformed form of East African Common Market (EAEC). The Economic Community of Central African States (ECCAS or CEEAC) and the Mano River Union (MRU) are also worth mentioning.

### II.4.2. Asia - Pacific

The first trace of regionalism in trade in Asia which precipitated as a reaction to the emergence of the common market in Europe and Latin America was the Association of Southeast Asia (ASA). Malaysia, Thailand and Philippines were the countries which established this grouping. Progress towards the achievement of the declared goals of ASA remained very slow largely due to strained political relations between the ASA partners especially between Malaysia and Philippines. The political tensions between the two countries over Sabah finally led to the collapse of ASA in 1964. Meanwhile, the creation of a Malaysian Common Market including Malaya, Singapore, Sabah and Sarawak in 1963 amounted to a miniature economic union within the proposed bigger common market of ASA partners (Bhalla and Bhalla 1997: 5). The ASA was followed by Association of Southeast Asian Nations (or ASEAN).[50] Though the economic co-

[50] ASEAN was established on 8 August 1967 in Bangkok by the five original Member Countries, namely, Indonesia, Malaysia, Philippines, Singapore, and Thailand. Brunei Darussalam joined on 8 January 1984, Vietnam on 28 July 1995, Laos and Myanmar on 23 July 1997, and Cambodia on 30 April 1999. The ASEAN region has a population of about 500 million, a total area of 4.5 million square kilometers, a combined gross domestic product of US$737 billion, and a total trade of US$ 720 billion.

operation within the ASEAN has been rather slow, the recent initiatives have added pace for the progressive integration of ASEAN in the region.[51]

### II.4.2.a. South Asian Association for Regional Cooperation

The Asian countries especially in the south have a long standing history and tradition of cooperation. All the countries have a colonial history. However, ever since Japan successfully challenged the western powers, a sense of Asian solidarity gripped the minds of Asian statesmen. Jawaharlal Nehru was the first South Asian leader to moot an association for cooperation in the region. He organized an Asian Relations Conference, even before the Indian independence, in March 1947. The Asian Relations Conference highlighted the awakening of Asia and thought about the turbulent times ahead. However, the political conditions and mistrust among the nations and the traditional political conflicts in the region delayed the formation of any meaningful organization. The feeling of the need for regional organization in South Asia became more acute in the 1970s. The successful experiments of regional cooperation all over the world in spite of different perceptions and bilateral disputes of the associating states provided incentive to the statesmen of South Asia also.

The regional groupings of the South Asian nations i.e. SAARC (South Asian Association for Regional Co-operation) [52] was established when its Charter was formally adopted on 8 December 1985 by the Heads of State or Government of Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan and Sri Lanka. SAARC provides a platform for the peoples of South Asia to work together in a spirit of friendship, trust and understanding. It aims to accelerate the process of economic and social development in Member States. The Agreement on SAARC Preferential Trading Arrangement (SAPTA) was signed in 1993 and four rounds of trade negotiations have been concluded. With the objective of moving towards a South Asian Economic Union (SAEU), the Agreement on South Asian Free Trade Area (SAFTA) was signed during

[51] ASEAN Free Trade Area (AFTA) was established in 1992. The objective was to increase the ASEAN region's competitive advantages on a production base geared for the world market. The Common Effective Preferential Tariff (CEPT) Agreement for AFTA required the members to reduce the tariff rates to 0 – 5 per cent on a wide range of products traced within the region. In principle, the free trade area covers all manufactured and agricultural products, although the time table for reducing tariffs and removing quantitative restrictions and other non-tariff barriers differ.

[52] For details see, http://www.saarc-sec.org [Accessed on 6 February 2010].

the Twelfth Summit in Islamabad in January 2004. SAFTA came into force on 1 January 2006 and has proved to be the most comprehensive mechanism to date that strives to achieve intra-regional economic cooperation. Unlike SAPTA, the SAFTA has a well defined approach to trade liberalization. It specifies time staggered tariff reductions for each member country. SAFTA concedes more than SAPTA on trade-related dispute resolution. The presence of ASEAN and SAARC has thus brought Asia to the new era of regionalism.

Another significant initiative, the Asia-Pacific Economic Cooperation (APEC) was formed in January 1989 by 12 Asia-Pacific economies.[53] APEC's primary goal is to support sustainable economic growth and prosperity in the Asia – Pacific region. APEC aims at building a dynamic and harmonious Asia – Pacific community by championing free and open trade and investment, promoting and accelerating regional economic integration, encouraging economic and technical cooperation, enhancing human security and facilitating a favourable and sustainable business environment.

APEC is the largest economic group in the Pacific region. The potential APEC bloc, while yet to be fully negotiated and still a long way from realization is important for many reasons. First it would encompass more than 2 billion people (nearly 40 per cent of the world's population) and includes nations with approximately 55 per cent of world output. The APEC group includes four of the top six fastest growing nations in the world and half of the bloc is in the top 20 fastest growing nations (based on per capita income growth). However, APEC has no designs for deep integration but merely posits free trade (and investment) in the region. Even this modest goal appears quite a way off. For the advanced industrialized nations of the group, trade is to be liberalized by 2010, and for the rest of the group the target date is 2020 (Frankel 1997). The main role of APEC under the current and foreseeable circumstances is to be a forum for high quality discussion on economic policy issues, and to facilitate information dissemination and exchange. This is an important role as APEC brings together Asian,

[53] Australia, Brunei Darussalam, Canada, Indonesia, Japan, Korea, Malaysia, New Zealand, the Philippines, Singapore, Thailand and the United States. China, China Hong Kong and Chinese Taipei joined in 1991. Mexico and Papua New Guinea followed in 1993. Chile acceded in 1994 and in 1998, Peru, Russia and Viet Nam joined and presently the membership is 21.

Australasian, Russia and such key Pacific powers and the US in one forum. India has also expressed its interest in APEC membership.[54]

East Asian Economic Caucus (EAEC) was a Malaysian initiative to establish the East Asian Economic Group (EAEG) as a bloc to counter NAFTA and the EC. After meeting a generally lukewarm Asian reception and outright disapproval by the US, the original idea was sealed back (Frankel 1997).

The Australia – New Zealand Closer Economic Relations Trade Agreement (ANZCERTA) is another major initiative in the region. The first reciprocal tariff preferences between Australia and New Zealand were introduced in 1922 as part of the British Preference System. A new emphasis on cooperation between Australia and New Zealand became inevitable in 1960s when the United Kingdom moved towards joining the European Economic Community. The New Zealand – Australia Free Trade Agreement (also referred as NAFTA) dealing mainly with tariffs and some other types of trade barriers came into force on 1 January 1966. NAFTA was, however, a limited and flawed agreement. By early 1979, NAFTA had descended into chaos and petty disputes[55] because of frustrated aspirations for the broadening of trans-Tasman[56] free trade. Negotiations on a new agreement between the countries started in 1980. Finally, ANZCERTA was signed on 28 March 1983 and was deemed to have come into force on 1 January 1983. ANZCERTA aims to strengthen broader relationship between the countries and to develop closer economic relation between the Member States through mutually beneficial expansion of free trade. It also provides for gradual and progressive elimination of trade barriers. ANZCERTA has presently achieved a true Free Trade Area with full free trade in goods and to a large extent in services (Prove 1995).

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[54] India had applied for APEC membership. The 9th APEC Ministerial Meeting has laid down certain guidelines for membership. This included geographical location in the Asia-Pacific region; broad based economic linkages with other APEC members in terms of size and share; significant integration with the world economy; and broad liberalization and deregulation policies to encourage external linkages. India more than meets these criteria and therefore has a strong case to be a member of APEC (Asher and Sen 2007).

[55] By 1970s NAFTA and its predecessors had resulted in the removal of tariffs and quantitative restrictions on 80 per cent of trade. However, further advances under NAFTA were limited because it lacked a mechanism for compulsorily removing the remaining restrictions. There were disputes on non-removal of export incentives and import license restrictions by New Zealand. New Zealand wanted better access for its dairy products.

[56] Trans-Tasman trade refers to trade between New Zealand and Australia. Often it is referred as trade over Tasman Sea.

### II.4.3. Latin, Central and North America and the Caribbean

The countries of Latin and Central America have persistently sought alternative economic development strategies and adjustment to their powerful US neighbour. These activities have been driven primarily by ideological, economic and cultural expressions of difference. By the 1990, the region was characterized by wide spread economic and political groupings which reflected economic strengths and strategies, particularly of the rapidly industrializing countries as well as political and security concerns.

Factors such as a wide geographical area, different development levels and strategies of countries and the existence of political and military conflict have been important in shaping sub-regional cooperation and integration. Countries in Latin America have consistently pursued different forms of regional economic integration, as have Central American and Caribbean states. Many Latin American countries, by the 1950s, saw economic development as the key issue for their political survival and social prosperity. They feared that in an international economy driven by mass production and consumption, small import-dependent and non-industrialized countries would remain economically and politically peripheral. Regional economic integration schemes became vital to the survival and growth of Latin America. In short, political fears of economic marginalization and economic dominance (or hegemony) and the political influence of neighbouring US were key motivations for the Latin American countries to embrace regionalism.

Regional economic integration in Latin and Central America dates back to 1960 when both the Latin American Free Trade Association[57] (LAFTA) and the Central American Common Market (CACM) were established. These were some of the earliest efforts in forming regional groups in this region. The LAFTA was created by the 1960 Treaty of Montevideo.[58] The signatories hoped to create a common market in Latin America.

[57] The Latin American Free Trade Association (LAFTA) consisted of Argentina, Brazil, Chile, Mexico, Paraguay, Peru and Uruguay. The original treaty provided for the creation of a free trade area to expand intra regional trade and the promotion of industrial integration. In 1980, after 20 years of existence, LAFTA was replaced by the Latin American Integration Association (LAIA) formed by the Treaty of Montevideo.

[58] The Association consisted of Argentina, Brazil, Chile, Mexico, Paraguay, Peru and Uruguay.

LAFTA came into effect on 2 January 1962. In 1970, LAFTA was expanded to include Bolivia, Columbia, Ecuador and Venezuela. In 1980, the members re-organized LAFTA into the Latin American Integration Association (LAIA or ALADI in Spanish).[59]

By 1960, the Central American Common Market (CACM)[60] was formed. The arrangement included a customs union, a central bank and had a common external tariff applicable for the imports entering the common market. Though initially it was a success, the growing tensions and later conflict between El Salvador and Honduras resulted in the withdrawal of Honduras from the CACM. In 1970s and 1980s, the arrangement got further weakened due to the conflict and war in Nicaragua. However, in 1991, the members of the CACM renewed the framework and extended free trade arrangements with Mexico. CACM members remained keen to develop close links with the Caribbean Common Market (CARICOM)[61] which came into existence in 1973 (Bhalla and Bhalla 1997: 7).

The late 1960s witnessed the formation of the Andean Group[62] in South America. The Andean Group made major efforts to develop economic union. The Andean Pact is one of the oldest active regional groups in Latin America. The Andean Group was formed by LAFTA members who were dissatisfied with the course of integration but unwilling to resign from LAFTA and aimed at accommodating the different levels of development of their economies (Atkins 1995: 185). Andean Pact originally entered into force in 1969. In spite of the difficulties, the Group continued with the liberalization and integration process and got organized into the Andean Community in 1996.

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[59] Under LAIA, agreements have usually granted preferences in specific sectors rather than covering all trade or eliminating all barriers. However, negotiations are on for a deeper free trade agreement between Latin American countries.

[60] El Salvador, Guatemala, Honduras, Nicaragua and Costa Rica were members.

[61] Jamaica, Trinidad and Tobago, Barbados and Guyana. Subsequently, Antigua and Barbuda, the Bahamas, Belize, Dominica, Grenada, Montserrat, St. Christopher-Nieves, St. Lucia and St. Vincent joined CARICOM. In 1968 several Caribbean countries launched their own integration system, the Caribbean Free Trade Area (CARIFTA). In 1973 CARIFTA was replaced by the Caribbean Community and Common Market (CARICOM). CARICOM never came close to a common market, in part because the individual islands relied heavily on tariff revenue; in part because the trade between them was extremely limited (Bhalla and Bhalla 1997: 7).

[62] It comprised of Bolivia, Chile, Columbia, Ecuador, Peru and Venezuela. Chile left the Pact in 1976. Venezuela left the Pact in 2006.

MERCOSUR (Southern Common Market) is a major initiative in this region which was formed in 1991. MERCOSUR's origins trace back to 1985 when the Presidents of Argentina and Brazil signed the Argentina-Brazil Integration and Economic Cooperation Programme (PICE). Later, the MERCOSUR was founded in 1991 as the Regional Trade Agreement between Argentina, Brazil, Paraguay and Uruguay, by the Treaty of Asuncion, which was later amended and updated by the 1994 Treaty of Ouro Preto.[63] Its purpose was to promote free trade and the fluid movement of goods, people and currency. Arguably MERCOSUR is the most significant regional trade bloc in Latin America. Its full name is *Mercado Comun del Sur*, which means market of the South. MERCOSUR aims eventually at deeper integration: a common market, with free movement of goods, labour, services and capital. MERCOSUR is also actively pursuing links with countries outside the bloc.

North American Free Trade Agreement (NAFTA) was concluded in 1993 between Canada, the US and Mexico. NAFTA's origins lie in the earlier Canada – US Free Trade Agreement (1988). The US and Canada signed the Canada – US Free Trade Agreement in 1988 aiming at the removal of bilateral tariffs including those applicable to agricultural products, the removal of quantitative restrictions and many far reaching liberalization in trade including services and investment. The US entered into negotiations with the Mexico for a similar treaty. Canada was also asked to join, and the diplomatic negotiations dating back to 1991 between the three nations culminated in conclusion of NAFTA in 1993. NAFTA came into effect on 1 January 1994. It is one of the most extensive and advanced free trade agreements. It is also the largest existing trade agreement in the hemisphere in terms of economic size. It included the liberalization of investment and financial services, intellectual property rights, and unlike many trade agreements, liberalization in agriculture. Liberalization was also accomplished with textiles and autos, but strict rules of origin undid much of the gains in these sectors.

[63] Bolivia, Chile, Colombia, Ecuador and Peru are currently the associate members. Venezuela signed a membership agreement on 17 June 2006 and is officially made a member of MERCOSUR.

### II.4.4. Middle East

The Arab Common Market and the Arab Maghreb Union established in the sixties were the two notable efforts for regional co-operation in the Gulf region which were not implemented. Arab League, a political organization of 21 countries formed in 1945 through its sub group, the Council of Arab Economic Unity (CAEC) provided the forum for the creation of Arab Common Market.[64] While much of the original goal of a customs union has not been reached, tariffs on manufactured goods were for the most part eliminated by 1971. The presence of many non-tariff barriers, however, hampered its effectiveness.

The successful and the more encouraging example of regional co-operation in trade in the region is the Gulf Co-operation Council (GCC), formed in 1981[65] (Bhalla and Bhalla 1997: 7). Members of the GCC signed a Preferential Trade Agreement that entered into force in 1983. The Agreement led to the creation of FTA for agricultural and industrial (but not petroleum) products and to the free movement of the factors of production. Originally the Council attempted to form a customs union by 1986, but failed to implement a common external tariff. However, the minimum and maximum tariffs have been specified.

Earlier attempts for regional integration had failed largely because of the political conflicts in the region. Efforts and initiatives are being taken recently for achieving more integration in this region.

### II.4.5. Europe

During the post 1945 period, Western Europe gradually constituted itself as a highly integrated and cohesive grouping of economies and peoples. The formal process of European integration, characterized by the European Union (EU) has been and continues to be shaped according to particular historical and political concerns. One of the most significant features of the post 1945 era was the fundamental shift in power

[64] Arab Common Market initially consisted of Egypt, Iraq, Jordan and Syria when entered into force in 1965 and Libya, Mauritania and Yemen joined later (WTO 1995a: 37).
[65] Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and the United Arab Emirates were the countries who established the GCC.

and authority away from a European and empire oriented balance of power to a new competitive bipolar world. The change in the French political thinking and the consequent Schuman Plan[66] (announced by the then French Foreign Minister Robert Schuman) proved to be a decisive factor in the European integration.

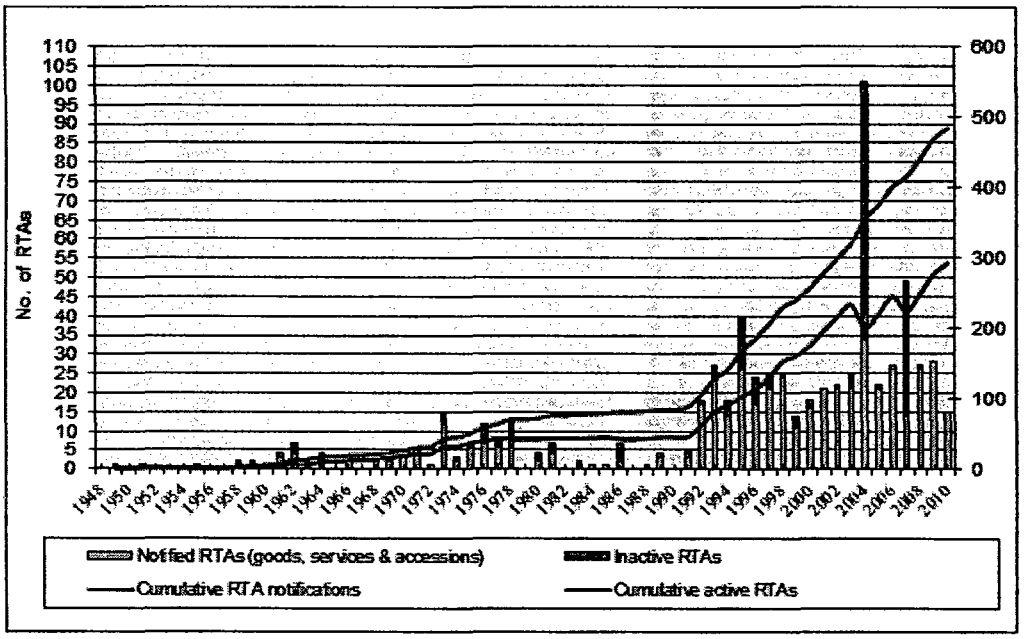
The subsequent development of the European Economic Community (EEC) and Euratom (European Atomic Community) resulted from a mix of factors: Benelux states were keen to widen sectoral economic integration into a customs union and common market. French government had ambitious civil nuclear programmes and political plans. Despite the uniform views on the scope and desirability of deeper integration the EEC did not emerge in 1958. During this period, other West European countries sought alternative mechanisms to achieve different objectives. The creation of the European Free Trade Association (EFTA) in 1960 as an industrial free trade area was as an outcome of this move. Later, EFTA members sought cooperative linkages with the EEC, particularly after the accession of two of its key members, Britain and Denmark to the EEC. As a result of wider economic and political change during the 1980s, the EFTA-EC (European Communities) relationship became progressively closer. The creation of the European Economic Area (EEA) in 1994 effectively extended much of the ECs activities to the EFTA countries, and in 1995 three EFTA members, Austria, Finland and Sweden joined the European Union (EU).

In short, the EU and the US have remained the two key players in the recent unprecedented proliferation of trade regionalism. Of the 87 notifications of FTAs to the WTO between 1990 and 2002, only 13 had no European partner (UNDP 2005). The US was one of the strong defenders of the GATT MFN Clause in the multilateral trade framework. Yet, it had adopted a benevolent attitude to European integration. A major shift in the US trade policy occurred with the adoption of US Trade and Tariff Act, 1984 which provided the Administration with the authority to enter into FTAs (UNDP

[66] The Schuman Plan of 1950 suggested that French and German production of coal and steel to be pooled, with decision making on production levels, prices and investment placed with a supra-national body. The outcome of the Schuman Plan was the European Coal and Steel Community (ECSC). Management of decision-making on coal and steel production, prices, investment and working conditions was entrusted with politically independent central institution of the ECSC. In addition, an Assembly exercising democratic oversight, a Court of Justice ensuring compliance with the ECSC laws, and a Council of Ministers representing government interests were also created. The ECSC represented a key development in the Western Europe's identity.

2005: 18-19). In 1988 the US entered into an FTA with Canada, which was subsequently widened to include Mexico to form the North American Free Trade Agreement (NAFTA). Thereafter, the US entered into numerous bilateral, regional and Free Trade Agreements with both developed and developing countries. In July 2005, the US House of Representatives approved the Central America FTA (hereinafter referred to as CAFTA) which intended to eliminate trade barriers among the US and 6 other parties [67](Crook 2005). Thus, it can be seen that the regionalization of trade is a continuing phenomenon in the global trade and its impact on the multilateral trade liberalization process is enormous and always a matter of concern for economists and other scholars. The continuing growth of RTAs and its accelerated pace in the recent years are evident from the chart shown below:

**Chart II.1: Evolution of RTAs (1948-2011)**




Source: WTO Secretariat[68]

From the above diagram it is quite explicit that the number of RTAs has exploded in the recent decades. The trend is likely to continue at least for sometime. The debate on the desirability of RTAs has been addressed from different theoretical perspectives.

[67] The parties were Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Dominican Republic
[68] The details are available at URL: http://www.wto.org/english/tratop_e/region_e/regfac_e.htm.

However, so far no definite conclusion has been arrived at on the possible impact of regionalism on multilateralism. Various theories have explained the economic impact of RTAs. However the need to discipline the RTAs and to contain regionalism within the multilateral framework is undisputed. Efforts in this direction have not delivered the desired results. Failing to contain the surge of RTAs meaningfully within the multilateral framework could derail the ongoing multilateral process itself. The WTO has taken several initiatives in this direction. The following section examines the WTO approach towards regionalism.

### II.5. WTO on Regionalism

The WTO provides for specific rules and conditions for preferential trade liberalization with RTAs. Way back in 1995, WTO came out with an assessment on RTAs which cautions on the impact of RTAs on the multilateral trade liberalization. The note observes that RTAs can compliment the multilateral trading system and help to build and strengthen the liberalization of trade multilaterally. At the same time it observes that the very nature of RTAs is discriminatory; they are a departure from the MFN principle, a corner stone of the multilateral trading system. The effects of RTAs on the global trade liberalization and economic growth are not clear given that the regional economic impact of RTAs is *ex ante* inherently ambiguous. The WTO Report (1995a) suggests that:

> In the face of the wide range of views on whether the world is moving inexorably towards integration on a global scale or towards a geographic concentration of trade, with the attendant risk of trade conflicts among the regional groups, the only sensible course of action is to accept that there is movement along both trades

that is, both regional and multilateral. The report further observes that:

> (t)he relative lack of success in enforcing the rules and procedures for customs unions and free trade areas is a concern, both as regards the specific issues involved and because of the implications it has for the broader credibility of the WTO system and its rules. This is especially true a time when the number of actual or planned regional integration agreements, and the attention they are getting from third countries, is large. Moreover, even if there is an affirmative answer to the question of whether regional integration agreements have been complementary to the multilateral process, experience cautions against

> assuming that post-Uruguay Round rules and procedures will be sufficient to guarantee that this will be the case with future agreements or, for that matter, with the evolution of current agreements (WTO 1995a).

It is yet disputed that the Uruguay Round had provided sufficient flesh and blood to the body of rules to enable it to regulate the existence and functioning of RTAs. However, the credibility of the WTO would be certainly compromised if any of its rules, including those relating to customs unions are not enforced. It should also be noted that whether rules regarding PTAs such as customs unions make sense, is also an important issue (Srinivasan 1999: 334). WTO also admits that the RTAs influence the multilateral trade liberalization process when it asserts that

> "(t)here is little question that the failed Brussels Ministerial in December 1990 and the spread of regional integration agreements (especially after 1990) were major factors in eliciting the concessions needed to conclude Uruguay Round" (WTO 1995a: 54).

It can be found that the proliferation of RTAs and its increased role and influence in multilateral trade is viewed seriously by the WTO while it observes that, 'though RTAs are designed to the advantage of the signatory countries, expected benefits may be undercut if distortions in resource allocations as well as trade and investment diversion, potentially present in any RTA process, are not minimized if not eliminated altogether. Concurrent MFN trade liberalization by RTA parties, either unilaterally or in the context of multilateral trade negotiations, can play an important role in defusing potential distortions, both at the regional and at the global level.'

Since the inception of GATT, RTAs have grown and influenced multilateralism. The need to tackle the challenge of regionalism has been always on the agenda of GATT/WTO. The GATT period witnessed hardly any improvement in dealing with regionalism. The weakness of GATT Article XXIV was evident and it became more and more explicit over the time.[69] WTO has undertaken a number of initiatives to strengthen the disciplines governing RTAs. By the time the Uruguay Round negotiations got underway (1986-1994), the so called "second wave" of regionalism had begun. Hence, it necessitated to deal with the challenge of regionalism.

[69] See Chapter III for more detailed discussions.

In the context of existing ambiguities and vagueness in the interpretation of Article XXIV of GATT, the GATT CONTRACTING PARTIES took a legislative step to strengthen the legal discipline in the area of regional trade particularly in the face of continued proliferation of RTAs. The legislative step was that the parties agreed on an 'Understanding on the Interpretation of Article XXIV of the General Agreement on Tariff and Trade 1994' ('The Understanding' hereinafter) during the Uruguay Round. The Understanding aimed at addressing some of the traditional controversial issues as well as clarifying and reaffirming the procedures and other practices in monitoring and reviewing the formation and functional aspects of RTAs.

The preamble of the Understanding on the Interpretation of Article XXIV acknowledged and reaffirmed the increased importance and vital role of RTAs in the present day world trade. The preamble emphasized on the positive contribution of RTAs in the liberalization and highlighted the "stumbling block" perspective of RTAs. At the same time, the preamble reminded of the need of substantial liberalization of trade without excluding any major sector of trade. The Understanding re-emphasized the importance of meeting the requirements of paragraphs 5, 6, 7 and 8 of Article XXIV while forming RTAs. It provided clarity to paragraph 5 of Article XXIV by clarifying the calculation method to assess whether the post RTA level of tariff outweighs the pre-RTA one. It was agreed in the Understanding that the assessment shall be based upon an overall assessment of weighted average tariff rates as well as applied tariffs. The Understanding wiped out the ambiguity in the term 'reasonable length of time' by defining it as 10 years and specifically provided that extra time shall be given only in exceptional cases and that too with full explanation.

The Understanding also explained the mechanism to be practiced for balancing tariff concessions through the negotiation of mutually satisfactory compensatory adjustment and withdrawal or modification of pre-existing tariffs. The above procedure was to be initiated when a member forming an RTA proposes to increase a "bound"[70] rather than "applied"[71] rate of duty. This provided member states to have some room for increasing their applied tariffs while forming an RTA without taking the tiring and complex

[70] Bound tariff is the ceiling tariff or maximum tariff that can be levied on a particular imported product.
[71] Applied tariff is tariff that is actually levied on an imported product.

process of tariff re-negotiation. Further, the provisions provided for reports by working parties, recommendations by the Council for Trade in Goods and other monitoring and surveillance mechanisms. It is pertinent to note that the Understanding provided that a working party shall recommend a plan and schedule for an interim agreement if it is not included in the submitted interim agreement. This provision enabled to resolve the many endless delays encountered in the final integration stage of many RTAs. Finally, the Understanding provided that the WTO Dispute Settlement procedure shall be invoked with respect to any dispute concerning Article XXIV. It put an end to a long standing controversy on the matter.

The Understanding was a legislative step intended to clarify the ambiguities that surrounded the RTAs. Though the Understanding achieved some level of progress, this legislative solution is insufficient because it focused mainly on tariffs or other financial charges. As a practical matter, however, the Understanding has basically challenged the economic aspects of Article XXIV, but could not answer legal questions related to non-tariff barriers or the environment or tackle key terms in Article XXIV (Nsour 2008: 417). In short, it is held that the Understanding could not achieve the desired results as explicit in the WTO Report (1995a: 20) which concluded that

> [w]hile the purpose of the Understanding on Article XXIV is to clarify certain areas where the application of Article XXIV had given rise to controversy in the past, and particularly as regards the external policy of customs unions, it fell short of addressing most of the difficult issues of interpretation noted....
>
> ...no consensus emerged in the Uruguay Round Negotiating Group on GATT Articles concerning proposals made by several participants (notably Japan), to clarify the substantially-all-trade requirement. It is evident, therefore, that most of the problems that have plagued the working party process were not solved in the Uruguay Round.

### II.5.1. Committee on Regional Trade Agreements

In the past the examination of the conformity of a regional agreement with the relevant GATT obligations was carried out by GATT Working Parties. Due to the vagueness and ambiguity in the interpretation of the legal text, the Working Party process on Article XXIV had been one of 'the most abused' in GATT; the principal criticism against the Working Parties were lack of its conclusiveness. In this context, Sampson

(1997: 87) observes that, the lack of conclusiveness of the Working Party process is a trend that can be traced to the examination of the European Economic Community in 1957.[72] While the Community did not confirm to GATT obligations, a finding in this direction could have spelt an end to GATT rather than the Community.

A marked improvement in the procedure relating to the examination of regional agreements has been achieved by WTO through the establishment of the Committee on Regional Trade Agreements.[73] As per the terms of reference, the Committee on Regional Trade Agreements (hereinafter referred to as the Committee) is to carry out all the examinations of agreements in accordance with the agreed procedures and terms of reference. The Committee is empowered to develop appropriate procedures to facilitate the examination process of the agreements. The formation of Committee to look after this affair was welcomed as the establishment of a large number of working parties, otherwise, along with the nomination of their Chairpersons for each agreement would have created great difficulties. Further, one Committee examining all agreements would facilitate the task of drawing conclusions about how to improve the examination process. Moreover, the Committee has particularly wide terms of reference, broad enough in fact to permit significant changes in the WTO concepts, principles and rules relating to regional trade agreements (Sampson 1997: 85). The Committee on Regional Trade Agreements has been mandated by WTO members 'to consider the systematic implications of regional agreements and initiatives for the multilateral trading system and the relationship between them and to make appropriate recommendations to the General Council.'[74] The Committee has concentrated its preliminary efforts on addressing the question whether the world trading system is moving to a world of rules at the regional level that compete with, or even contradict, multilateral rules, or are regional agreements developing regional rules which are complimentary to those in the WTO rule-based multilateral trading system and prepare the ground for future

[72] *Treaty Establishing the European Economic Community*, Report submitted by the Committee on the Rome Treaty to the CONTRACTING PARTIES on 29 November 1957, GATT Document L/778 of 20 December 1957.

[73] Decision of the General Council of 6 February 1996 (WT/L/127 dated 7 February 1996). The Committee on Regional Trade Agreements convened its first meeting on the 21 May 1996. Minutes of the meeting reported as WT/REG/M/1 dated 27 June 1996.

[74] Drawn from the 1999 Report of the Committee on Regional Trade Agreements to the General Council, WT/REG/8 of 11 October 1999.

multilateral disciplines (Sampson 1997: 84). The methodology adopted in this work is to compare across the regional agreements under examination in the Committee the various provisions of these agreements with those contained in the various WTO Agreements.

CRTA is primarily entrusted with two duties – first, to replace the working parties in reviewing the texts of RTAs under the GATT, GATS and the Enabling Clause and second, to make systemic studies on RTA-related concerns and issues.[75] The CRTA has discussed systemic issues, particularly related to Article XXIV, including the controversial phrases in Article XXIV. The CRTA has tackled critical questions including how to calculate the general incidence of duties after and before the formation of CUs and what the impacts would be of measures other than tariffs, such as anti-dumping, subsidies, technical standards, preferential rules of origin and countervailing measures (CRTA WT/REG/W/12 dated 10 February 1997). CRTA has also highlighted other key issues, such as the relationship between Article XXIV and the Understanding on Article XXIV.

Among other issues, CRTA has come out with the need of regulation for Customs Union and Free Trade Areas as different modes of RTAs and also noted that the rules of origin issues in RTAs are important and a subject of controversy, since it is not clear whether those rules of origin could be classified as "other regulations of commerce" under Article XXIV:5(b) (WT/REG/W/37 dated 2 March 2000).

The CRTA, however, faces many challenges in reviewing RTA reports. First, some WTO members take CRTA lightly and do not provide or delay providing accurate information abut their RTAs (Hafez 2003). Second, the large number of RTAs makes it even harder for the CRTA to accurately review in time (WT/REG/15 dated 3 November 2005). Third, the CRTA has never been specific and precise in its reports (WT/REG/8 dated 11 October 1999). Faced with clear difficulties in the surveillance of the WTO and concerned by the increasing number of RTAs, the WTO further took initiatives to address the issues. WTO members agreed on negotiations aimed at

[75] See the WTO website, Work of the Committee on Regional Trade Agreement, URL: http://www.wto.org/english/tratop_e/region_e/regcom_e.htm [Accessed on 6 February, 2010].

"clarifying and improving disciplines and procedures under the existing WTO provisions applying to regional trade agreements." The negotiations were pursued along two tracks: identifying the issues for negotiation including "substantive" issues (eg: systemic and legal issues) and holding consultations on procedural issues related to transparency of RTAs. Negotiations over substantive issues have shown great complexity and have experienced limited progress (World Trade Report 2007: 306). As far as the procedural issues are concerned, on 14 December 2006, the WTO's General Council established on a provisional basis a new WTO Transparency Mechanism for all Regional Trade Agreements (RTAs) (WT/L/671 dated 18 December 2006)[76].

The WTO Negotiating Group on Rules has presently started its review of the Transparency Mechanism and is considering replacing the existing Mechanism with a permanent one. Countries have submitted their views and proposals on the above. There are divergent views emerging on the issue of introducing permanent mechanism for review of RTAs.[77]

Thus, the WTO still holds the view that the GATT/WTO's role in the surveillance of the RTAs is so far ineffectual. However, there is an important new departure in the WTO's approach to regional agreements with the introduction of New Transparency Mechanism. The New Mechanism emphasizes a non-litigious approach to establishing a uniform and complete information base that will allow the WTO membership an improved understanding of RTAs. It is also important to note that this exercise is not intended to undermine the WTO's legal basis for dealing with RTAs but rather to strengthen it. The WTO is undertaking the above exercise through the Committee on Regional Trade Agreements (CRTA) which is entrusted with the review of RTAs.

[76] The Transparency Mechanism requires members to newly signed RTAs to provide the WTO with basic information on the RTA and all relevant contact information such as the timetables for the liberalization of trade. The Mechanism requires that this step should be fulfilled before the final ratification of the RTAs takes place. Under the Mechanism, the parties are required to notify the RTAs 'as early as possible' since it is ratified.

[77] See the proposals submitted by US (TN/RL/W/248 dated 24 January 2011), Ecuador (TN/RL/W/249 dated 24 January 2011) and Bolivia (TN/RL/W/250 dated 26 January 2011).

## II.6. Conclusion

Regionalism is not a new phenomenon. It could be traced back to the history of international trade. Its nature and course have changed over the time. However, its underlying principles have remained the same. Countries have entered into regionalism for reasons both economic and political. The balance between these two aspects varies in context and decides on the fate of many regional initiatives. Every part of the world has witnessed the rise of regionalism. Though the modern regionalism in trade is led by the US and the EU, Asia, Africa and Latin America have also given rise to regional trade blocs capable of influencing the global trade.

The traditional debate on the subject focused on the desirability of RTAs, in other words the 'trade creating' and 'trade diverting' effects of RTAs. Several studies have appeared on the conventional debate on 'regionalism versus multilateralism' but the precise impact on multilateral trading system is still hazy. Though there is no proven thesis out rightly rejecting regionalism or welcoming it, its impact on multilateralism is undoubted. WTO is also concerned with the implications of trade regionalism. WTO has acknowledged the role of regional trade agreements in the liberalization of trade. At the same time, it has cautioned of the possible trade diversion that the regional route could create. WTO, over the time, has emphasized the need to minimize the trade diverting potential of RTAs and has taken several steps in this direction. WTO has initiated legislative and institutional mechanisms to deal with the challenge posed by regionalism. The Committee on Regional Trade Agreements has been devised to look into the various aspects of RTAs. The Committee is empowered to examine the compatibility and other aspects in accordance with the agreed procedures and terms of reference. The establishment of the Committee is a remarkable development in addressing the issue of regionalism from a multilateral framework. The New Transparency Mechanism brought in by the WTO is another important step in this direction. Still the prevailing view is that the legal discipline governing regionalism needs to be strengthened considerably to deal with the modern challenges posed by the RTAs. The WTO is on its way to devising and developing proper legal and institutional mechanisms to tackle the challenge of regionalism.

In the final analysis, the instances of compatibility and conflict between the trading regimes are beyond the theoretical nuances. The economic interests of the country members in each regime decide the balance between regionalism and multilateralism. The inter relationship of the two regimes is still a matter of explanation as in each circumstance. The important question is whether the proliferation of regionalism circumvents the multilateral legal framework and its carefully calculated rules and regulations. In the present world order, the question is not a choice of either of the regimes but one of how to attain a coordinated coexistence. In setting the broader picture of the debate it has been attempted to bring forth a background for the study in these lines. However, to explore the debate and issues associated with the two regimes, a sound understanding of the legal provisions governing the subject is inevitable. The following chapter therefore examines the core legal provisions regulating regionalism under the GATT/WTO, its evolution, development, interpretation and practice.

## Chapter III

## Shaping GATT/WTO Principles on RTAs: Content and Meaning

### III.1. Introduction

The law and practice of regional preferences in international trade crystallized through the post-war trade negotiations of the Havana Conference and the ITO Charter. The ITO Draft Charter provision on regional exception was carried into the GATT through a protocol and that is the present GATT Article XXIV.[1] The developing countries held to the view that the GATT Article XXIV failed to fully address their aspirations for regional integration upon their terms. They continued with this demand which finally culminated in the Enabling Clause[2] provision in the Part IV of the GATT. The GATS Article V[3] also provided for similar kind of regional exceptions as GATT Article XXIV.

These regional exception provisions provide the legal basis for the formation and operation of the RTAs. Though they are expected to regulate the RTAs within the multilateral framework, to date this has not been effectively discharged.[4] The reason to a large extent could be attributed to the ambiguities surrounding the provisions since its drafting and continued application over the years. A thorough examination of the evolution, formulation and application of the legal text of the provisions definitely enables us to understand the inherent weaknesses of regulating regionalism in international trade and is also essential for the present study. This chapter examines the various legal provisions under GATT/WTO which allows for the formation of Regional Trade Agreements namely GATT Article XXIV, GATS Article V and the Enabling Clause.

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[1] GATT Final Act 1947 (hereinafter referred to as GATT 1947), Geneva, 55 UNTS 194, 1947, Article XXIV, at p. 264. For WTO Legal Text, see, WTO (1995), *The Results of the Uruguay Round of Multilateral Trade Negotiations: the Legal Texts*, Geneva: WTO. Also, 33 ILM 1125 (1994).

[2] Decision of the GATT CONTRACTING PARTIES on *Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries* (L/4903 dated 28 November 1979).

[3] See, the text of GATS at Annex IB of the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations in WTO (1995), *The Results of the Uruguay Round of Multilateral Trade Negotiations: the Legal Texts*, Geneva: WTO.

[4] It is viewed that one of the most prominent and difficult problems engendering exceptions to MFN and GATT is found in GATT Article XXIV, which provides exceptions for customs unions (CUs), free trade areas (FTAs) and interim agreements leading to either. This article has furnished an extremely large loophole for a wide variety of preferential arrangements (Jackson 1997: 165).

### III.2. Erection of High Tariff Barriers

The origin of MFN in international commercial matters could be traced to the seventeenth and eighteenth centuries. It is said that by 1860, the MFN became the common commerce law of the great European powers (Jackson 1969). By the end of the First World War, the Allies intended to establish the MFN principle. It could be noted that one of the Woodrow Wilson's Fourteen Points[5] (1918) urged "the establishment of an equality of trade conditions among all the nations consenting to the peace." However, the countries were rather in a mood for repudiating MFN. The policy and practice aimed, *inter alia*, at the rapid and targeted expansion of exports relative to other countries, the use of unfair competition in trade, the notably predatory dumping of exports with an intent to destroy competitive industries in other countries to prevent them from industrializing and the export of capital and personnel to obtain financial control or dominance over key foreign enterprises. The preamble of the 1916 Paris Economic Conference[6] has been cited by Hirschman[7] as evidence of the mood between the allies (Mathis 2002: 14). It stated:

> "[T]he representatives of the Allied governments... declare that, after forcing upon them the military contest in spite of all the efforts to avoid the conflict, the Empires of Central Europe are today preparing, in concert with their allies, for a contest on the economic plane, which will not only survive the reestablishment of peace, but will at that moment attain its full scope and intensity."

There was growing disillusion with the MFN in this period. This was demonstrated by the retention of preferential relations for a time between the European powers as to the central and neutral powers and to the United States (Viner 1950: 24). In the 1920s and early 1930s, country after country enacted trade barriers as a beggar-thy-neighbour approach which exacerbated the Great Depression[8] (Bhala 2005: 51). The

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[5] Text of Fourteen Points is available at URL: http://avalon.law.yale.edu/20th_century/wilson14.asp [Accessed on 6 February 2010].

[6] The text of resolution passed by the 1916 Paris Economic Conference is available at URL: http://query.nytimes.com/mem/archive-free/pdf?_r=1&res=9800E5D6113FE233A25754C2A9609C946796D6CF [Accessed on 6 February, 2010]

[7] See generally, Hirschman (1945), *National Power and the Structure of Foreign Trade*, Berkeley: University of California Press for detailed discussions.

[8] See generally, Kindleberger, Charles P. (1973), *The World in Depression: 1929-1939*, US: University of California Press for detailed study on Great Depression.

infamous Tariff Act of 1930[9] of the US worsened the economic scenario while the Great Britain responded by introducing a preferential trading system for its Empire (Bhala 2005: 51).

Within twenty years after the conclusion of the Versailles Peace,[10] the effects of the inter-war policies rose to alarming levels and were generally blamed for the cause of the great economic depression. Nationalism was rendered dangerous by its capacity to capture commercial policy instruments for its service. It was this linkage which raised the term "economic nationalism" and made it a common usage after the inter-war period. The allied approach at Versailles conflicted with that envisioned by the United States for a post-war system based on non-discrimination. The two views became conflicting in the economic sections of the final Treaty of Versailles. What was seen to emerge in the comparable period of post war planning for Second World War was a proposition relying upon the original non-discrimination provisions of the 'Fourteen Points.' According to one view, if economic nationalism required an environment tolerant of commercial discrimination the corrective policy was to change this environment so as to eliminate the conditions for discriminatory practices (Mathis 2002: 17).

Thus, there was no consensus among the major trading nations on installing the MFN principle at the conclusion of the First World War and throughout the inter-war period. Generally, the commercial policy and practice of the countries aimed at rapid and targeted expansion of exports relative to other countries. The countries often engaged in unfair competition for achieving this. In the 1920s and early 1930s countries raised more and more trade barriers as a beggar-thy-neighbour approach which exacerbated the Great Depression. These kinds of policies during the inter-war period are generally blamed for the cause of the economic depression. However, the

[9] The Smoot–Hawley Tariff Act of 1930, known under its official name, the Tariff Act of 1930, was an Act signed into law on 17 June 1930 that raised U.S. tariffs on over 20,000 imported goods to record levels. The ensuing retaliatory tariffs by U.S. trading partners reduced American exports and imports by more than half and according to some views may have contributed to the severity of the Great Depression. Ensuing laws have virtually eliminated the Act's most onerous provisions, yet it remains as permanent authority and a vehicle for trade legislation.

[10] The Treaty of Versailles was one of the peace treaties at the end of World War I. It ended the state of war between Germany and the Allied Powers. It was signed on 28 June 1919. The text of the Treaty is available as URL: http://history.sandiego.edu/gen/text/versaillestreaty/all440.html [Accessed on 6 February 2010]

post-war period witnessed a shift in the attitude of countries, especially the US and the UK, though they had different approaches to the non-discrimination principle.

### III.3. Dismantling Commonwealth Preference System

American planners placed the revival of the non-discrimination principle at the centre of their policy in the post-war economic arrangements. The intention was to curb the practices of economic nationalism and use of certain commercial instruments. The US post-war planners were united in their determination to break completely with the legacy of economic nationalism and economic isolation (Gardner 1980). While the revival of a non-discrimination principle was pre-eminent and ascendant in US policy, the desire to return to a liberal trading system was also rising in the United Kingdom.

Though this was the general mood in the countries, there was critical difference between the two, as the British considered that the first priority should be placed upon the reduction of trade barriers between the major partners and particularly upon the reduction of US barriers. The US was concerned with the various preferences practiced by countries especially the Commonwealth Preferences of Britain and one of its prime post- World War II objectives was the dismantling of trade preferences, especially the Commonwealth system.[11] In earlier times, British Imperial Preference had been cited by Americans as a best indicator of an open door policy. However, the Commonwealth system became a point of contention as preferences were expanded by the Ottawa Agreements of 1932[12] in response to the economic depression. This compelled the US to link its position on the resurrection of the MFN principle with the termination of the Commonwealth Preference system. Thus it could be found after the amendments introduced by the Ottawa Agreements, the Commonwealth Preference became the central issue of the negotiations. Over the years, the question of reintroducing non-discrimination to international trade came to the centre of US-British relationship. A major step in this direction was taken in the August 1941

[11] The details of the clash between the US and British policy and public opinion on the dismantling of Commonwealth Preferences could be found in Richard Gardner's (1980) work, *Sterling Dollar Diplomacy*, New York: Columbia University Press.

[12] Ottawa Agreements (1932) refers to a series of bilateral agreements between the United Kingdom and its Dominions for mutual tariff concessions and certain other commitments and constituted a system of imperial preferences to counter the impact of Great Depression.

Atlantic Charter,[13] the joint declaration of principles enunciated by President Roosevelt and Prime Minister Churchill. For the proposed declaration, the US had suggested the phrase "access without discrimination on equal terms" which was viewed with skepticism by the British for its implications for the 1932 Ottawa Agreements and the Commonwealth Preferences system and the counter proposal from their part was to drop the explicit reference to discrimination and to tie the obligations subject to the phrase "with due respect for their existing obligations." These responses indicated the importance the countries attached to their issue of preference. However, the MFN clause evolved through preparations of the Mutual Aid Agreements and during the stage of the International Trade Organization (ITO) preparatory work through Geneva in 1947.

Near the end of the process seeking legislative endorsement of the MFN principle, the emphasis on dismantling the Commonwealth Preference system became a conditional requirement for Congressional support of the ITO process itself. Not so ironically, linkage between the MFN and Commonwealth also was a significant factor in the loss of support in the Congress for the process in Geneva. This was demonstrated by the Administration's literal guarantee to Congress that US negotiators would deal a fatal blow to the Commonwealth Preference at the negotiations in Geneva. If this blow could not be delivered, the Administration admitted in open Congressional testimony that there would be little point in supporting the resulting ITO charter. Since ultimately the British did not yield their position, there was no retreat position for the Administration to stand upon other than to admit that the Charter negotiations had failed in their expressed purpose (Gardner 1980).

### III.4. ITO Negotiations and Regional Exception

Complete regional formations in the form of customs union territories had long received exemptions from the MFN principles in bilateral arrangements. It could be found that this treaty practice was carried forward before Geneva and was retained through the Havana Conference and the final ITO Charter. Throughout the negotiations, the debate over which preference system would be permitted to continue

[13] Atlantic Charter (1941) refers to the Joint Statement made in August 1941 by President Franklin D. Roosevelt and Prime Minister Winston Churchill of the common principles in the national policies of their respective countries which was to be a blueprint for the post-war world after the Second World War.

after MFN came into force and which new systems would be permitted to be established, was essentially a negotiation over the scope and application of the new MFN provisions itself.

Countries had their own reasons for adhering to the taste of preferences. The Allied countries which emerged victorious after the Second World War cared enough to write into the first Article of GATT more than just a command to extend trade concessions multilaterally and unconditionally. In doing so, they paid attention to their historical ties in Asia, Africa and Latin America. But not all the Great Powers agreed on or was in favour of the continuation of preferences. The primary goal which the United States sought to accomplish in the ITO charter and the GATT was dismantling of trading preferences and preferential systems, particularly the Commonwealth system. American goals were multiple: to obtain rehabilitation of the MFN principle, to promote the reduction of tariffs, to eliminate intra-imperial preferences via a multilateral framework and to remove official trade barrier other than duties (Viner 1950: 110).

It is ironical to note that the US position was that the less-developed countries could best develop by participating fully in a multilateral non-discriminatory system with the lowest possible levels of tariffs and no quantitative restrictions. This position proved totally unacceptable to the less developed world, which sought both affirmative commitments by all member countries to further the process of economic development, and more important, specific exceptions to many of the prohibitions of the ITO in order to permit the less developed countries to follow an independent commercial policy (Dam 1970: 225; Bhala 2005: 76). During the negotiations the above demand of the developing countries found its place in the form of Preferential Agreements for Economic Development and Reconstruction. This was precisely aimed at providing avenues for developing economies to ensure sound and adequate market for any particular industry or branch of agriculture which was in its infancy. However, the above provision was not carried to the GATT for reasons unknown. Finally, though regional exception provisions were created, it failed to address the concerns of developing countries and ultimately paved the way for creating discriminatory trade blocs.

It could be seen that the major trading countries and other parties to the negotiations had divergent views on the question of preferences. While the US stood for elimination of all preferences, British refused to abandon reciprocal tariff benefits exchanged between countries, most notably between the United Kingdom and other Commonwealth countries. France took a position similar to that of Britain. The result is the exception, manifest in GATT Article 1:2[14] to the MFN obligation.

According to Bhagwati, since the 1945 proposals contained more or less US positions as the basis for the proposed ITO charter, the US commercial policy provisions were incorporated into the GATT when ITO failed to materialize. Article I of the GATT thus embodies the strong US support for non-discrimination, while tolerating the continuation of Imperial Preference as a compromise exception. But if preferential arrangements of less than 100 per cent were anathema to the US, and ultimately to the British economists on the negotiating team, and specific exceptions were admitted into GATT's Article I only for the political necessity on a sort of 'grandfathering' 'as-is' basis, the attitude towards 100 per cent preferences was far more positive. Politically, the US tolerance of 100 per cent preferences seemed to have been motivated by a presumption that European stability would be aided by economic integration and therefore the latter must be supported. There was perhaps also an inchoate, if strong, feeling that integration with 100 per cent preferences somehow was special and consonant with the objective of multilateralism (Bhagwati 1991: 64-65).[15]

By custom as well as explicit provision, certain regional arrangements had long been given exception to the MFN clause in many commercial treaties. The regional exception was based partially on the historical precedent of special regimes of frontier traffic between adjacent countries, and partly on the policy that world welfare can be enhanced by regimes of trade that totally eliminated restrictions to trade among several countries (Jackson 1997: 165). The regional arrangements of the time posed a

[14] GATT Article I:2 contains MFN exception to existing preferential arrangements.

[15] Kenneth Dam confirmed the above stand of the US by quoting the prominent US official Clair Wilcox as follows: "A customs union (with 100% preferences) creates a wider trading area, removes obstacles to competition, makes possible a more economic allocation of resources and thus operates to increase production and raise planes of living. A preferential system (less than 100%) on the other hand, retains internal barriers, obstructs economy in production, and restrains the growth of income and demand... A customs union is conducive to the expansion of trade on a basis of multilateralism and non-discrimination, a preferential system is not" (Dam 1970: 274-75).

dilemma for the commercial draftsmen because of the danger of diluting the MFN clause. The draftsmen of the GATT and the ITO charter were much concerned of the problem of how to define the regional exception without opening the door to the introduction of all preferential systems under the guise of a customs union. The US draft solution to this danger was to define a customs union to be the arrangement where "all tariffs and other restrictive regulations of commerce as between the... members of the union are substantially eliminated" and where a uniform external tariff and regulation system exists for the union. In addition the US draft required that the common external tariff and regulation "shall not on the whole be higher or more stringent than the average level of the duties and regulations of commerce applicable in the constituent territories prior to the formation of such union." The United States representative explained this as follows: "Customs Unions are desirable, provided that they [do] not cause a disadvantage to outside countries, in comparison with their trade before the customs union [was] effected (UN Document E/PC/T/C.II/38 dated 2 November 1946: 8). At the 1946-47 Preparatory Conference countries like the Netherlands and France however urged that a period of transition to form a customs union be allowed. The United States agreed that an "interim period" was reasonable, but "only after it had been definitely agreed to establish such a customs union" (UN Document E/PC/T/C.II/38 dated 2 November 1946). Ultimately, the Geneva draft ITO and the GATT contained clauses incorporating these suggestions.

It could be found that a significant progress in this direction during the drafting was the paragraph included in the London Draft Charter[16] (1946) providing for 2/3 majority vote, wherein the members recognized that there may in exceptional circumstances be justification for new preferential arrangements requiring an exception to the provisions of the chapter dealing with customs union. According to Viner, as the Geneva draft (1947) introduced the concept of interim agreements leading to customs unions, a sufficient degree of flexibility was obtained by those added provisions (presumably), and the above referred provision was dropped from the customs union chapter. It did however later emerge in a modified and far more comprehensive form in a new Havana Charter chapter dealing with Economic Development (Viner 1950: 115, footnote 21). This chapter has also played a vital role on developments in the customs union chapter, especially for its later provisions

[16] See the commentaries on the London Draft of the Charter by Wilcox (1947) and Viner (1947).

regarding free-trade areas. The Development Article also provided for preferences and was a subject of debate in regard to the overall compromise formed regarding the role of future preference.

### III.5. Havana Charter Debate on 'Preferential Arrangements'

A chapter on Economic Development for the first time was provided in the proposal for the Geneva Draft (1947). It retained the requirement of a majority 2/3 vote for approval of

> "preferential arrangements between two or more countries, not contemplating a customs union, in the interest of the programmes of economic development or reconstruction of one or more such countries" (Viner 1950: 116).

Free-trade areas were not introduced to the customs union chapter in the first draft. It was introduced only in the later draft. The Article on preferential arrangements was expanded in the Havana Draft Article 15, titled "Preferential Agreements for Economic Development and Reconstruction." While the concept of pre-approval by a two-thirds voting procedure was retained, a new section was added which allowed the formation of self declaratory preferences. As per the draft Article this was available to contiguous territories or those belonging to the same economic regions.[17]

Reciprocity not reduction to zero-duty levels was required. However, there was provision for adherence of other members. The Article did not require that the parties to preference required be least or lesser developed countries, though the conditions of the preference activities permitted could be said to resemble an infant industry type which is likely to suit for least or lesser developed countries.[18] Although the two-thirds voting provisions did not apply, organizational control was not abandoned.[19]

It could be seen that the self-declaratory provisions of Article 15 was primarily intended to permit an industry or agriculture sector to be expanded between contiguous parties or economically integrated parties. Article 15 was designed not

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[17] The Article provided for preferential agreements necessary to "to ensure a sound and adequate market for a particular industry or branch of agriculture which is being, or is to be, created or reconstructed or substantially developed or substantially modernized" (Havana Charter, Article 15:4).
[18] See, GATT Analytical Index (1995).
[19] The Article also required "a reduction in an unbound most-favoured nation rate of duty proposed by the Member in respect of any product so covered, if in the light of the representations of any affected Member it considers that rate excessive" (Havana Charter).

with a view of granting authority for preferential systems in a larger sense, but rather to accommodate the special items for a limited period of time as beneficial between developing countries or in some way or other economically or geographically related parties.

Thus it could be found that Article 15 was in no way an overlapping provision with the later free-trade area exception as the latter contemplated a more complete and permanent system of exchanges by the parties. Thus though both the provisions intended to be complementary, they were designed to address distinct situations. Therefore, it may be concluded that Article 15 was viewed as a means of providing limited preferences between developing countries while the inclusion of a free-trade area exception was intended to service the notion of more complete regional entities. An important distinction between the two Articles as they emerged from Havana was that Article 15 retained the requirement of a waiver from MFN to be approved by a two-third (2/3) vote of the Charter members, except for the contiguous sector preferences, while for regional groupings under customs union chapter, a less rigorous approval process was established, but with the provision that a consensus of the Members could always impose modifications upon an agreement.

As rightly put by Jackson, the provisions for free trade areas and the other provisions related to this as we now find in Article XXIV were included in the Havana (1948) ITO Charter as Article 44 Part IV, titled Commercial Policy. These provisions replaced the earlier Geneva Charter (1947) text by a special Protocol (Jackson 1969: 578).[20]

From the details of the discussion available it is apparent that many Havana parties were not convinced with the MFN compromise that had been reached at Geneva.

[20] It was also observed by scholars that the provisions for free-trade area exception recommended by the Sub Committee were approved without any substantive debate (Haight 1972: 393). It could be observed that the recommendations of the Sub Committee were approved without substantial debate, prior to the referral of the full committee to the Sub Committee. We could find an extensive discussion concerning the role of future preferential systems in relation to the MFN clause. These discussions which include mostly the position of the parties regarding the unconditional MFN were provided under the title of "General Discussion" of Chapter IV (Commercial Policy). The issue raised in the debate was the manner in which Geneva provisions had provided for a standstill for the existing preferential arrangements, but subjected future regional arrangements to a voting approval. At the centre of discussion was the relationship between the MFN Article on the one hand and the development preferences provided by Article 15 and the customs union Article (Article 42) on the other (Summary Record of the Commercial Policy Committee in Documents E/CONF.2/C.3/SR.4 to SR.8 from 3-11 December 1947; Mathis 2002: 37).

Confusion prevailed over whether future preferences should be encouraged or discouraged and if permitted whether they should be subject to pre-approval by voting. This concern of the parties was clear from the positions taken by many of them during the debate.[21]

Going through the debates, it is evident that the development preferences provided in Article 15 were not considered sufficient or the Article 15 could not satisfy or accommodate the interest of these countries, either because of the voting waiver required or because of a desire for larger regional market. The negotiated standstill for certain pre-existing preferences, as provided in Article 16 also had triggered the countries' interests.[22]

The conference record indicates that a large number of countries were interested in including provisions for regional preferences. Though at this point, a possibility of an exclusive free-trade area provision was not expected, the debate surrounded on the language and requirement of the Development Article's provision. While some

[21] The thought that two or more developing countries might be prepared to abolish all trade barriers among themselves, though not wishing to construct a common tariff towards rest of the world, originated with a proposal put forward by Lebanon at Geneva in 1947. This was not formally discussed until it was resubmitted jointly by Lebanon and Syria at Havana. There it was referred to a Sub Committee, together with the Geneva draft customs union provisions and a wide range of proposals by developing countries for the right to exchange new preferences among neighboring countries, among countries within an economic region, among countries having close historical or economic ties and for promoting economic development. While supporting the MFN, the Syrian representative "...but pointed out that exceptions had been admitted which would permit the continuation of existing preferential arrangements representing vested interests. However, there were certain countries within the same economic area, having traditional relationships which should not be overlooked even though these had not been formalized. His delegation had submitted amendments, both in Geneva and here, which would permit the conclusion of new preferential tariff agreements for such economic areas" (E/CONF.2/C.3/SR.4 dated 3 December 1947: 2). Similarly, the Iraq representative noted that preferential arrangements between small producing areas having complementary trade would not cause the dislocation which Article 16 was designed to prevent. Customs Unions, although permitted under Article 42, required a long time to establish and involved administrative difficulties. Therefore preferential arrangements should be permitted as well as customs unions and supported the Syrian, Lebanese and Turkish proposals in this respect (E/CONF.2/C.3/SR.4 dated 3 December 1947: 2). The Lebanese representative supported preferential arrangements as one solution for the handicap of small countries with limited markets (E/CONF.2/C.3/SR.4 dated 3 December 1947: 3). The free-trade area idea appeared to be of interest to many parties especially for countries in Latin America and in the Near East. It was not only the developing or less developed countries which showed interest, some industrialized countries also found this idea useful. The French representative supported the Lebanon-Syria proposal and said it would be of great interest to Europe.

[22] Australia put forward the view that development preferences were possible under Article 15 of the Charter. Venezuela questioned the stand of Australia and asked why prior approval was needed for some countries while not for others (E/CONF.2/C.3/SR.4 dated 3 December 1947: 6). Argentina also expressed the concern that the MFN clause included exceptions for the benefit of certain countries and perpetuated discriminatory practices for others. Those exceptions should be made more equitable by the inclusions of complementary economic regions (E/CONF.2/C.3/SR.5 dated 4 December 1947: 2).

countries pushed for expanded possibility of future preferences, some others were very strong in expressing their opposition to the pre-approval requirements contained in Article 15. It is also likely that members, seeking an expanded possibility for future preferences without pre-approval, also found common ground with those who sought a regional grouping exception with lesser administrative severity than posed by customs union requirement.[23] The Conference discussions indicate that generally a large number of countries were in favour of charter additions which would allow the creation of future preference systems with less strict criteria.[24] There were also arguments against new preference systems.[25]

The divergent views and positions taken by countries necessitated broad and new provisions concerning the regional preferences. The question of existing preferences was the first one to be met. The demand for regional economic co-operation was another concern raised by some countries, while the developing countries voiced the need for special provisions for the protection and development of affected industry or sectors. The developed countries always took positions opposing this view and stuck to their stand that regional preference should not be and will not be a promising device for economic development and allowing such preferences will defeat the purpose of multilateralism and was against the spirit of MFN. The developed

[23] Chilean representative stated that his delegation would advocate general provisions for preferential arrangements on a regional basis rather than the specific provisions of paragraph 2, Article 16, for the reason that, within the purposes of the Charter, provisions should be made for all, and the present preferential agreements including those of his own country, were too limited to attain the expansion of trade envisioned by the Charter. It was possible to use the same arguments for establishing preference for economic regions as for customs unions (E/CONF.2/C.3/SR.6 dated 7 December 1947: 3).

[24] Ecuador's representative noted that "it was significant that forty of the countries represented at the conference considered the system of preferential treatment indispensable to profit world trade" (E/CONF.2/C.3/SR.7 dated 8 December 1947: 1).

[25] Countries like Australia, United Kingdom and the United States had taken strong positions opposing to regional arrangements. The Australian representative indicated opposition to regional arrangements (other than customs unions), but saw a need for small countries seeking to develop industries in inadequate markets to have access to certain preferences, but rather upon an individual article or commodity basis and with prior approval. According to his view, the provisions already made in Articles 15 and 42 were quite adequate for this purpose (E/CONF.2/C.3/SR.7 dated 8 December 1947: 3). United Kingdom took the view that while the existing preference systems were granted a standstill, "new preferences were not to be established and the existing ones were subject to a progressive reduction or elimination... If the creation of new preference were not subject to examination by the Organization, the position would have to be examined" (E/CONF.2/C.3/SR.7 dated 8 December 1947: 3). It was also suggested that the price paid for a standstill which would restrict the Commonwealth Preference in the future was a system of pre-approval for new preferences. Mr. Leddy, the US representative noted that economic regional preference arrangements were not a promising device for economic development. Special circumstances justifying such arrangement should be submitted to the Organization for its decision as to the net gain to world trade, otherwise the whole object of eliminating preferences would be undermined (E/CONF.2/C.3/SR.7 dated 8 December 1947: 4).

countries further argued that any preference should be subject to the prior approval of the Organization which would be obtained through a two-third (2/3) majority. This was also met with strong opposition from the developing countries which viewed it as a discriminatory practice. The extensive debate and difference of opinion in this regard prompted the draftsmen to find an avenue for compromise to meet the various positions. Thus the question of future preferences was central to the consideration of the MFN obligation in the Havana Forum. This is quite clear from the terms of reference made in the referral to the drafting sub committee.[26]

Generally, the commercial policy rules of the Havana Charter and of the GATT were not buttressed by argument or rationale (Haight 1972: 394). However, at Havana, the regional exception was further broadened to include the case of a "free-trade area", i.e. regional arrangement in which restrictions between the members are eliminated but no common tariff wall or common regulations is required with the non-members. Importantly, the Havana Conference added an article to the Charter which expressly recognized the desirability of "preferential arrangements for economic development and reconstruction," though with prior approval of the Organization with a two-third (2/3) majority (Havana Charter: Article 15).

The ITO Draft Charter article on the regional exception with its new provisions on free-trade areas along with the newly drafted statement of the general principles recognizing and favouring regional arrangements was carried into the GATT, after the Havana Conference through a Protocol of 24 March 1948.[27] However, the special Article on preferential agreements for economic development and reconstruction was not then added to GATT – it was expected that it would be added to GATT along with the replacement of the rest of Part II of GATT when the ITO Charter would come into force. The reasons given for not adding this particular article of the Havana Charter to GATT were rather ambiguous (Jackson 1969: 578).

The introduction of a free-trade area exception was coined for the first time through the report of the Sub Committee which was charged with reviewing the three Articles

[26] The terms of reference required to consider and submit recommendations to both Committees regarding Article 15, 16(2) and (3) and 42... with a view to finding a solution of the question of new preferential arrangements.

[27] Special Protocol Relating to Article XXIV of the GATT (1948), 62 UNTS 56 as well as the discussion in GATT documents.

viz. 15, 16 and 42, which had the elements of preferential arrangements and related provisions. In view of the extensive debate and difference of opinion echoed in the positions taken by various countries, the Sub Committee was asked to find a solution on the question of new preferential arrangements. Since the Sub Committee was charged with viewing three Articles, changes to the proposed Article 15 were also forwarded to the Coordinating Committee of the Congress, and described in a separate report. According to the Sub Committee report, for the Article 42 provisions,

> "The text of Article 42 has been redrafted on the basis of proposals by the French delegation, the main change being to extend to free-trade areas the provisions relating to customs unions, as requested by delegations of Lebanon and Syria (E/CONF.2/C.3/78 dated 7 March 1948: 4-5).

Finally the report indicates that,

> "In paragraph 4 the definition of a customs union, which was contained in the second sentence of paragraph 4 of the Geneva draft, has been amended and a definition of a free-trade area has been added. This describes a free-trade area as a group of two or more customs territories within which tariffs etc. (except where necessary, those permitted under section B of Chapter IV and under Article 43) are eliminated on substantially all the trade between the constituent territories or at least on substantially all the trade in products originating in such territories" (E/CONF.2/C.3/78 dated 7 March 1948: 7).

In the final stages of the Havana Conference two unrelated sentences were put together in a preambular paragraph which now constitutes the paragraph 4 in Article XXIV of GATT.[28]

During the discussion of the provisions, several delegations suggested and pointed out that the substance of the matter was very much related to the formation of customs unions. Thus the text was moved to the customs union Article in spite of the objection raised by the French. Thus the portion was modified and added to the customs union Article to read as:

> "Members recognize the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration between the economies of participants" (E/CONF.2/C.6/107 dated 10 March 1948: 1 and C.6/SR.38 dated 13 March 1948).

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[28] It read: "The contracting parties recognize the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer economic integration between the economies of the countries parties to such agreements. They also recognize that the purpose of a customs union or of a free-trade area should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories" (Haight 1978: 395).

Later, the Central Drafting Committee changed the opening words of the paragraph that follows (paragraph 5 of the GATT text) to read: "Accordingly, the provision of this Chapter shall not prevent...." (E/CONF.2/C.8/23 dated 17 March 1948). Thus it could be found that the word "integration" crept into the GATT, and the desirability of closer economic integration was inscribed – more by accident than by design – as the philosophical basis for the formation of customs unions (Haight 1972: 397). Except for two minor amendments made in 1955-57,[29] the language of Article XXIV remains as was drafted at Havana (Jackson 1969: 578). The addition of the provision allowing for an interim period for the formation of a customs union or free trade area was a central concomitant to a belief in the desirability of customs unions and free-trade areas (Jackson 1969: 579).

### III.6. Emergence of Regional Preferences and Developing Countries

From the discussions above, it could be observed that countries had taken various positions and represented divergent views in the course of negotiations according to their trade interests. While the US was determined to dismantle the preferential system existed in trade, countries including the UK were keen to protect their existing preferences including the Commonwealth Preferences. Preference systems, whether they be imperial or colonial or in any other form were sought to be challenged by the emerging MFN principle. The debate over which preference systems would be permitted to continue after the MFN came into force and which new systems would be permitted to be established, was essentially a negotiation over the scope of application of the new MFN provision itself.

Apart from the existing preferences, Havana parties also sought to retain certain prerogatives for the future preferential agreements between the developing countries. Discussions at the 1946 London and 1947 Geneva Preparatory Conference meetings considered the possibility of focusing exceptions on less developed countries. Syria and some Latin American countries initiated the discussion on the need for RTAs among Third World Countries. These countries along with like minded developing countries advocated the need for exemption for RTAs among developing countries to stimulate trade and industrialization of poor countries. However, the proposal was not

[29] At the Ninth Session, "constituent territories" was substituted for "parties" in paragraph 4 and "included" replaced "provided for" after the "schedule" in paragraph 7(b) (Jackson 1969: 578).

accepted initially when the other delegates rejected the provisions that would have allowed less developed countries to enter into RTAs solely or largely to facilitate industrialization. Yet, the developing countries had not given up and that rejection was not the end of the efforts. The need to address the concern of developing countries continued to echo in the later discussions and debates on preferences.

Later on, at the Havana Conference, a consensus was arrived at and the delegates agreed to a provision in the ITO Charter, Article 15, which explicitly acknowledged the link between RTAs and economic development. The Article titled "Preferential Agreements for Economic Development and Reconstruction" was indeed a breakthrough for the developing countries. The Article[30] recognized that "special circumstances, including the need for economic development or reconstruction, may justify new preferential agreements between two or more countries in the interest of the programmes of economic development or reconstruction of one or more of them" (Article 15:1). The Article required the Members concluding such an agreement to "communicate its intention to the Organization and provide it with the relevant information to enable it to examine the proposed agreement" (Article 15:2). The Article required the members to obtain a two-third (2/3) majority approval for the exception (Article 15:3). Though paragraph 3 of the Article required two-third majority approval for exception, paragraph 4 empowered the Organization to authorize exception to Article 16 (the general MFN obligation on ITO Charter) based on the fulfillment of certain conditions and requirements. The Article also contained provisions to address the concern of non-members to the agreement if they are affected by the said Agreement.

In short, paragraphs 1 and 3 of Article 15 of the ITO Charter would have authorized RTAs among less developed countries upon approval by two thirds majority. Further, paragraphs 4 to 6, under certain circumstances, notwithstanding two-thirds majority allowed the ITO to condone the creation of an RTA for economic development purposes by less developed countries. Though Article 15 could not be viewed exclusively as addressing the concerns of developing countries, to a good extend the Article recognized the need for preferential arrangements for the economic development purpose of developing countries. Article 15, indeed set the ground and

[30] Refer to Article 15 of the Havana Charter (Annexure I).

pace for the developing countries to push their developmental requirement in international trade. Article 15 was originally intended to be included in GATT, along with what is now Article XXIV. Article XXIV was added to the GATT after the Havana Conference through a protocol dated 24 March 1948. As against the expectation, Article 15 was not added at that time. It was believed that the special article on preferential arrangements for economic development and reconstruction would be inserted into the GATT, once the ITO Charter took effect. That expectation could not be realized as the ITO Charter failed.[31] The reason why Article 15 was not added along with the provisions what is Article XXIV now is not clear. Scholars have not pointed out a clear reason for the omission of Article 15 alone while the other relevant provisions were carried on to the GATT. Jackson (1969) has observed that however, the special article on preferential arrangements for economic development and reconstruction was not then added to GATT – it was expected that it would be added to the GATT along with the replacement of the rest of Part II of GATT when the ITO Charter would come into force. The reasons given for not adding this particular provision of the Havana Charter were rather ambiguous. Oblique reference was made to administrative, constitutional and other difficulties and the need to "limit amendments to cases where the retention of the present provisions of Part II would create serious difficulties for contracting parties" (Jackson 1969: 578). It was also observed that the concern of countries like India, Palestine, Syria, Lebanon and certain Latin American countries who advocated the developmental preferences were addressed through providing specific exceptions.[32] Syria's particular problem was solved by establishing in the MFN provision in Article I an additional specific exception for preferences between Lebanon-Syria customs union and certain neighboring countries. Certain other regional arrangements, in particular the Benelux Customs Union and certain Latin American preference had also been explicitly exempted by name from the MFN clause in Article I (Jackson 1969: 578).

Thus, unfortunately for the developing countries in general, Article 15 never entered into force. All that survived of a tailoring effort designed initially for all poor countries was Paragraph 11 of Article XXIV (special provision for India and Pakistan) plus the remainder of the Article (Bhala 2005: 588). Article 15 may not be

[31] Owing to the withdrawal of the US by announcing that it would not seek congressional approval of the Charter, given the strong opposition of it in the Congress.
[32] Article XXIV:11 and Article I:1 MFN and 1:2 where these exceptions are set forth.

viewed as an Article which permitted the formation of regional preferences alone; it was all the more important as it recognized the need for preferential treatment for economic development purposes. In that sense, Article 15 legitimized the preferential treatment required for members especially the developing and less developed countries. In comparing with the present Article XXIV provisions, Article 15 had a totally different footing which was built on the need for preferential treatment for the economic development of countries. Finally, with the exclusion from GATT of an Article 15 type provision, a historic opportunity to clarify the distinction between preferential arrangements on the one hand and a regional arrangement (i.e. a customs union or a Free Trade Agreement) on the other hand, was lost (Bhala 2005: 589). Now a days, "PTAs and RTAs are sometimes confused as nearly synonymous, differing only insofar as a PTA includes members not geographically located in the same region, yet in truth, there is a distinction to be made (Bhala 2005: 589). Many a time, the terminology 'RTA' and 'PTA' are used without rationale. As for the term 'RTA', the disadvantage of the term is that it tends to suggest that the parties to the accord are from the same geographic region, which often is not the case.[33] The disadvantage of the term 'PTA' is that it can get confused with the preferences granted by a developed country to less developed countries, that is, with special and differential treatment. More specifically, the primary thrust of a preferential accord is to assist in the economic growth and industrialization process of developing countries rather than furthering liberalization. Suppose the delegates at the various ITO Charter and GATT drafting Conferences had put the distinction between 'PTA' and 'RTA' clearly on paper, and created rigorous legal texts for its enforcement, it would have paved the way for even greater attention on developed country policies that create an incentive for a preferential arrangement, particularly that involving non-reciprocal benefits extended by developed to developing countries.

Another view[34] is that the Havana Article 15 provisions, as referred by the sub committee, retained the pre-approval conditions including the two-thirds majority. A fair number of countries had already registered their opposition to these conditions. It must be considered therefore that the inclusion of a free-trade exception in Article 42

[33] While it is true with the case of NAFTA and EU that the member countries belong to the same region, it is not true of many bilateral FTAs such as the US agreements with Australia, Chile, Israel, Jordan and Singapore.
[34] See, Mathis (2002).

was posed as an alternative solution which would permit regional preferences within wholly formed systems rather than partial systems, but absent customs union administrative formalities and the requirement of a two-third approval (Mathis 2002: 42). As such, the inclusion of the free-trade area exception may well have reflected a compromise whereby pre-approval for sectoral preferences was retained, but then also granting a simplified construction to those parties seeking to form complete regional entities but without the customs union requirements to establish territory treatment. Overall, such an inclusion might have served to rebalance the Geneva arrangements in the light of the larger group of developing participants who were not parties to the earlier round and flawed in part as a consequence of the compromise reached in Geneva (Mathis 2002). It was obvious that the developing countries had realized the importance of the need for preferential treatment for their economic development and they strongly echoed this in the Havana and in the ITO. But while coming to the GATT, the preferential and special preference required for developing countries is watered, while a looser and more liberal regional preference was included as a 'one fit all size.' In this regard, the developing countries have not demonstrated sufficient vision and strength in appreciating the role of RTAs that could play in the future growth of their economies.

### III.7. Evolution and Meaning of Terminologies

Before the Havana provisions for free-trade areas in Article 42, the term free-trade area was not common in the commercial policy lexicon. No reference to such an area could be found and the various terms for preferential systems in the period did not employ any formation known as the free-trade area. It is clear from the below observation of Viner that such regional instruments were unknown in the pre-GATT practice, as he states that,

> "The term is introduced, as a technical term, into the language of this field by the Charter, and its meaning for the purposes of this Charter must therefore be sought wholly within the text of the Charter" (Viner 1950: 124).

It is also important to understand the intent of the Havana provisions. The relevant provisions for regional exceptions were culled out after giving stand-still obligations for the pre-existing margins of preference between the countries under Article I: 2 of the GATT (Havana Charter: Article 16:2). Hence, it may also be intended that,

preferential systems introduced thereafter were not to have been easily qualified the MFN exceptions. In this view, the Article XXIV is to be viewed as having a restrictive function rather than a promoting approach. Dam (1970) emphasized the restrictive nature of the new Article XXIV gateway and the structural link between the provisions of Article I and Article XXIV as,

> "...the principal objective in the drafting of the customs union and free-trade area provisions became to tie down, in the most precise legal language possible, the conditions that such regional groupings would have to fulfill in order to escape prohibition under the most-favoured nation clause as preferential arrangements."

Jackson also holds a similar view as under:

> "...the fear of some countries that the regional exception could be abused to allow the introduction of detrimental preference systems otherwise inconsistent with MFN was the motive power behind the elaborate draftsmanship that went into the other clauses of the regional exception" (Jackson 1969: 600).

Such a view of the restrictive interpretation for Article XXIV finds support from an often-quoted summary of the American justification for advancing the customs union exception from Wilcox (1949),

> "A customs union creates a wider trading area, removes obstacles to competition, makes possible a more economic allocation of resources, and thus operates to increase production and raise planes of living. A preferential system, on the other hand, retains internal barriers, obstructs economy in production, and restrains the growth of income and demand... a customs union is conducive to the expansion of trade on a basis of multilateralism and non-discrimination; a preferential system is not" (Clair Wilcox cited in Mathis 2002: 45).

If it is to be assumed that the final outcome was compatible with the US position, then it could be concluded that free trade areas were permitted upon the understanding that they would also eliminate internal barriers to trade in a manner similar to a customs union. According to this view, the draftsman aimed at creating disciplines which would require elimination of internal barriers for regional formations to be qualified for MFN exception. The fact that both for customs union and free trade areas the uniform requirement is prescribed regarding the internal trade barriers further

supports this view. The correlation of this provision indicates an expressed intent to equate the internal trade requirement for both free-trade area and customs union.

Further, it could be found that the requirement for the elimination of internal trade barriers remained consistent through out the negotiations even as the free trade exception was introduced. The initial Geneva text provided that,

> "A customs union shall be understood to mean the substitution of a single customs territory for two or more customs territories, so that all tariffs and other restrictive regulations of members of the union are substantially eliminated and substantially the same tariffs and other regulations of commerce are applied by each of the members of the union to the trade of territories not included in the union.[35]"

While the final Havana text of Article 44 provided as follows:

> "A customs union shall be understood to mean the substitution of a single customs territory for two or more customs territories, so that duties and other restrictive regulations of commerce (except where necessary those permitted under Section B of Chapter IV and under Article 45) 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)".

Subsequently, free trade area provisions with a similar language were also added. Whether the minor changes brought about in the language is to align the existing provisions with those of the new free-trade area is a matter not sufficiently clear as any reports in this regard are not available. It is pertinent to note that there is no difference between the two forms for any of the requirements to be met regarding the internal trade. In other words, both the free-trade area and customs union need to meet the same criteria in the case of internal trade as to qualify for the MFN exception. The only difference is regarding the external policies, while customs union is required to substitute a common external tariff and a free trade area may retain its individual member tariffs.

The intent of the drafters is therefore apparent from the provisions viewed overall. While an exception was being recognized for a new "regional" formation which did not create a customs territory, the free-trade area would nevertheless be required to

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[35] Article XXIV:4, Final Act adopted at the Conclusion of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Geneva, 1947.

meet the same test as a customs union, whatever that might be, in regard to the elimination of its internal barriers to trade (Mathis 2002: 48). This intent of the draftsmen has essentially to be applied while examining or analyzing a free-trade agreement for its compatibility with Article XXIV. The internal trade requirement is key for legally qualifying the test of Article XXIV. It is also observed that at the time of drafting Article XXIV, such a surge of regional preferences or instruments were not foreseen. The use and abuse of these provisions by various countries appeared decades after the conclusion of Article XXIV. In this manner, it is also viewed that the legal text of Article XXIV was not drafted with sufficient care and caution.

### III.8. Analyzing Article XXIV

So far we have discussed the evolution of Article XXIV within the multilateral framework. It demonstrates the interests of the countries in having an MFN exemption for preferential treatment, though such a widespread use of the provisions was not foreseen. However, the interpretation and application of the regional exemption provisions have led to numerous conflicts and disputes within the multilateral system. The legal content and meaning of the provisions are examined in detail hereunder for a sound understanding of the legal framework created for RTAs under the GATT/WTO.

Article XXIV of the GATT[36] is the fundamental legal provision for regional trade agreements in the GATT/WTO regime.[37] It is included in the Part III of the GATT. The Article bears the title 'Territorial Application – Frontier Traffic – Customs Union and Free-trade Areas' which is often criticized as 'awkward title' when compared against its purpose and objective (Bhala 2005: 590). Basically the Article provides for the formation of three kinds of trade arrangements namely the Customs Unions,[38]

[36] The text of Article XXIV is provided in Annexure II.

[37] Article V of the General Agreement on Trade in Services (GATS) and the Enabling Clause also provides for formation of regional/economic groupings. The relevant provisions are discussed in the later part of this chapter.

[38] Paragraph 8(a) of Article XXIV defines a customs union. The two required characteristics to be qualified as a customs union as per Article XXIV are that (a) trade restrictions between the union members are 'substantially eliminated' and (b) uniform restrictions on trade with non-union members are established. For such a customs union or interim agreement leading to a customs union to be eligible for exemption, the paragraph 5(a) of Article XXIV provides that the duties and other restrictions on trade of non-union GATT parties to and from the customs union shall not on the whole be higher or more restrictive than the general incidence of duties and regulations of commerce... prior to the formation of such union. It would require some tariff increase and decrease by the members of

Free Trade Areas[39] and Interim Arrangements.[40] The Article stretching to 12 paragraphs mainly lays down the principle, purpose and requirements for the formation of RTAs. The first part of the Article deals with the territorial applicability and provides exemption for frontier traffic.[41] Thereafter, the Article enunciates the purpose and objectives for forming RTAs.[42] Importantly, it explains the various kinds of arrangements permitted under the Article and the legal requirements to be followed in forming the RTAs. The provision also contains procedural aspects like notification requirements[43] and also includes certain tailor-made provisions for addressing some

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the union in order to arrive at a common external tariff. In such a case, if any of the increased tariffs are bound in a GATT schedule, then the procedures of Article XXVIII of the GATT (procedure for Modification of Schedules) are to be applied to provide for compensatory adjustment (GATT Article XXIV:6).

[39] The GATT definition of free trade area is relatively similar to that of customs union. Paragraph 8(b) which explains the free-trade areas, requires the elimination of duties and restrictions on 'substantially all the trade' between members, without a requirement of uniform common external tariffs and regulations on trade with non members as in the case of customs unions. The members in a free trade area could remain the same as they were prior to the arrangement, as there is no mandatory requirement to have uniform tariffs and restrictions towards non-members of this area. Any free trade area to be eligible for exemption to GATT obligations under Article XXIV, each member's duties and regulations of commerce 'shall not be higher or more restrictive than the corresponding' ones existing prior to the formation of the free trade area or the interim agreement (GATT Article XXIV:5(b)). According to GATT definitions, a customs union results in a new "customs territory" to which the GATT obligations apply directly whereas a free trade area is not so defined. It is interesting to note that GATT obligations do not apply to this trade area as an entity, since each remains autonomous as to trade restrictions towards non area territories.

[40] Paragraph 5(c) of Article XXIV states that "[A]ny interim agreement referred to in sub paragraphs (a) and (b) shall include a plan and schedule for the formation of such a customs union or of such free trade area within a reasonable length of time." The GATT provides that with respect to either a customs union or a free trade area, "interim agreement" (as referred above) shall be eligible for the MFN exemption. In fact, all regional agreements so far brought to GATT approval or accepted under GATT have been basically interim agreements (Jackson 1969: 584). The agreements must however meet the requirements of Article XXIV:5 set for the customs union or free trade area as to the level of restrictions of trade barriers permitted by its formation. Thus the interim agreement leading to a customs union is required to have duties 'not on the whole... higher... than general incidence' prior to formation; that leading to a free trade area or customs union which requires 'corresponding duties' to be not higher than before.

[41] Paragraph 3 of the Article includes provisions for exception for frontier traffic and trade with Free Territory of Trieste. Though the Article does not explain what constitutes frontier traffic, it provides that, "the provisions of this Agreement shall not be construed to prevent advantages accorded by any contracting party to adjacent countries in trade with the Free Territory of Trieste provided they are contiguous to that territory and such advantages are not in conflict with the Treaties of Peace arising out of the Second World War" (Article XXIV:3(b)).

[42] Paragraph 4 of the Article "recognizes the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration between the countries." At the same time, it specifies that the purposes of customs union and free trade areas should be to facilitate trade and 'not to raise barriers to the trade of other contracting parties with such territories.'

[43] Paragraph 7 of Article XXIV provides for notification requirements. It requires the contracting parties deciding to enter into a customs union or free-trade area; or an interim agreement leading to the formation of such a union or area to promptly notify to the CONTRACTING PARTIES regarding such an intention or initiation to form such a union or area and to make available such information regarding the proposed union or area so as to enable them to make appropriate reports and recommendations as they deem fit. Paragraph 7(b) empowers the CONTRACTING PARTIES to make recommendations if after having studied the plan and schedule included in an interim agreement they find that such an

specific circumstances[44] which are often irrelevant in the present context. The salient features of the Article are examined hereunder.

### III.8.1. Territorial Application

Under Article XXIV:1, each separate customs territory on behalf of which the General Agreement is applied is "treated as though it were a contracting party," and thus the MFN clause of Article I:1 and the non-discrimination requirements of Article XIII:1, which apply as between contracting parties, apply as between each separate customs territory even if it is under common sovereignty with another customs territory.[45] The records of the Havana Conference indicate that the phrasing of paragraph 1 was changed from "customs territories of the Members" to "metropolitan customs territories[46] of the Members and to any other customs territories in respect of which this Charter has been accepted..." in order to avoid the implication that the customs territories of colonies were necessarily part of the customs territory of the metropolitan state (GATT Analytical Index 1995: 795). Similarly paragraph 1 also cautiously avoided any room for misinterpretation of Article XXIV in relation to the relationship in administrative and political arrangements between territories and contracting parties.[47]

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agreement is not likely to result in the formation of a customs union or a free-trade within the period contemplated by the parties to the agreement or if the proposed period is not a reasonable one. It further requires the parties not to maintain or put into force the proposed agreement if they are not prepared to modify it according to the recommendations. Paragraph 7(c) of the Article requires the parties to communicate any substantial change in the plan or schedule of a notified interim agreement under paragraph 5(c) and allows the CONTRACTING PARTIES to request for consultation with concerned contracting parties if the changes proposed seem likely to jeopardize or delay unduly the formation of the customs union or the free-trade area

[44] See Paragraph 11 which deals with the specific case of India and Pakistan. Considering the exceptional circumstances and recognizing the fact that the two countries have long constituted an economic unit, the Article permits the two countries to enter into special arrangements with respect to the trade between them, pending the establishment of their mutual trade relations on a definitive basis.

[45] For example, the records of the London session of the Preparatory Committee indicated that in 1946 the various territories under French sovereignty in the French Union included some colonies treated as part of the metropolitan customs territory of France, and others which constituted separate customs territories. The historical preferences accorded within the French Union were provided for under Article I:2 in the case of the latter, by listing them in Annex B of the General Agreement. In 1955, certain territories were deleted from Annex B because on 1 January 1948, they had been raised to the status of French departments and thenceforth formed part of the metropolitan customs territory.

[46] The reference in paragraph 1 to a "metropolitan" customs territory pertains to the colonial and immediate post-colonial period. These entities were dependent on a metropolitan power and examples included the now former colonies of France in West Africa (Bhala 2005: 570).

[47] Paragraph 1 of Article XXIV states: "... the provisions of this paragraph shall not be construed to create any rights or obligations as between two or more customs territories in respect of which this

While paragraph 1 explains the territorial application of the Agreement, paragraph 2 of Article XXIV explains the term customs territory. According to Article XXIV:2, a customs territory shall be understood to mean "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." The requirement is that separate tariffs or other regulations of commerce shall be maintained at least for a substantial part of the trade of such territory. It is interesting to note that it does not require complete or exclusive control of the entire trade of the territory. Such a construction gives ample space to include "any other" customs territory referred in paragraph 1. Clearly, from paragraph 2, the concept of a "customs territory" eludes the controversial question of full sovereignty. It does so by creating an entity that can be a Member of the WTO, and can be a part of a customs union or FTA so long as it has the requisite degree of control over its foreign economic policy (Bhala 2005: 570). It is clear that Members chose to have such a loose construction as a proposal to change the definition of "customs territory" in paragraph 2 to substitute "substantially all" for a "substantial part" was rejected (GATT Analytical Index 1995: 795). Hence, paragraph 2 defines requisite degree ambiguously, and for good reason, so as to accommodate various kinds of political arrangements (Bhala 2005: 570).

### III.8.1.a. Frontier Traffic

The trade that occurs in a market place or a town near an international boundary is almost invariably cross border in nature. The trade occurring in such areas is referred to as Frontier Traffic. Article XXIV:3(a) ensures that provisions of GATT in no way prevent measures that facilitate frontier trade. Sub-paragraph 3(b) is more of historical importance as it has hardly any application.[48] In the discussions during the Geneva session of the Preparatory Committee, "it was agreed that 'frontier traffic' should not be defined too narrowly as it varied in each case and that the Organization would have, if necessary, to decide" (GATT Analytical Index 1995: 796).

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Agreement has been accepted under Article XXVI or is being applied under Article XXXIII or pursuant to the Protocol of Provisional Application by a single contracting party."

[48] The Report of a Working Party which examined and redrafted Article 42 of the Charter of Havana Conference noted that "the proposal of the delegation of Italy requesting exemption from the most-favoured-nation clause for a special regime between Italy and the Free Territory of Trieste, was subsequently altered to refer only to advantages accorded to trade with Trieste by contiguous countries." The Working Party decided it could accept this modified proposal on condition that trade advantages thus accorded were not contrary to the terms of the Italian Peace Treaty (GATT Analytical Index 1995: 796).

### III.8.2. Rationale and Purpose of RTAs

It is important to understand the 'purpose' laid down in Article XXIV:4 and its implications and relationship with paragraphs 5 to 9. One approach based on the aspirational and non-mandatory language is that paragraph 4 is precatory in nature. The (supposedly) "hard" rules are in the subsequent paragraphs (Bhala 2005: 591). The opposite perspective is that paragraph 4 is a chapeau for the subsequent paragraphs, and itself embodies general rules, particularly a "purpose" test for a proposed RTA (Dam 1970: 276). The above issue of the role of paragraph 4 and its relationship with other provisions is dealt with by the Appellate Body in the *Turkey – Restrictions on Imports of Textiles and Clothing Products*[49] (Turkey – Textiles) case. The finding of the Appellate Body can be considered as an official and authoritative interpretation in this regard. In its Report, the Appellate Body clarifies that "purpose" test suggested by paragraph 4 is relevant to interpret the conditions laid down in Article XXIV. The Appellate Body stated:

> "...the purpose set forth in paragraph 4 informs the other relevant paragraphs of Article XXIV, including the chapeau of paragraph 5. For this reason, the chapeau of paragraph 5, and the conditions set forth therein for establishing the availability of a defence under Article XXIV, must be interpreted in the light of the purpose of customs unions (or FTAs) set forth in paragraph 4 (WT/DS34/AB/R 1999: paragraph 57).

In addition to the possibility of a "purpose" test, Article XXIV lays down basic rules to be followed, or disciplines to be respected, when setting up an RTA. In other words, Article XXIV:4 provides the basic framework and outline on the "purpose" of the RTAs in the light of which the other provisions of the Article has to be interpreted.

The relationship between paragraph 4 and paragraphs 5 to 9 was first discussed in depth during the examination of the *Treaty of Rome establishing the European Economic Community*. [50] During the discussions, various contracting parties have taken divergent views on the applicability and interpretation of Article XXIV:4 in

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[49] WTO Document WT/DS34/AB/R of 22 October 1999. See the discussion of the case in Chapter IV.

[50] *Treaty Establishing the European Economic Community*, Report Submitted by the Committee on the Rome Treaty to the CONTRACTING PARTIES on 29 November 1957, GATT Document L/778 of 20 December 1957.

different contexts.[51] Countries have interpreted and assumed the role of paragraph 4 of Article XXIV in different ways while some asserted the importance of paragraph 4 in interpreting the provisions for customs unions and RTAs under Article XXIV; some have tried to downplay its legal importance. With the finding and observation of the Appellate Body in *Turkey - Textiles case*,[52] which clarified the 'purpose' test of paragraph 4 and its importance in the interpretations of the conditions laid down in Article XXIV, the legal status and objective of paragraph 4 are emphasized.

### III.8.3. Conditions for the Formation of CUs and FTAs

Article XXIV lays down the conditions for the formation of a customs union or of a free-trade area or the adoption of an interim agreement necessary for the formation of a customs union or of a free-trade area[53] (Article XXIV:5). The language in paragraph

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[51] It is interesting to note the statement of one member of the Working Party recorded in the Report on the *EEC Association Agreements with African and Malagasy States and Overseas Countries and Territories* (L/2441 of 3 June 1965) that "even if a trade area arrangement between developed and less developed countries met all the more specific requirements of Article XXIV, it was unlikely, given that the parties to the Arrangement tended to produce entirely different products, to satisfy the general requirement of paragraph 4 of the Article that free-trade arrangements should be designed to create new trade between the parties and not to divert the existing trade." The representatives of the Community and the Associated States stated that "with regard to the general principle in paragraph 4... the precise wording of paragraph 5...made it abundantly clear that if the requirements of paragraphs 5 to 9 of Article XXIV were fulfilled, the Agreement was necessarily compatible with the principle set out in paragraph 4" (GATT Analytical Index 1995: 797). The Report of the Working Party on *Accession of Portugal and Spain to the European Communities* (L/6405 of 5 October 1988) records that "some delegations expressed concerns which related to the introduction in Portugal and Spain of new quantitative restrictions some of which were discriminatory and inconsistent with Article XI and Article XXIV:4.". In response to this, the representative of the European Communities put forth that "Article XXIV:4 did not constitute an obligation but an objective and did not preclude members of a customs union from erecting barriers to trade if their overall incidence was less restrictive than the ones which had prevailed before the customs union was established" (GATT Analytical Index 1995: 798). The Report of the Working Party on the *Free-Trade Agreement between Canada and the United States* (L/6927 of 31 October 1991) notes that major concern of members with the provisions in this Agreement that the Agreement would take precedence over the General Agreement unless otherwise provided therein. They questioned the possible implications for third parties and for the multilateral trading system. The representative of the United States stated that "in accordance with both paragraphs 4 and 5 of Article XXIV, the Canada-United States Free Trade Agreement had not raised barriers to the third country trade either directly in the context of phased-in implementation of the provisions of the Agreement or indirectly as a consequence of its negotiations." Some representatives of a group of countries said that "if the FTA was consistent with Article XXIV, it should have trade-creating effects for third parties" (GATT Analytical Index, 1995: 798).

[52] See more detailed discussion of the *Turkey-Textiles* case in Chapter IV.

[53] For customs unions, it requires, 'the duties and other regulations of commerce imposed at the institution of any such union or interim agreement in respect of trade with contracting parties not parties to such union or agreement not on the whole be higher or more restrictive than the general incidence of the duties and regulations of commerce applicable in the constituent territories prior to the formation of such union or the adoption of such interim agreement...." (Article XXIV:5(a)). In respect of the free-trade areas, 'the duties and other regulations of commerce maintained in each of the constituent territories and applicable at the formation of such free-trade area or the adoption of such interim agreement to the trade of contracting parties not parties to such agreement shall not be higher or

5 of Article XXIV leaves a larger room for interpretation and debate. This language likely reflects the desire of the drafters to strike a balance between preserving MFN treatment and recognizing the need for an FTA/customs union exception but only where Members meet strict conditions for such exception (Gantz 2009: 33). The basic condition imposed by Article XXIV may be colloquially dubbed as the 'no trade fortress rule' (Bhala 2005: 595). An RTA being created must not impose trade barriers against non-members that, on the whole, are higher than those applicable to the non-members before the RTA was formed. This rule applies to customs unions, FTAs or interim agreements by virtue of the language of Article XXIV:5, particularly sub-paragraphs (a) and (b). This rule as embodied in the Article XXIV:5 is that duties and regulations in respect to trade of non members shall at the beginning of an arrangement "not on the whole be higher or more restrictive than the general incidence" prior to the formation of the arrangement. The original GATT used the phrase "average level" but at the Havana Conference, this was changed to "general incidence"[54] (Jackson 1969: 611).

However, the application of this criterion has been extremely difficult. How to evaluate the overall level of a customs tariff was the central question. Whether to average the tariff rates or to weigh them by the volume of trade under each product rate, there was a lack of consensus on the mode of calculation of overall level of a customs tariff. The first case in the practice of GATT that considered in detail the criterion of Article XXIV:5(a) was that of the EEC.[55]

Based on the 1957 GATT Working Party Report on the EEC, it can be said there is no generic mathematical formula to be used in every case (Bhala 2005: 596). Even if there had been a mathematical formula derived for the calculation of 'general

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more restrictive than the corresponding duties and other regulations of commerce existing in the same constituent territories prior to the formation of the free-trade area or interim agreement....' (Article XXIV:5(b)).

[54] From the Havana Reports, it is clear that, it was the intention of the Sub-Committee which dealt with the subject that this phrase should not require a mathematical average of customs duties but should permit greater flexibility so that the volume of the trade may be taken into account (Jackson 1969: 611-612).

[55] The GATT report on the customs union indicated that a substantial number of GATT members "felt that an automatic application of a formula, whether arithmetic average or otherwise, could not be accepted and agreed that the matter should be approached by examining individual commodities on a country by country basis" (L/778 of 20 December 1957: 4). However, the EEC member states took a different view and would not agree to the above view and noted that "the common tariff has to be judged as an entirety" (Jackson 1969: 612).

incidence', it would be helpful only in quantifying quantifiable barriers like duties, but not for 'other regulations of commerce' affecting the trade such as licensing rules, technical or sanitary standards etc which are not quantifiable barriers.

Apart from the interpretation of 'general incidence' and quantification of it, more difficult problem arose with the interpretation of the term "other trade restrictions." The interpretation became more crucial and difficult in the treatment of rules of origin. Here the central question arose whether rules of origin are 'other restrictions' or not. Although, there are views that rules of origin should be regarded as restrictions of trade, there were strong opposition to it also. Though the negotiators deliberated on the issue whether rules of origin were "other restrictions" or not in the Uruguay Round negotiations, they failed to reach any conclusion as to whether rules of origin were "other restrictions" or not[56] (WT/REG/W/17 dated 31 October 1997).

The language used for the requirements in Article XXIV:5 (and also in Article XXIV:8), however, has long been criticized for its ambiguity. That ambiguity is the main cause for the inconclusiveness of GATT Working Party examinations of most RTAs (Hafez 2003: 889-890). In the context of these existing ambiguities and vagueness in the interpretation of Article XXIV of GATT, the GATT CONTRACTING PARTIES had taken a legislative step to strengthen the legal discipline in the area of regional trade particularly in the face of continued proliferation of RTAs, in the form of the *Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994* (hereinafter, the Understanding).[57]

[56] In the Working Party which examined the compatibility of the NAFTA with GATT rules, the United States argued that rules of origin are not trade restrictions in the same sense as tariffs and quantitative restrictions.

[57] The Understanding aims at addressing some of the traditional controversial issues as well as clarifying and reaffirming the procedures and other practices in monitoring and reviewing the formation and functional aspects of RTAs. Panels have yet to pronounce on the legal nature of the Understanding. It seems reasonable to conclude, however that such Understandings constitute international agreements concluded by WTO Members and that they should, therefore, be interpreted in accordance with the Vienna Convention on the Law of the Treaties (Matsushita et al. 2003: 353). See Chapter II for more discussions on the Understanding. The text of the Understanding is provided in Annexure III.

The Understanding provides for a method and criteria for the calculation and assessment of the general incidence of duties and other regulations of commerce.[58] The Understanding countenances a case-by-case approach. Yet there exists a threshold problem of delineating the "regulation of commerce" contemplated by the language (Bhala 2005: 596). In a world of increasingly globalized economies, an argument can be made that most commercial regulations bear on cross-border trade. At least they may do so indirectly. But the drafters of GATT could not have meant to cover every domestic law, regulation and rule affecting barriers (Bhala 2005: 596). Prior to the 'Understanding' practice seems to accept that, in principle, an item-by-item approach is unwarranted in the context of Article XXIV:5(a), but there is a disagreement as to the precise level on which comparisons will take place (Matsushita et al. 2003: 353). The picture seems much clearer now with the entering into force of the Understanding.[59]

According to the Understanding, the assessment of their incidence may involve "the examination of individual measures, regulations, products covered and trade flows affected." As per this, one issue which has attracted attention refers to the assessment of the effects of duties and Other Regulations of Commerce (hereinafter ORCs) – is there a single, broad requirement for duties and ORCs grouped together or do duties and ORCs have to comply individually with the requirements? Countries have taken divergent views on this.[60]

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[58] The Understanding provides that "the evaluation under paragraph 5(a) of Article XXIV of the general incidence of the duties and other regulations of commerce applicable before and after the formation of a customs union shall in respect of duties and charges be based upon an overall assessment of weighted average tariff rates and customs duties collected. This assessment shall be based on import statistics for a previous representative period to be supplied by the customs union, on a tariff line basis and in values and quantities, broken down by WTO country of origin. The Secretariat shall compute the weighted average tariff rates and customs duties collected in accordance with the methodology used in the assessment of tariff offers in Uruguay Round of Multilateral Trade Negotiations. For this purpose, the duties and charges to be taken into consideration shall be applied rates of duty. It is recognized that for the purpose of the overall assessment of the incidence of other regulations of commerce for which quantification and aggregation are difficult, the examination of individual measures, regulations, products covered and trade flows affected may be required" (Understanding: paragraph 2).

[59] The Understanding provides more precision and clarity for the interpretative problem of paragraph 5(a) of Article XXIV, as moving to tariff lines in itself provides the necessary precision to the terms "on the whole" and "general incidence." Hence, with respect to GATT Article XXIV:5(a), it seems appropriate to conclude that the test for consistency post –Understanding is precise enough for interpreters (Matsushita et al. 2003: 353).

[60] Some members took the view that there are two separate requirements, with compliance required for each. For them, a key word is the "or" in the phrase "shall not on the whole be higher or more restrictive", where duties could not be "higher" and ORCs could not become more restrictive (Hong

In the *Turkey – Textiles* case, the Panel found that "what paragraph 5(a) provides, in short, is that the effects of the resulting trade measures and policies of the new regional agreement shall not be more trade restrictive, overall, than were the constituent countries' previous trade policies" and that paragraph 5(a) provided for an "economic" test for compatibility; both these findings were shared by the Appellate Body as well (WT/DS34/R 1999: paragraph 9.121 and WT/DS34/AB/R 1999: paragraph 55). The Appellate Body also stated the need for the text of the chapeau of paragraph 5 to be interpreted in its context, which, as indicated by the word "accordingly" at the beginning of the paragraph, can only be read to refer to paragraph 4; since the purpose of a customs union is "to facilitate trade" between the constituent members and "not to raise barriers to the trade" with third countries, "a balance (must) be struck by the constituent members of a customs union (WT/DS34/AB/R 1999: paragraph 56).

The Understanding on Article XXIV clarifies the term "weighted average tariff rates" and the method to compute the same on a "tariff line basis" drawn from "import statistics for a previous representative period...broken down by the WTO country of origin." It suggests a product-specific computation of tariffs, for each WTO Member that is joining the customs union. While calculating it requires disaggregating data by the country of origin of each product. Yet, left undefined is the "previous representative period" (Bhala 2005: 595). If there have been changes in the duty structures of the countries coming together in a customs union, their choice of that period will be critical in considering whether that union does, or does not raise barriers to third countries (Bhala 2005: 595).

Another dilemma was that how to compute the weighted average duties for the various products categories. In other words, there is a problem of weighing duty rates for each product category by trade volume in that category. It is also difficult to

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Kong, China in WT/REG/M/15 dated 13 January 1998: paragraph 22; Japan in WT/REG/M/16 dated 18 March 1998: paragraph 59). In addressing the question of evaluation under Article XXIV:5(a), the Understanding refers to two overall assessments – that of tariffs and that of ORCs which are difficult to quantify and aggregate (Hong Kong, China in WT/REG/M/15 dated 13 January 1998: paragraph 57). Other members maintained that the appearance of the words "on the whole" in Article XXIV:5(a) indicates that there is only one assessment, with tariffs and ORCS being lumped together, implying that certain benefits involved in one particular element might offset certain deficiencies in the other (EC in WT/REG/M/16 dated 18 March 1998: paragraph 63). This interpretation has been questioned on the grounds that Article XXIV:5(b) which refers to FTAs does not contain the term "on the whole" (Hong Kong, China in WT/REG/M/16 dated 18 March 1998: paragraph 57).

average the tariffs of the members in a proposed customs union, as it is not practical to weigh the country averages into a single, union-wide average. The observations of both Dam and Jackson are highly relevant in this context that the volume traded of any item always bears an inverse relationship to the magnitude of the duty applied to that item (Dam 1970: 277-78; Jackson 1969: 612). A lower volume is concomitant with a higher tariff. In turn, if a trade-weighted average tariff is calculated, then a very high tariff probably will get a low volume weight. That is because the weights are relative trade volumes, and a very high tariff will cut off trade. The result will be distorted average. The truly restrictive tariff hardly counts, because it is so effective in 'killing' imports of the product (Bhala 2005: 598).

The difference between a customs union and a Free Trade Area is the presence of a common external policy in the former and absence of the same in the latter. This difference has direct implications in the regulation of the external requirements under Article XXIV:5. It is sub paragraph 5(b) of Article XXIV which deals with the external trade requirement for FTAs.

Article XXIV:5(b), which applies to free-trade areas, requires that "duties and other regulations of commerce...shall not be higher or more restrictive than the corresponding duties and other regulations of commerce existing in the same constituent territories prior to the formation of the free-trade area...." Article XXIV:5(b) does not require the members participating in an FTA to modify their external protection while joining an FTA. This approach is dictated by the very nature of FTAs because an FTA aims only at liberalizing trade within its constituents without addressing the question of external trade requirement. Although WTO members that join an FTA make no change to their external protection, internal regulations such as rules of origin can dramatically affect external protection (Matsushita et al. 2003: 351). Rules of Origin are particularly "appropriate" in an FTA context: unless goods circulating through an FTA are accompanied by a "certificate of origin", exporters will have an incentive to the cheapest port of entry (because external protection remains an issue of national sovereignty and it could very well be the case that there are asymmetries as to the level of customs duties among members of an FTA) (Matsushita 2003: 351-352). The first best would be that the national systems conferring origin at the pre-FTA stage remain in force unchanged

post-FTA. This is almost never the case however (Matsushita 2003: 351-352). Members of the FTA renegotiate "regional" rules of origin that, from an empirical perspective, are more often than not, stricter after the creation of an FTA (Jaime et al. 1997).

In the Uruguay Round Negotiation, negotiators attempted to tackle the issues of whether or not rules of origin were "other restrictions." However, they were unable to reach any conclusion as to whether they were or were not "other restrictions" (WT/REG/W/17 dated 31 October 1997; Matsushita 2004: 507). No panel or Appellate Body Reports have clarified this issue and therefore, this remains unresolved till date[61] (Matsushita 2004: 507). As the WTO bodies have not yet determined the definitive rules of origin, the issue is likely to remain alive and may have to be discussed in connection with future negotiations on rules of origin. Though the negotiators discussed the issue of rules of origin in the Uruguay Round Negotiations, the only result was to state that there should be transparency in the enforcement of rules of origin in FTA. Other issues were left to future negotiations and clarifications.

The language used in sub-paragraphs 5(a) and 5(b) of Article XXIV regarding the assessment of the conditions of third countries access to the markets of the parties to an RTA is largely symmetrical. But it contains some differences and this difference has given rise to divergent views by countries. Sub-paragraph 5(a) states that the duties and other restrictions of commerce "imposed" by a customs union are to be compared to those "applicable" by its parties prior to the institution of the union. Paragraph 2 of the 1994 Understanding clarifies the meaning of the words "imposed" and "applicable" with respect to duties, by specifying that, in the context of the general incidence calculations, "the duties and charges to be taken into consideration

[61] If rules of origin are "other restriction of trade" in the sense of Article XXIV, there is still a problem. Article XXIV:5(a) requires that tariffs and other trade restrictions after the formation of an FTA shall not be higher or more restrictive than those before its formation. The question here is: what is before? If an existing FTA is enlarged to another FTA (such as the transformation of the US-Canada Free Trade Agreement with that of the NAFTA), the answer may be a comparison between the common rules of origin at the time of the US-Canada Free Trade Agreement with that of the NAFTA. However, what if a new FTA is entered into? There were no common rules of origin before. The common rules of origin were created only after the formation of the FTA. Then the question is what rules should be compared with what rules. Should the common rules of origin be compared with those of each Member at the time before the formation of the FTA? However, a Member may have exercised "the tariff classification rule" while others may have exercised "the substantial transformation rule." This would make it very difficult to compare situations before and after (Matsushita 2004: 507).

shall be the applied rates of duty." The corresponding language used in sub paragraph 5(b) for FTAs states that the comparison is to be made between the duties and ORCs "maintained in each of the constituent territories and applicable at the formation" of the FTA and those previously "existing in the same constituent territories." Members have put forward divergent views with respect to the difference in these terms.[62]

Further, the paragraph 5(c) of Article XXIV requires the 'interim agreement' to "...include a plan and schedule for the formation ...within a reasonable length of time." Although Article XXIV does not impose specific condition on interim agreements as for the customs unions and free trade areas, Article XXIV still requires interim agreements to "include a plan and schedule for the formation of such a customs union or of such a free trade area within a reasonable length of time." The meaning of "reasonable" however was always controversial (Nsour 2008: 390).

RTAs often exploited the flexibility of the word "reasonable" to have an interim agreement for long periods of time with insubstantial trade liberalization (Nsour 2008: 390). The ambiguity was put to rest to some extend by the 1994 Understanding paragraph 3 which provided that "the reasonable length of time' referred to in paragraph 5(c) of Article XXIV should exceed 10 years only in exceptional cases. In cases where Member parties to an interim agreement believe that 10 years would be insufficient, they shall provide a full explanation to the Council for Trade in Goods of the need for a longer period (Understanding: paragraph 3). Though the Understanding clarified "reasonable" as 10 years it also left unclear what is "exceptional cases" and what constitutes "a full explanation." Though most customs unions or FTAs have been, at least in part, implemented by stages, only a few have expressly been notified as "interim agreements" in the GATT/WTO history. This shows the lack of consensus among Members on what may constitute an interim agreement in the sense of Article XXIV and the 1994 Understanding. On the above, a few specific issues have also been raised in the Committee on Regional Trade Agreements (CRTA) with respect to

[62] With respect to duties, while some have argued that the "applicable" duties for FTAs refer to bound rates, others have contended that they refer to applied rates. By pointing to the 1994 Understanding, the proponent of a stricter definition have claimed that a consistent interpretation of paragraph 5 would require that duties "applicable" by an FTA refer to applied rates just like in the case of a customs union (WT/REG/W/37 dated 2 March 2000: paragraph 41-42).

the application of the requirements on interim agreements[63] (WT/REG/W/37 dated 2 March 2000: page 18-19).

However, still a lot of interpretative issues are associated with paragraph 5 of Article XXIV which needs to be addressed for the effective application of the provision.

### III.8.4. Third Party Rights

Article XXIV requires customs union members to enter into negotiations with third parties if the formation of the union affects those third parties. The primary object of the negotiation is to provide compensatory adjustment in light of the change of duties after the formation of the customs union (Nsour 2008: 392). It requires the members of a customs union to follow the procedure set forth in Article XXVIII if they propose to increase any rate of duty inconsistently with the provisions of Article II of GATT. Article XXVIII, which concerns modifications of Tariff Schedules, lay out the procedure for making a compensatory adjustment, and highlights the importance of third countries with an initial negotiating right (INR).

The WTO Understanding both reiterates and amplifies the above requirements. It provides that if an agreement could not be reached on the compensatory adjustment within a reasonable period of time from the initiation of negotiations, the customs union shall, nevertheless, be free to modify or withdraw the concession; affected Members shall then be free to withdraw substantially equivalent concessions in accordance with Article XXVIII.

### III.8.5. Notification Requirements

Article XXIV requires the Members to notify their RTAs to the WTO. The main objective of notification is to ensure that RTAs have fully complied with the Article

[63] (a) It has been argued that the transitional period (10 years) characterized as a "reasonable length of time" in paragraph 3 of the 1994 Understanding could refer to individual products and that the obligation "to exceed 10 years in exceptional cases" could be used to justify a longer transition period for some products, if such products constitute a very small percentage of trade; (b) what should be expected as a "full explanation" by parties to an interim agreement with transitional periods longer than 10 years?; (c) when should interim agreements fulfill the requirements spelled out in paragraphs 5 and 8 - at the time of entry into force of the interim agreement or when the RTA has been fully implemented?; (d) should there be a distinction in the treatment of Other Restrictive Regulations of Commerce (ORRCs) and Other Regulations of Commerce (ORCs) between fully implemented RTAs and interim agreements? (WT/REG/W/37 dated 2 March 2000: 18-19).

XXIV requirements. For this purpose, the WTO Members contemplating the establishment of a customs union, free-trade area or interim agreement must notify the WTO of their plan; they are also required to provide sufficient information to allow it to make appropriate recommendations. The Understanding also supplements the Article XXIV:7 discipline. The Understanding stresses the point that WTO members should notify the WTO when they intend to form an RTA. Paragraph 11 of the Understanding requires WTO members to notify the substantial changes they make to the RTAs. It also requires periodic reporting to the Council for Trade in Goods. These notifications made by the members shall be examined by a working party and it shall submit a report to the Council of Trade in Goods, provides the Understanding. But now the process of examination is entrusted with the Committee on Regional Trade Agreements (CRTA)[64], which is mandated for this purpose. In July 2006, the WTO Negotiating Group on Rules approved a New Transparency Mechanism for all RTAs.[65]

Though Paragraph 7 of Article XXIV provides for notification, the time at which the notification should be made is neither precisely formulated nor homogeneously expressed in the rules. Now the WTO has brought in the Transparency Mechanism which requires the early notification of RTAs and the procedures to be followed in notification. This initiative has brought substantial clarity to the debate on the notification requirements.

### III.8.6. Definitional Aspects

Article XXIV defines customs unions and free-trade areas (Article XXIV:8). More precisely, it lays down the requirements to be qualified as customs union and free-trade areas under Article XXIV. The requirements enlisted in Article XXIV:8 aims at minimizing the effect for third parties. For this, it requires that RTA members must eliminate trade restrictions with respect to 'substantially all trade' between the 'constituent territories' of the RTA. Under Article XXIV:8(a) customs unions are required to eliminate duties and other restrictive regulations of commerce "with respect to substantially all the trade between the constituent territories of the union or

[64] The functioning of CRTA has been examined in Chapter II.
[65] See generally, Committee on Regional Trade Agreements, Report of the Committee on Regional Trade Agreements to the General Council, WT/REG/2 dated 11 June 1996.

at least with respect to substantially all the trade in products originating in such territories...." On the other hand, regarding FTAs, Article XXIV:8(b) states that "[d]uties and other restrictive regulations of commerce (except where necessary, those permitted under Article XI, XII, XIII, XIV, XV, XX) are eliminated on substantially all the trade between the constituent territories in products originating in such territories....' Thus Article XXIV treats customs unions and free trade areas differently. Though similar language is used for both, the requirement for customs union and free trade areas differ. In case of customs unions, duties and other restrictions on trade ought to be eliminated either with respect to substantially all the trade between the customs union members or with respect to substantially all the trade in goods originating within the customs union borders, while FTAs are only required to eliminate restrictions on substantially all the trade in products originating in the FTAs territories. Further, as per Article XXIV:8(a)(ii), the members of the customs union are required to apply substantially the same duties and other regulations of commerce to the trade of territories not included in the union. This differentiation reflects the nature of both customs union and free trade areas – customs unions are a more advanced type of trade liberalization because trade barriers are eliminated irrespective of the origin of goods once they enter the union (Nsour 2008: 377). In Article XXIV:8(b) however, trade barriers should be eliminated solely on goods originating in the FTA territories (Nsour 2008: 377).

The language construction of paragraph 8 and its interpretation has always been a matter of debate. Debates have always revolved around if "substantially all" should be understood in qualitative terms (exclusion of major sectors, etc.) or quantitative ones (percentage of trade of the members covered (Bhala 2001: 625). GATT working parties that were established to examine regional trade agreements, and later the Committee on Regional Trade Agreements (CRTA) have not been able to arrive at a precise conclusion on the meaning and implication of "substantially all the trade" (WT/REG/M/16 dated 18 March 1998; Nsour 2008: 377). To date, there is no consensus on what percentage could be deemed "substantially" or "all the trade"[66] (WT/REG/M/16 dated 18 March 1998; Nsour 2008: 377).

[66] Some WTO Working Parties like Hong Kong and China SAR attempted to define "substantially all the trade" through the percentage of trade covered. However, the exact percentage has never been agreed upon. For instance, the EC delegation suggested in 1998 that "substantially all the trade"

Over the years, major controversies have arisen because working party members could not agree on the meaning of the key terms "substantially all the trade" and "other restrictive regulations of commerce" contained in Article XXIV:8 (Matsushita 2003: 356). Scholars have attempted to provide accurate explanations when addressing the meaning of "substantially all the trade" (Cho 2001: 419, 436-37). Scholars have also expressed the ambiguity and difficulty in arriving at a consensus on the interpretation of the term. As Jackson (1969: 608) observes, "the term 'substantial' is just as studiously ambiguous as 'reasonable' and imposes even more problems in any attempt in GATT to evaluate a regional arrangement." He adds further that, although it is not necessary that the meaning of 'substantially' be the same in each of the four places it is used in Article XXIV in paragraph 8, since there is so little guidance for the interpretation of this term, and since an interpretation of that term in one context can at least be analogy for interpretation in another context....'

The preparatory work is not helpful in trying to fill in the meaning of 'substantial' beyond the obvious point that substantial is not "all", so some duties and restrictions can remain in each of the cases to which the term applies (UN Document E/PC/T/C.II/PV/7 dated 1 November 1946; Jackson 1969: 608). In GATT reports on specific regional arrangements the term 'substantially all' is discussed several times.[67]

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entailed 80 per cent of total trade volume (WT/REG/M/16 dated 18 March 1998; Nsour 2008: 377). Moreover, the EC delegation argued that the wording of Article XXIV says "substantially all the trade" and not "substantially all the products", thus excluding a sector of trade is not inconsistent with Article XXIV (L/1235 dated 4 June 1960). This opinion met with different reactions (Nsour 2008: 378).

[67] In the GATT Report evaluating the free-trade area relationship of the European Economic Community to the associated African States, the parties were asked to furnish data on the proportion of trade between constituent African territories and the European members that would remain subject to restrictions. The EEC representative asked that first a definition of "substantially all" be forthcoming and suggested that when 80 per cent of total trade was liberalized that this was "substantially all." The EEC, by totaling the trade among the constituent territories of the overall free trade area, which included the intra-European trade among the six countries of EEC, was able to claim that 98.6 per cent of their trade would be liberalized (Jackson 1969: 608). The "substantially all" question arose in several discussions including that of the *European Free Trade Area (EFTA)*. The issue here was the effect of exempting most of the agricultural trade from the terms of the EFTA Agreement. The report reflects the arguments as follows: It was also contended that the phrase "substantially all the trade" had a qualitative as well as quantitative aspect and that it should not be taken as allowing the exclusion of a major sector of economic activity. However the EFTA states maintained the view that it is important to note that the phrase used in Article XXIV was "substantially all the trade" and not "trade in substantially all products." Some members might wish to avail themselves of this latitude in respect of different products (L/1235 of 4 June 1960: paragraph 51).

Finally, the GATT Working Party Report noted: There was, therefore, a divergence of view regarding the justification for including, in estimating the amount of trade within the free-trade area to be freed

It is observed that it is difficult to arrive at a proportion that could be deemed "substantially all" within the GATT regional criteria but it has so far been impossible for GATT parties to agree on even the qualitative aspects of interpreting this term. Some agreement appears for the proposition that no important segment of trade can be omitted from an arrangement and still have that arrangement meet the "substantially all" test.[68] Scholars have expressed divergent views on the percentage criteria for "substantially all" test.[69] This imprecision in defining "substantially all the trade" made it difficult for RTA parties or prospective RTA parties to prove the compatibility of their RTA with the requirements of Article XXIV (Cho 2001: 436-37). So far, neither the GATT nor the WTO has provided a workable legal definition of "substantially all the trade", a key element of the internal trade requirement of GATT Article XXIV. In the absence of a consensus it is argued that it is still hard to

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from barriers in terms of Article XXIV, the trade in agricultural products where imports were freed in the case of one member state only. In the time of its disposal, the Working Party was unable to reach agreement concerning the interpretation which should be given to the relevant provisions of Article XXIV (L/1235 of 4 June 1960: paragraph 54).

[68] The Working Party which examined the *EEC-Finland Free Trade Agreement* in 1973 took the view that the "substantially all" test should be interpreted to liberalization of all products and should not be interpreted to allow an exemption of a particular sector of the economy in its entirety (L/ 4064 dated 1 August 1974). As per this view, to exempt any entire sector of the economy from liberalization would be contrary to Article XXIV of the GATT no matter what the quantitative coverage of this sector may be in the total trade (Matsushita 2004: 505).

[69] Cho has observed that, '[t]o fix a given figure as a criterion for qualification as an RTA seems problematic for many reasons. First of all, the measurement of "liberalized" trade volume would hardly be accurate in reality because such measurement is generally based on *ex ante* forecasts of unrealized transactions, such as increased imports resulting from the formation of an RTA' (Cho 2001: 443). Matsushita and Ahn, on the other hand supports a 1997 Australian proposal for the clarification of the term 'substantially all' on a quantitative element. 'In Australia's view, only a quantitative element (not a qualitative element) can define "substantially all the trade", and future negotiations should concentrate on putting a number next to the concept. Australia proposed that "substantially all the trade" should be defined as coverage of 95 per cent of all the six digit tariff lines listed in the Harmonized System. Australia conceded that the 95 per cent figure is an arbitrary figure intended to move negotiations out of a deadlock and to provide a rule of thumb. Mindful of the fact that if trade is concentrated in only few products, the 95 per cent figure could exempt sizeable trade flows, Australia proposed an assessment of prospective trade flows under an arrangement at various stage (Matsushita 2003: 359-360). Matsushita (2003) looks at the possibility of interpreting the term "substantially all the trade" in conformity with the customary rule of interpretation in Article 31 of the Vienna Convention on Law of the Treaties, as required by the Article 3.2 of the Dispute Settlement Understanding (DSU). The customary rule of interpretation as envisaged in Article 31 of the Vienna Convention obliges the interpreter to examine the ordinary meaning of the terms; in their context; in the light of their object and purpose; taking into account any subsequent decision; and taking into account subsequent practice. It further provides that if the interpreter still finds the meaning of the term to be manifestly ambiguous or unreasonable, recourse may be made to supplementary means of interpretation (Article 32 of the Vienna Convention), the preparatory work (*travaux preparatoires*) of an international treaty (in our case, the GATT). In their examination, Matsushita (2003) comes out with the proposition that the burden of proof in proving the compatibility of RTA with Article XXIV lies with the parties forming the RTA. In this regard, it was observed that GATT Article XXIV:8 is an exception to GATT Article I only to the extent that Article XXIV:8 has been complied with. Acknowledging that a treaty provision is of exceptional character has only one legal consequence: the burden of proof to demonstrate compatibility rests with the party invoking exception.

set a standard for what constitutes "substantially all the trade" and therefore, the best approach is to have a case-by-case approach (Cho 2001: 442-443).

Two issues have blocked the assessment of RTAs fulfillment of these requirements: the meaning of "substantially all the trade" and the scope of the list of ORRC exception. Lack of consensus on the meaning of "substantially all the trade" has repeatedly led examinations of RTAs to an impasse (WT/REG/W/37 dated 2 March 2000: 21). The Understanding of Article XXIV was not helpful in addressing the matter of trade coverage. It merely noted that the contribution to the expansion of world trade through closer integration between the relevant economies is diminished if any major sector of trade is excluded (Understanding: Preamble). In other words, the Understanding failed to clarify the term or to establish any obligations in this regard.

In the *Turkey – Textiles* case the Appellate Body attempted to address the meaning of "substantially" in two ways. It held "that 'substantially all the trade' is not the same as *all* the trade; yet it is something considerably more than merely *some* of the trade." The Appellate Body also added that the term "substantially all" contains both qualitative and quantitative meanings.[70] Similarly, the Appellate Body interpreted Article XXIV:8(a)(ii), which requires customs unions to have "substantially the same" trade regulations with non-members, by declaring that although paragraph 8 of Article XXIV offers some degree of flexibility, "substantially the same regulations" demands "approximating sameness", and not only a degree of comparability. In a same ratio, the Panel in the *United States – Line Pipe* case[71] found that the United States had established a prima facie case when it produced evidence that the NAFTA eliminated duties in 97 per cent of the parties' tariff lines, which was unquestionably deemed substantially all trade.

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[70] It held that: "[T]he ordinary meaning of the term "substantially" in the context of sub-paragraph 8(a) appears to provide for both qualitative and quantitative components. The expression "substantially the same duties and other regulations of commerce are applied by each of the Members of the (customs) union" would appear to encompass both quantitative and qualitative elements, the quantitative aspect more emphasized in relation to duties" (WT/DS34/AB/R 1999: paragraphs 48-50).

[71] See Panel Report, *United States – Definitive Safeguard measures on Import of Circular Welded Carbon Quality Line Pipe from Korea*, WTO Document WT/DS202/R of 29 December 2001: paragraphs 7.130, 7.144.

A number of suggestions have been made in the CRTA, in an attempt to bridge or complement the various approaches to the interpretation of the term "substantially all the trade."[72] However, no conclusive determination has evolved as yet.

### III.8.7. Duties and Other Restrictive Regulations of Commerce

Article XXIV requires that "duties and other restrictive regulations of commerce" should be eliminated on substantially all the trade between RTA partners (Article XXIV:8(a)(i)). Just as we found above in the case of "substantially all the trade", disagreements exist on the interpretation of the term "other restrictive regulations of commerce" (hereinafter, ORRCs). The source of long-standing disagreement on the meaning and scope of the term ORRC is understandable if one considers the broader commercial and economic policy environment for the interpretation of Article XXIV (Mathis 2002: 81). No consistent practice or consensus has emerged for ORRC terminology in the GATT working groups or later in the CRTA reviews of submitted free trade area and customs union plans.

Another major issue in paragraph 8 is whether or not the listing of Articles XI (quantitative restrictions), XII (restrictions for balance of payment purposes), XIII (non-discriminatory administration of quantitative restrictions), XIV (exceptions to the rules of non-discrimination), XV (exchange arrangements) and XX (general exceptions) is exhaustive or only indicative. In considering the above list in Article XXIV:8 exhaustive or indicative, the question arises that whether members can exclude the application of safeguards and anti-dumping measures between the members of a customs union or free trade area. Some scholars are of the view that in relation to ORRCs, Article XXIV is exhaustive while some others hold that it is indicative.[73] Like the scholars, countries have also held differing views on whether

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[72] Some of the important suggestions are: (a) To link RTA's compatibility with the "substantially all the trade" (SAT) requirement to a product coverage defined in terms of a certain percentage of tariff lines and not only in terms of trade flows; (b) To refine the quantitative approach to the SAT requirement by taking into account the use of preferential rules of origin in trade among the parties to an RTA (HKC in WT/REG/W/27 dated 8 July 1998); (c) To define RTAs coverage as meaning that all sector should be included; (d) To explore whether footnote 1 to GATS Article V provides a basis for some clarification of the SAT concept. In referring to the need of Economic Integration Agreements (EIAs) to have substantial sectoral coverage, the footnote 1 to GATS Article V reads: "This condition is understood in terms of number of sectors, volume of trade affected and modes of supply. In order to meet this condition, agreements should not provide for the *a priori* exclusion of any mode of supply."

[73] Mathis (2002) is of the view that as long as safeguards are not mentioned in Article XXIV, this should be a sign that it is not ORRCs. If there is no 'inter alia' reference, Article XXIV as drafted

measures under the Article cited in XXIV:8 as permitted exceptions are the only ones which parties to an RTA can still apply to the trade covered by the Agreement. Discussions and debate on the scope of the list of ORRC exceptions have focused on the application of anti-dumping measures and in particular, of safeguards, since neither Article VI nor Article XIX is cited as permitted exceptions in the list.[74]

The Panel in the *Argentina – Safeguard Measures on Imports of Footwear*[75] [hereinafter, Argentina – Footwear case] case dealt with the question of applying safeguards. In this case, the EC raised complaint regarding the provisional safeguard measures on imports of footwear introduced by Argentina (WT.DS121/R 1999: paragraph 5.149). EC alleged that the safeguard measures introduced, violated Articles 2, 4 5, 6, and 12 of the Agreement on Safeguards and Article XIX of GATT 1994 (WT/DS121/R 1999: paragraph 9.1). Though the Appellate Body upheld the decision of the Panel, yet it reversed certain findings and conclusions of the Panel which related to the relationship between the Agreement on Safeguards and Article XIX of GATT 1994 on one hand and to the use of Article XXIV as a defence to impose the safeguards on the other. The Panel in *Argentina – Footwear* case considered safeguards as ORRCs. The Panel noted that footnote 1 of the Agreement

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apparently manifests an exclusive listing (Mathis 2006: 92-93). In support of this view, scholars argue that excluding other articles such as Article XIX makes sense because Article XIX is an emergency measure that might be taken in response to unforeseen circumstances (Hart 1987). Scholars like Joost Pauwelyn (2004) and Lockhart and Mitchell (2005) are of the view that the listing in Article XXIV:8 is indicative. In support of this, they point out the Appellate Body Report in *Turkey – Textiles* case which noted that "the terms of sub-paragraph 8(a)(i) offer 'some flexibility' to the constituent members of a customs union when liberalizing their internal trade. On the above finding, the scholars in support of their view argue that applying safeguards between regional partners is not against the spirit of Article XXIV. To support the view of indicative nature of listing it is often pointed out that Article VI, just like Article XIX , is excluded from the list; hence, if the list were exclusive, "all intra-regional anti-dumping and countervailing duties would also be prohibited" (Pauwelyn 2004: 127).

[74] Canada took the view that anti-dumping measures are, by nature, discriminatory. It has been argued that the issue of the MFN application of anti-dumping duties does not arise since only the alleged dumping countries or exporters are targeted (WT/REG/M/15 dated 13 January 1998: paragraph 26). The fact that some parties use competition or anti-trust policy measures in place of anti-dumping measures was also a point of debate in this context. Japan was of the view that the maintenance of a dual system (of antidumping duties for third parties and competition policy for RTA members) is likely to have trade distortive effects (WT/REG/W/28 dated 28 July 1998). With respect to safeguards, one view is that the application of safeguard measures is forbidden in trade among parties to an RTA under Article XXIV (WT/REG/M/15 dated 13 January 1998: paragraph 40). Some members share a totally different view on the issue as they argued that safeguard measures are to be applied on an MFN basis (WT/REG/M/14 dated 24 November 1997: paragraph 7 and WT/REG/M/15 dated 13 January 1998: paragraph 22). Another view is that the application of safeguard measures is *permitted* in trade among parties to an RTA (WT/REG/M/14 dated 24 November 1997: paragraph 13). Members supporting that interpretation were however divided on the nature of the ORRC list and the situations justifying such flexibility (WT/REG/W/37 dated 2 March 2000: paragraph 24).

[75] See Panel Report, *Argentina – Safeguard measures on Imports of Footwear*, WTO Document WT/DS121/R of 25 June 1999.

on Safeguards mentioned Article XXIV:8, which could mean that safeguards could indeed be considered as ORRCs. The Panel Report further stated that "although the list of exceptions in Article XXIV:8 of GATT clearly does not include Article XIX, in our view, that paragraph itself does not necessarily prohibit the imposition of safeguard measures between the constituent territories of a customs union or free-trade area during their formation or after their completion" (WT/DS121/R 1999). The Appellate Body Report[76] did not reject this per se, but found that this question was irrelevant to the case.

### III.8.8. Historical Preferences

Article XXIV provides insulation to the historical preferences referred to in paragraph 2 of Article I (Article XXIV:9). It provides that "the preferences referred to in paragraph 2 of Article I shall not be affected by the formation of a customs union or of a free-trade area." Further, it provides for elimination or adjustment of the same by means of negotiations with affected contracting parties. An Interpretative Note, *Ad* Article XXIV, paragraph 9, requires that when a product which has been imported into the territory of a member of a customs union or free trade area at a preferential rate of duty is re-exported to the territory of another member of such union or area, the latter member should collect a duty equal to the difference between the duty already paid and any higher duty that would be payable if the product were being imported directly into its territory (*Ad* Article XXIV: 9).

### III.8.9. CUs and FTAs with Non-GATT Countries

Article XXIV provides for an exception clause for 'proposals which do not fully comply with the requirements of paragraph 5 to 9 inclusive, provided that such proposals lead to the formation of a customs union or a free-trade area.' Such an exception is to be approved by a two-thirds majority of the CONTRACTING PARTIES. Paragraph 10 was added to the General Agreement when the original text of Article XXIV was replaced by the texts of the corresponding Havana Charter articles. As originally proposed, the Charter only provided for the formation of customs union between Members. The provisions of paragraph 10 were added at the

[76] See Appellate Body Report, *Argentina – Safeguard measures on Imports of Footwear*, WTO Document WT/DS121/AB/R of 14 December 1999.

Havana Conference.[77] Free-trade areas including a contracting party and one or more non-contracting parties have been approved by the CONTRACTING PARTIES in two instances.[78] In practice, it could be found that treaties entered between contracting parties and non-members are not treated very strictly.[79]

### III.8.10. Arrangements between India and Pakistan

Article XXIV and its Interpretative Note (Ad Article) provides for special arrangements for India and Pakistan (Article XXIV:11). It is explained in this paragraph itself why such a specially tailored provision is made for India and Pakistan. It explains that, "taking into account the exceptional circumstances arising out of the establishment of India and Pakistan" and "recognizing the fact that they have long constituted an economic unit," the exception or waiver is granted. These circumstances become clearer when we look at the fact that India and Pakistan were declared independent countries as a result of the British Partition of the Indian Sub-continent on 15 August 1947 and paragraph 11 of Article XXIV was inserted in GATT one month after the partition, on 17 September 1947 at the Geneva session of the Preparatory Conference. A corresponding provision was added to the Charter at Havana, to respond to the particular situation of India and Pakistan as the partition of India and Pakistan had taken place on 10 August 1947.[80] Through paragraph 11 of Article XXIV, the drafters created a unique dispensation, exempting India and

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[77] The reports on discussions at Havana note that "a sixth paragraph was added to provide that the Organization may, by a two-thirds vote, approve proposals which do not fully comply with the requirements of the Article provided that they led to the establishment of a customs union or a free-trade area in the sense of the Article. It was the understanding of the Sub Committee that this new paragraph 6 will enable the Organization to approve establishment of customs union and free-trade area which include non-Members" (Havana Reports as per GATT Analytical Index 1995: 829). It was the view of those who favoured the insertion of the words "as between the territories of Members" in Article 44 that "this Article, including paragraph 6... would not prevent the formation of customs unions and free-trade areas of which one or more parties were non-members but would give the Organization an essential degree of control" (Havana Reports as per GATT Analytical Index 1995: 829).

[78] They are the Decision of 25 October 1951 on *Free-Trade Area Treaty between Nicaragua and El Salvador* and the Decision of 13 November 1956 on participation of *Nicaragua in the Central American Free Trade Area* (GATT Analytical Index 1995: 829).

[79] See generally Working Party Reports in respect of EFTA: BISD 9S/20; LAFTA: BISD 9S/21; Arab Common Market: BISD 14S/20; UK/Ireland Free Trade Area Agreement: BISD 114S/23 etc.

[80] At the review session of 1954-55, the need for this provision was considered and it was retained at the request of the delegations of India and Pakistan (GATT Analytical Index 1995: 829).

Pakistan from GATT obligations in the context of creating a RTA involving them[81] (Bhala 2005: 607).

### III.8.11. Observance by Regional and Local Governments

Article XXIV obliges the contracting parties to ensure that the regional and local governments and authorities do not violate the provisions of GATT (Article XXIV:12). In this regard, it requires the contracting parties to "take such reasonable measures" available to it to ensure the compliance of the provisions of the GATT. The provision is aimed at countries with federal system of government wherein there is a central government and provincial or state governments with their own authorities. The above provision comes into play when such a provincial government or a local authority introduces trade measures inconsistent with the GATT obligations. In such cases it is the duty of the central or the federal government to take reasonable measures to bring the act of the subordinate government or authority compatible with the GATT obligations. The 1994 Understanding, paragraphs 13, 14 and 15 elaborate the obligation under Article XXIV:12 and explains the procedures to be followed in its application. The Understanding reiterates and emphasizes that '[e]ach Member is fully responsible under GATT 1994 for the observance of all provisions of GATT 1994, and shall take such reasonable measures as may be available to it to ensure such observance by regional and local governments and authorities within its territory'[82] (GATT Analytical Index 1995: 829).

[81] See Bhala (2005) for a detailed discussion on the provision.

[82] In case of an inconsistent practice the Understanding provides that: "[t]he provisions of Articles XXII and XXIII of GATT 1994 as elaborated by the Dispute Settlement Understanding may be invoked in respect of measures affecting its observance taken by regional or local governments or authorities within the territory of a Member. When the Dispute Settlement Body has ruled that a provision of GATT 1994 has not been observed, the responsible Member shall take such reasonable measures as may be available to it to ensure its observance. The provisions relating to compensation and suspension of concessions or other obligations apply in cases where it has not been possible to secure such observance." Further the Understanding provides that: "[e]ach Member undertakes to accord sympathetic consideration to and afford adequate opportunity for consultation regarding any representations made by another Member concerning measures affecting the operation of GATT 1994 taken within the territory of the former."

### III.9. Other Provisions for Regional Arrangements under GATT/WTO

#### III.9.1. GATS Article V

Besides trade in goods, services are an integral part of international trade and also a part of RTAs. Major RTAs include provisions for services trade liberalization along with goods. Similar to GATT Article XXIV, the GATS Article V titled 'Economic Integration' provides for the formation of RTAs or rather Economic Integration Agreements (EIAs) as the title suggests. The key provision of Article V of GATS provides:

> [The provisions of GATS] shall not prevent any of its Members from being party to or entering into an agreement liberalizing trade in services between or among the parties to such an agreement, provided that such an agreement:
> (a) has substantial sectoral coverage, and
> (b) provides for the absence or elimination of substantially all discrimination in the sense of Article XVII, between or among the parties, on the sectors covered under the sub paragraph (a), through:
>  (i) elimination of existing discriminatory measures and/or
>  (ii) prohibition of new or more discriminatory measures either at the entry into force of that agreement or on the basis of a reasonable time-frame, except for measures permitted under Articles XI, XII, XIV and XIV bis.

The footnote for V:1(a) 'substantial sectoral coverage' provides that '[t]his condition is understood in terms of number of sectors, volume of trade affected and modes of supply. In order to meet this condition, agreements should not provide for the *a priori* exclusion of any mode of supply.'

As per GATS Article V:1, the key requirement that RTAs or EIAs should meet while liberalizing trade in services is "substantial sectoral coverage" – pursuant to paragraph (a) of Article V of GATS, the RTAs must have "substantial sectoral coverage" of the trade in services while liberalizing. The footnote to paragraph 1, as above, explains to some extend the term 'substantial sectoral coverage' as it elaborates that such coverage is to be understood in terms of number of sectors, volume of trade affected

and modes of supply. It further emphasizes that the agreements should not provide for *a priori* exclusion of any mode of supply.

Paragraph 1(b) of Article V of GATS requires the RTAs to provide for the absence or elimination of substantially all discrimination in the trade in services between or among the parties, in the sectors covered under the agreement. The elimination or abolition of discrimination pursuant to paragraph 1(b) shall be in the sense of Article XVII of the GATS (National Treatment). This elimination or abolition of discrimination is to be achieved through (i) elimination of existing discriminatory measures and/ or (ii) prohibition of new or more discriminatory measures. This elimination or abolition of all discrimination existing in the trade in services covered under the agreement is to be enacted either at the time of entry into force of the agreement or be enacted within a reasonable time-frame. The above requirements are exempted for measures permitted under Articles XI, XII, XIV and XIV *bis* of the GATS (GATS Article V).

Paragraph 2 of Article V of GATS provides for an evaluation test for the paragraph 1(b) requirements. It provides that '[i]n evaluating whether the conditions under paragraph 1(b) are met, consideration may be given to the relationship of the agreement to a wider process of economic integration or trade liberalization among the countries considered' (GATS Article V:2).

In contrast with GATT Article XXIV, the paragraph 3 of GATS Article V provides for favourable treatment for developing countries. It allows flexibility for conditions set out in paragraph 1 of Article V for developing countries. It further provides that the special treatment for developing countries shall be available "in accordance with the level of development of the countries concerned, both overall and in individual sectors and sub sectors" (GATS Article V:3).

Paragraph 4 of Article V of GATS which lays down the general purpose and object for RTAs resembles paragraph 4 of Article XXIV of GATT – both emphasize that RTAs should facilitate trade, and not raise barriers to third parties who are not members to the agreement. The paragraph uses the term 'shall not...raise the overall level of barriers' in restricting RTAs from raising barriers against third parties. This is

similar to the term 'not on the whole higher' in Article XXIV:5(a) and (b) of GATT (GATS Article V:4).

Article V:7 of GATS requires the parties to promptly notify the agreement and any subsequent enlargement or any significant modification of the agreement to the Council for Trade in Services. While notifying, the parties are required to make available such relevant information as may be requested by the Council (GATS Article V:7). The Council is also empowered to establish working party to examine the various aspects of the agreement and to report to the Council regarding the consistency of the agreement with Article V of GATS. Members of RTAs are required to report periodically to the Council (GATS Article V:7(b)) and the Council may examine the reports and take necessary steps as it deems fit. The Council is also empowered to make appropriate recommendations as it deems fit on the examination (GATS Article V:7(c)).

Similar to GATT Article XXIV, the GATS Article V is also surrounded with ambiguities and interpretative difficulties. Many of the terms are ambiguous and need substantial clarification. The language used is loosely constructed and vulnerable to misconstruction.

Article V:1(a) provides that an EIA must have "substantial sectoral coverage" with respect to the trade in services among the parties. The footnote of the provision provides that "substantial sectoral coverage" should be "understood in terms of number of sectors, volume of trade affected and modes of supply." It also states that it may not *a priori* exclude any of the four modes of supply. Although the parameters have been identified in the Article and footnote to determine the conformity of RTA with Article V, the question is whether these are limited to the parameters listed in the footnote or if there are other considerations also. Moreover, there exist divergent views on the extent of liberalization required to meet the 'substantial sectoral coverage' test (WT/REG/W/37 dated 2 March 2000: 29-30). This issue is parallel to the discussions on the relative merits of a quantitative versus qualitative test for "substantially all the trade" (SAT) requirement under Article XXIV (WT/REG/W/37 dated 2 March 2000: 30). Members hold differing views on the scope of the substantial sectoral coverage criterion especially on whether one or more sectors can be excluded from an EIA. The unavailability of reliable data on trade in services has

been another issue in this context which makes the computing of volume of trade difficult.

Sub-paragraph 1(b) requires that an EIA should provide for "the absence or elimination of substantially all discrimination in the sense of Article XVII (National Treatment) through (i) elimination of existing discriminatory measures and/or (ii) prohibition of new or more discriminator measures, with certain exceptions listed. These provisions are to be implemented either at the entry into force of the agreement or on the basis of "a reasonable time frame" (GATS Article V:1(b)).

The main issue here is the meaning and interpretation of "substantially all discrimination" – what constitutes "substantially all discrimination and what discriminatory measures, to what extent are allowed without breaching the provisions of Article V? Another issue is regarding the applicability of "and/ or" language in the context of provisions (i) and (ii). Subscribing alone to the meaning of either "and" or "or" will substantially affect the meaning and content of the provision. There is also a lack of consensus on the question of whether the list of exceptions mentioned in the Article V:1(b)(ii) is exhaustive or indicative. Debate on this issue resembles the similar question of listed exceptions in Article XXIV of GATT. Difficulties are also expressed in arriving at a percentage type test for quantitatively measuring "substantially all discrimination" as there is a lack of detailed data available on trade in services. The term "reasonable time-frame" used in sub paragraph 1(b)(ii) also requires clarification as to what period constitute a reasonable time-frame. In evaluating an agreement's consistency with Article V:1(b), paragraph 2 states that its relationship to "a wider process of economic integration or trade liberalization" among the parties to the agreement may also be taken into account. It is not clarified as to what constitutes "a wider process or economic integration or trade liberalization."

Sub paragraph V:3(a) allows "flexibility" to the parties of an RTA or EIA that involves developing countries, in meeting the requirements of paragraph 1 (especially with respect to sub paragraph (b)). The flexibility is to be granted "in accordance with the level of development of the countries concerned, both overall and in individual sectors and sub sectors" (Article V:3 of GATS). Here the question arises as to what sort of flexibility is to be accorded for developing countries and whether the margin of

flexibility granted to developing countries should be defined and if so, how? Further when it states that the flexibility is to be granted in accordance with the level of development of the countries, the question is what is the criterion of development and how it is to be assessed?

The paragraph 4 stipulates that parties to the RTA or EIA must ensure that the agreement does not "raise the overall level of barrier" to trade in services with respect to third parties "within the respective sectors or sub sectors compared to the level applicable prior to such an agreement"(Article V:4). How the "overall barrier to trade" in services is to be calculated and identifying the appropriate method for determining the change in the "overall barriers to trade" in services against the third parties remains a concern with regard to this provision.

Article V:7 requires that RTAs or EIAs to notify promptly to the Council for Trade in Services about the economic integration in services and any other modification brought in. The CRTA will examine the arrangements and the modifications and report to the Council with necessary recommendations as appropriate (GATS Article V:7(b) and (c)). Except for the ninety days advance notice for introducing GATS inconsistent modification provided in Article V:5, no specific time frames are provided to organize the examination process of RTAs or EIAs. However as the RTAs/ EIAs in the area of services are covered by the new Transparency Mechanism, all the deadlines and time frames mentioned therein are applicable to GATS RTAs or EIAs.

Paragraph 6 of Article V of GATS provides that a third party service supplier, legally recognized as a juridical person by a party to an RTA/EIA, is entitled to equivalent treatment granted within the EIA, provided that it engages in "substantive business operations" in the territory of the parties to that agreement (GATS Article V:6). Here the primary issue is what constitutes a "substantive business operations"? What is the definition of the scope of "substantive business operations?" Interpretation of the term may not be easy as members differ in their view on what can be termed as "substantive business operations."

It may be argued that many of the provisions of GATS Article V resembles Article XXIV of GATT and hence the interpretation and understanding of Article XXIV can

be a guiding light in interpreting GATS Article V. However, the inherent difference between the goods and services make it hard to apply the rules of trade in goods to trade in services. For example, while the tariff concept is the backbone of trade in goods, tariffs do not exist in trade in services. In interpreting the key provision of GATS Article V, the only authoritative yet insufficient hint was provided by the Panel in *Canada – Autos case*[83] which stated that "the purpose of Article V is to allow for ambitious liberalization to take place at a regional level, while at the same time guarding against undermining the MFN obligation by engaging in minor preferential arrangement" (WT/DS139/R of 11 February 2000: paragraph 10.271)

### III.9.2. GATT Enabling Clause

The developing countries have always demanded the inclusion of a provision in the General Agreement which would allow them to form regional or inter-regional preferential arrangements amongst themselves. It is well known that the GATT rules allowing the formation of customs union or free-trade areas were drawn up with plans for the economic integration of Europe in mind (Wilcox 1949: 71). The demand of developing countries was therefore that they should be authorized to enter amongst themselves into preferential agreements falling short of Article XXIV. During the Part IV negotiations of GATT in 1964, developing countries proposed the amendment of Article I of GATT to allow the granting of preferences for development purposes.[84] Though the negotiations concluded in the elaboration of provisions on trade and development which clearly differentiated between developing and developed countries, it did not provide for preferential treatment for developing countries in international trade relations.

After the addition of Part IV of the GATT, India, the United Arab Republic (Egypt) and Yugoslavia, concluded a trade agreement on preferential basis.[85] Before this,

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[83] See Panel Report in *Canada – Certain Measures Affecting the Automotive Industry*, WTO Document WT/DS139/R of 11 February 2000.

[84] See proposals of India, Brazil, Chile and United Arab Republic in Committee on the Legal and Institutional Framework of GATT in relation to Less-Developed Countries, GATT Doc. L/2147 of 24 February 1964.

[85] Trade Expansion and Economic Co-operation Agreement between India, the United Arab Republic and Yugoslavia concluded on 23 December 1967, GATT Document L/2980/Add.1 dated 4 March 1968.

Australia had formed an arrangement in 1966[86] with a limited scheme of tariff preference in favour of developing countries only (L/2443 dated 4 June 1965). Both the arrangements were claimed to be formed as a fulfillment of the commitments assumed under Part IV and presented it to GATT as "a modest pioneering effort in trade expansion" which had "evolved in pursuance of obligations under Part IV of the Agreement." But as Part IV does not provide for a legal basis for any preferential arrangements, the contracting parties had to adopt individual decisions allowing the implementation of the above schemes subject to certain conditions and procedures (Yusuf 1980: 489).

The issue of preference-giving to the developing countries again came up in 1971 during the elaboration of "Agreed Conclusions" in UNCTAD. "Agreed Conclusions" provided that the preference would be exclusively for developing countries, and that, no third country would invoke its rights under MFN to obtain these preferences. But, legally speaking the preference-giving countries were still under the legal obligation under MFN clause of the GATT according to which "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." (Article I:1 of the GATT MFN clause). Thus, the implementation of the GSP by countries would constitute a legal violation of the treaty obligations they had under the GATT. This necessitated a way out or a formula which would make the preferences compatible with Article I:1 of the GATT. After several considerations, on 28 November 1979, at the end of the Tokyo Round the "Enabling Clause" – *Decision on Differential and More Favorable Treatment, Reciprocity and Fuller Participation of Developing Countries* was adopted (hereinafter the Enabling Clause).

Generally speaking, the Enabling Clause was designed to permit developed countries to offer preferential tariff treatment to the imports of developing countries, to allow

[86] In a statement to the working group set up by the contracting parties, the Australian representative pointed out, *inter alia*, that "Australia had accepted Part IV of the GATT on the understanding that the provisions of Article XXXVII would be applied to the fullest extent possible with Australia's development needs, policies and responsibilities, and that it was against this background that the application should be viewed" (Yusuf 1980: 489).

for regional or global preferential arrangements among less-developed countries and to emphasis the need for special treatment for least developed countries.

The first paragraph of the Enabling Clause provides that "contracting parties may accord differential and more favorable treatment to developing countries without according such treatment to other contracting parties." The paragraph thus provides for legal exception to MFN obligation under the GATT Article I:1 (Enabling Clause: paragraph 1).

Paragraph 2 of the Enabling Clause elaborates the broad scope of paragraph 1 as it suggests that the paragraph 1 provision applies to "preferential tariff treatment accorded by developed contracting parties in accordance with the Generalized System of Preferences"[87] (Enabling Clause: paragraph 2). Paragraph 1 provision applies to Differential and More Favourable treatment with respect to non-tariff measures contained in various GATT instruments (Enabling Clause: paragraph 2(b)). Paragraph 2(c) provides that the exception under paragraph 1 is applicable to "regional or global arrangements entered into amongst less-developed contracting parties for the mutual reduction or elimination of tariffs" (Enabling Clause: paragraph 2(c)). It also provides for the mutual reduction or elimination of non-tariff measures in such arrangements in accordance with the criteria or conditions which may be prescribed by the CONTRACTING PARTIES on products imported from one another (Enabling Clause: paragraph 2(c)). Paragraph 2(d) indicates that "special treatment of the least developed among the developing countries in the context of any general or specific measures in favour of developing countries" are also eligible for exception under paragraph 1 (Enabling Clause: paragraph 2(d)).

The Enabling Clause excludes RTAs among developing countries from many conditions mentioned in Article XXIV such as the "substantially all the trade" requirement and other legal technicalities. However, the Enabling Clause asserts just like Article XXIV:3 that the main purpose of RTAs for developing countries should be to facilitate trade without hindering trade with other members (Enabling Clause: paragraph 3(a)). It also provides that the treatment provided under this "shall not

[87] The Generalized System of Preferences mentioned here refers to the *Decision of the CONTRACTING PARTIES of 25 June 1971*, relating to the establishment of "generalized, non-reciprocal and non-discriminatory preferences beneficial to the developing countries" (L/3545 of 28 June 1971)

constitute an impediment to the reduction or elimination of tariffs and other restrictions to trade on a most favoured nation basis" (Enabling Clause: paragraph 3(b)). In other words, the provision requires that the treatment under Enabling Clause shall not hinder the multilateral liberalization process. It further provides that the treatment under this provision shall "be designed and, if necessary, modified to respond positively to the development, financial and trade needs of developing countries" (Enabling Clause: paragraph 3(c)).

Similar to GATT Article XXIV and GATS Article V, the Enabling Clause also requires parties to notify arrangements formed under the provision and to furnish all the relevant information that they may deem appropriate (Enabling Clause: paragraph 4(a)). The provision also requires to afford adequate opportunity for prompt consultations at the request of any interested contracting party (Enabling Clause: paragraph 4(b)).

Paragraph 5 of the Enabling Clause lays down the principle of non-reciprocity which states that "[t]he developed countries do not expect reciprocity for commitments made by them in trade negotiation to reduce or remove tariffs and other barriers to the trade of developing countries" (Enabling Clause: paragraph 5). It is thus a reincarnation of Article XXXVI:8 and *Ad* Article XXXVI:8 (Bhala 2005: 1065). Paragraph 6 contains the same principle of non-reciprocity but with a special emphasis for the least developed countries (Enabling Clause: paragraph 6).

Paragraph 7 reiterates the broad language supporting the objectives of GATT with reference to the preamble and Article XXVI. It also includes the principle of 'progressive development and participation,' as it suggests a less developed country as it grows out of poverty, is expected to contribute more fully to the multilateral trading system, and offer up to the rest of the world significant trade concessions (Enabling Clause: paragraph 7). Paragraph 9 provides for review and joint action by the contracting parties (Enabling Clause: paragraph 9).

The Enabling Clause also incorporates ambiguities that have not yet been clarified. The Panel and Appellate Body in the *European Communities- Conditions for the*

*Granting of Tariff Preferences to Developing Countries*[88] (hereinafter European Communities Tariff Preferences) examined the question of the broadness of the Enabling Clause. India successfully launched a complaint against the European Communities (EC) to challenge the conditionality of the voluntary preference scheme of GSP by EC.[89] The Appellate Body agreed with the Panel that the Enabling Clause is not a legal obligation per se, rather it "contains requirements that are only subsidiary obligations, dependent on the decision of the Member to take [particular] measures" (WTDS246/AB/R 2004: paragraph 4.41). The Appellate Body found that the Enabling Clause is "in the nature of an exception to Article I:1 (WT/DS246/AB/R 2004: paragraph 126) and takes precedent over it should a conflict arise between them (WT/DS246/AB/R 2004: paragraph 101). The Appellate Body also simultaneously reversed the Panel's findings that tariff preferences under the GSP should be identical for all developing countries by holding that preferential treatment should respond positively to financial and trade needs of each developing country (WT/DS246/AB/R 2004: paragraph 173). Neither the Appellate Body nor the Panel outlawed the idea of conditionalities that are consistent and non-discriminatory.

Though the Panel and Appellate Body on this case dealt with some of the interpretative aspects of Enabling Clause, the ambiguities existing are not completely wiped out. The interpretation of the Enabling Clause has given rise to controversy among the WTO members (Hafez 2003: 902). There is no definition in the GATT of the term "developing countries" (Mavroidis 2005: 248; Nsour 2008: 411). In this context, the observation of Professor Jackson (1997: 172) that "(t)he GATT and its Article XXIV, as well as the more ambiguous legal framework of the 1979 Enabling Clause, are grossly inadequate for the tasks required for a multilateral system to provide some sort of adequate supervision and discipline on certain of the more dangerous tendencies of trading blocs" is worth noting.

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[88] See Panel Report and Appellate Body Reports in *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WTO Documents WT/DS246/R of 1 December, 2003 and WTDS246/AB/R of 7 April 2004.

[89] According to India, the scheme was incompatible with Article I of GATT. India argued that the EC's drug measures violated Article I of the GATT because this (i) discriminated between developing countries as they applied only to 12 developing countries; (ii) were not beneficial to developing countries and (iii) the scheme is only beneficial to the EC.

### III.10. GATT Article XXIV: A Weak Legal Discipline?

So far the discussion has focused on the historical evolution of GATT Article XXIV, its drafting history and the analysis of the legal text as well as that of the GATS Article V and the Enabling Clause. Some broad observations could be made from the analysis above.

Though the legislative and judicial outcomes on the subject have contributed substantially towards providing clarity in applying the legal text of Article XXIV, the ambiguities surrounding since its drafting continue to plague its application. The weak discipline of the Article XXIV is well explained by Dam (1970) in his illustrated work, wherein over three decades ago, he offered the assessment of the Article. He observes that Article XXIV failed to attain precision in keeping RTAs within the legal framework. Experience shows that whenever conflicts arise on the compliance, it is the GATT which yielded than the RTAs. Most of the RTAs which came for review under Article XXIV were in violation of the provisions still could not treat them as violations of MFN. He criticizes that the standards established under Article XXIV are deceptively concrete and precise and resulted in ambiguities in its application. Similarly, though the rules appear to be based on economic consideration, it hardly makes economic sense. GATT/WTO so far failed to make findings on the legality of various RTAs. According to him, the GATT draftsman erred in creating a large number of prohibitions rather than creating well defined procedures for disciplining RTAs (Dam 1970: 275-76, 291).

The observation of Dam simply speaks about the inherent weakness of the GATT Article XXIV. The central purpose of the Article is to regulate the tension between the regionalism and multilateralism by ensuring that the contracting parties do not enter into RTAs in a way that blocks progress toward multilateral trade liberalization. In other words, Article XXIV aims at prohibiting or minimizing the 'trade diverting' effects of RTAs. A large number of RTAs without being strictly within the legal framework of Article XXIV demonstrate the weak discipline of the Article. Earlier, Professor Jackson identified rightly the "basic problem" of the Article as under:

> [It contains] criteria that are so ambiguous or so unrelated to the goals and policies of GATT Contracting Parties that the international community was not prepared to make compliance with the technicalities of Article XXIV the

*sine qua non* of eligibility for the exception from other GATT obligations (Jackson 1969: 588).

As indicated by the experience over the years, it is difficult to say that GATT Article XXIV has succeeded in exercising effective control over RTAs. Scholars (Hafez 2003; Cho 2001, etc.) have expressed doubt whether the Article will be able to effectively ensure discipline of RTAs in the years to come. The serious difficulty lies with the interpretative problems associated with Article XXIV. There is no consensus so far on the interpretation of terms such as "substantially all the trade" and "other restrictive regulations of commerce" (WTO 1995a; Hafez 2003: 914). The lack of consensus and understanding on these key terms and provisions is one of the main reasons for the failure of the CRTA on deciding on the WTO-conformity of RTAs. The situation got more complex when Members took advantage of the inability of the regulating forum and went on with formation of RTAs of their choice. Controversy also surrounds on the precise understanding and interpretation of many other key terms and provisions of the Article XXIV like "not on the whole higher or more restrictive" and "general incidence." Though the Understanding on the Interpretation of Article XXIV of 1994 clarified some of the ambiguities and possible interpretation of certain terms, the Understanding also failed to remove the ambiguities surrounding the key provisions of the Article. WTO acknowledges this in its Report on regionalism in which the WTO itself has disappointingly noted that the Uruguay Round made little progress regarding the interpretation problems of Article XXIV (WTO 1995a).

Despite the fact that modern day trade involves both goods and services, the GATT Article XXIV is limited by its exclusive focus on trade in goods. Modern RTAs include provisions for preferential treatment for both trade in goods and services. While the RTAs notified under Article XXIV contains provisions for trade in services, there is no legal thread which makes the relevant provisions of General Agreement on Trade in Services governing the preferential or regional trade arrangements in the trade in services binding. Article V of GATS provides for provisions for "economic integration."[90] Similar to GATT Article XXIV, GATS Article V is also plagued by vague terms such as "substantial sectoral coverage." Further, there is hardly any body of jurisprudence that has emerged so far on the

[90] Section III.9.1 examines the provisions in GATS governing economic integration.

subject to provide a guiding light in interpreting the inherently nebulous legal language of the text. Given the similarities between the two provisions, for instance, paragraph 1 and paragraph 4 of the GATS resembles paragraphs 4 and 8 of the GATT Article XXIV respectively, one might argue that the GATT/WTO jurisprudence shall be adopted in interpreting GATS Article V. But it is illogical to subscribe to this view considering the fundamental structural difference between the GATS and the GATT. The inherent difference between goods and services preclude simple legal conflation which in turn may complicate the establishment of technically common jurisprudence in trade regionalism (Cho 2001: 451).

Moreover, the legal framework of GATT Article XXIV concerns only the "formation", that is, the creation or expansion of RTAs. It lays down the requirements under GATT/WTO to be eligible for the exception for RTAs. In other words, its basic purpose is to authorize the formation of RTAs (Cho 2001: 451). The provision is regrettably silent on critical issues such as the 'operational' and 'functional' aspects of RTAs. Nothing is found in the Article which could regulate the post-formative functioning of RTAs. Given the fact that a large number of regional arrangements exist and that the proliferation of RTAs continue unabated, it is likely to surface many new and complex legal questions from the interactions between the RTAs and the WTO as well as RTAs among themselves. Apart from the lack of legal discipline of the GATT Article XXIV, the provision miserably fails to address many sophisticated issues pertaining to the operational aspects of RTAs.

Further, Article XXIV does not impose a strict timing for notification. Countries notify RTAs when they are finally signed and sealed, or notification happens long after the RTAs come into force (Hafez 2003: 915). The new Transparency Mechanism introduced to bring discipline in the notification process of RTAs also contains a loose language and allow countries ample space for misuse. Though it requires countries forming RTAs to notify and furnish details, it is still unclear what all data and to what extent is to be provided with. In this regard, the Chile's submission to the Negotiating Group on Rules regarding Regional Trade Agreements is interesting. The RTAs have continuous problem of four "Ws": (i) when to notify; (ii) where to notify; (iii) what to notify and (iv) whether to notify (TN/RL/W/16 dated 10 July 2002). Though the new Transparency Mechanism has been introduced to

address some of these issues, it has also not provided a strict discipline in this regard. Further the examination process of the CRTA has not been a resounding success. The problem of transparency and the disagreements over the interpretations of Article XXIV have seriously affected the examination process by the CRTA (Hafez 2003: 917). The Committee has currently examined about 67 RTAs under the Transparency Mechanism and a backlog of about 95 RTAs are pending (WT/REG/20 dated 16 October 2009).

So far the jurisprudence evolved on RTAs through Panel and Appellate Body Reports are also limited or insufficient.[91] In the pre-Uruguay Round period, the GATT Panels did not adjudicate any issues under Article XXIV resulting in the absence of jurisprudence on RTAs (Sampson 1996). It was more considered as a political issue to be decided by the CONTRACTING PARTIES rather than judicial. After the Uruguay Round, not enough cases have been brought before the Panel or Appellate Body concerning Article XXIV. The WTO Panels and Appellate Body have had very few occasions in which they had the opportunity to discuss Article XXIV. The *Turkey – Textiles* case, in which the Appellate Body to a great extent examined Article XXIV, it was reluctant to deal comprehensively with Article XXIV. This was clear from the observation of the Appellate Body that "we make no finding either on many other issues that may arise under Article XXIV. The resolution of those other issues must await another day" (WT/DS34/AB/R 1999: paragraph 65). Hence, it is to be concluded that a mature jurisprudence on Article XXIV is yet to evolve and develop.

### III.11. Conclusion

The evolution of Article XXIV testifies that preferences in trade were common and it enjoyed exception even in bilateral agreements since the earlier days of international trade. After the World Wars, the non-discrimination and MFN principle in trade emerged challenging the preferences including the regional preferences. The negotiations and debate on the scope and application of the ambitious MFN principle was essentially surrounded on the desirability of allowing or dismantling the preference system. It could be found that the law and practice of regional preferences in international trade crystallized through the post war trade negotiations which

[91] See Chapter IV for detailed discussion on GATT/WTO jurisprudence.

developed through the GATT Geneva negotiations, the Havana Conference, the ITO Charter and finally took the form of GATT Article XXIV. The further demand of the developing countries for exception for pro-developmental preferences among them resulted in the GATT Enabling Clause. The GATS also provided for a similar exception for regional integration agreements under Article V. The drafting history reveals that the debate on permitting regional preference was essentially focused on its potential for weakening the multilateral liberalization based on the principles of non-discrimination. This concern is well reflected in the legal text of Article XXIV where it is stated that the purpose of RTAs should be to facilitate trade between the constituent territories and not to raise the barriers to the trade of other contracting parties. However, a close analysis of the Article reveals that the subsequent legal provisions are not effective enough to protect the above spirit of the Article.

GATT Article XXIV imposes two primary set of obligations to the parties forming RTAs. One set is definitional in nature as it outlines the categories of arrangements that fall within the provisions of this Article. The other set establishes certain implementation and procedural conditions while forming the RTAs. However, many of the legal requirements enlisted in the text are ambiguous and lack clarity. This loose language in the legal text has led to the widespread abuse of the provisions. WTO is aware of the legal challenges that RTAs present and has initiated legislative and administrative steps to ensure that RTAs are disciplined. Understanding on Article XXIV and the New Transparency Mechanism are two major steps in this direction. However, the responsibility of ensuring proper compliance of RTAs finally lies with the WTO Members themselves. It is also observed that the GATT Article XXIV is not ambiguous as to make the compliance impossible. It very much depends on the attitude of the WTO Members. The present surge of abuse of Article XXIV provisions points to renewed interest of countries in regionalism. The efforts to discipline RTAs certainly require the strengthening of multilateralism. The success of the Doha Round will have a bearing on reorienting the WTO Members to the multilateral route.

## Chapter IV

## GATT/WTO Jurisprudence on Regional Trade Agreements

### IV.1. Introduction

We have so far examined the evolution and structure of the regional exception provisions within the multilateral framework. The interpretation of some of these provisions by the GATT/WTO dispute settlement bodies forms the next important section of this study.

In the pre-Uruguay Round period, the competency of the GATT Panels to adjudicate on issues pertaining to the RTAs was greatly disputed. An earlier GATT Panel[1] even refused to address the issues related to Article XXIV on the ground that "examination or re-examination of Article XXIV agreements was the responsibility of the contracting parties." It is often viewed that the inapplicability of the GATT 1947 dispute settlement mechanism to Article XXIV as well as weak dispute settlement system had the effect of suffocating any meaningful jurisprudential development on RTAs (Cho 2001: 438). However on closer examination, it could be seen that in spite of the inherent limitations of the GATT Panels,[2] legal issues directly and indirectly related to Article XXIV have been addressed during the GATT period. The question of judicial scrutiny was resolved by the Uruguay Round Understanding on Article XXIV which clarified in paragraph 12 that the WTO dispute settlement procedure can be invoked with respect to any issue concerning Article XXIV. Since then, the WTO Dispute Settlement System has had the opportunity to deal with various aspects of Article XXIV (See Table IV.1 below)

**TABLE IV.1: WTO DISPUTES INVOLVING ARTICLE XXIV**

| Dispute Ref. | Title | Brief Facts | Remarks |
|---|---|---|---|
| DS 19 | Poland – Import Regime for | India requested consultations concerning | Article XXIV cited in the request for |

[1] Report of the Panel in *European Community – Tariff Treatment on Imports of Citrus Products from Certain Countries in the Mediterranean Region*, GATT Document L/5776 of 7 February 1985, paragraph 4.5.

[2] Under the GATT regime adjudication of GATT panels was generally limited due to the right of the losing party to block the adoption of a panel report through positive consensus.

| | | | |
|---|---|---|---|
| | Automobiles | Poland's Preferential Treatment of the EC in its tariff scheme on automobiles | consultations. However, parties notified a mutually agreed solution. |
| DS 29 | Turkey – Restrictions on Import of Textile and Clothing Products | Hong Kong requested consultations concerning Turkey's QRs on imports of textiles and clothing products | Hong Kong claimed that Article XXIV did not entitle Turkey to impose new restrictions in the context of the EC-Turkey customs union. However, no further proceedings noted. |
| DS 34 | Turkey – Restrictions on Import of Textile and Clothing Products | India requested consultations concerning Turkey's imposition of QRs on a broad range of textile and clothing products | AB and Panel held that Article XXIV did not constitute a defence to Turkey's measures (See Sections IV.4 and IV.5 of the chapter). |
| DS 47 | Turkey – Restrictions on Import of Textile and Clothing Products | Thailand requested consultations concerning Turkey's imposition on QRs on imports of textile and clothing products | Article XXIV cited in the request for consultations. However, no further proceedings noted |
| DS 53 | Mexico – Customs Valuation of Imports | EC requested consultations with Mexico concerning the Mexican Customs Law. EC claimed that Mexico applied CIF value as the basis of customs valuation of imports originating in non-NAFTA countries, while it applied FOB value for imports originating in NAFTA countries | Violation of Article XXIV:5(b) alleged.<br><br>No Panel/ Withdrawal/ Solution notified yet. |
| DS 121 | Argentina – Safeguard Measures on Imports of Footwear (Argentina – Footwear) | EC requested consultations with Argentina in respect of provisional and definitive safeguard measures on imports of footwear | AB held that Panel erred in deciding that an examination of Article XXIV:8 was relevant to its analysis of whether safeguard measures at issue were consistent with the provisions of Article 2 and 4 of the Agreement on Safeguards. |
| DS 139 | Canada – | Japan requested | Panel rejected |

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| | Certain Measures Affecting the Automotive Industry (Canada – Autos) | consultations with Canada in respect of measures taken by Canada in automotive industry | Canada's defence that Article XXIV allowed duty exemption for NAFTA members, because it found that the exemption was provided to countries other than the US and Mexico and because the exemption did not apply to all manufacturers from these countries |
| DS 144 | US – Certain Measures Affecting the Imports of Cattle, Swine and Grain from Canada | Canada requested consultations with the US in respect of certain measures, imposed by the US state of South Dakota and other states, prohibiting entry or transit to Canadian trucks carrying cattle, swine and grain | Violation of Article XXIV:12 alleged.<br><br>No Panel/ Withdrawal/ Solution notified yet. |
| DS 166 | US – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities (US – Wheat Gluten) | EC requested consultations in respect of definitive safeguard measures imposed by the US on imports of wheat gluten from the EC | AB upheld the Panel's view that it could rule on the EC claim without recourse to Article XXIV or footnote 1 to the Agreement on Safeguards |
| DS 202 | US – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea (US – Line Pipe) | Korea requested consultations in respect of definitive safeguard measures imposed by the US on imports of line pipes | AB avoided ruling on whether Article XXIV serves as an exception to Article 2.2 of the Agreement on Safeguards |
| DS 349 | EC – Measures Affecting the Tariff Quota for Fresh or Chilled Garlic | Argentina requested consultation with the EC concerning measures that allegedly increased the tariff quota for fresh and chilled garlic in favour of China. | According to Argentina, the increase in tariff quota for garlic was the result of bilateral negotiations between the EC and China, pursuant to |

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| | | | Article XXIV:6 of GATT 1994, as a result of the EC's enlargement.<br><br>No Panel/ Withdrawal/ Solution notified yet. |

Source: WTO website

This Chapter examines some of the important Panel and Appellate Body Reports which deal with the issue of regional exception, in particular Article XXIV. Section 2 of this Chapter examines the 1993 GATT Panel (un-adopted) report in the case *EEC – Member States Import Regimes for Bananas* (Bananas I); Section 3 examines the 1994 GATT Panel Report in *EEC – Import Regimes for Bananas* (Bananas II) case and Sections 4 and 5 deal with the 1999 WTO Panel and Appellate Body Report respectively in *Turkey – Certain Restrictions on Imports of Textiles and Clothing Products* case. In the examination of the cases below, emphasis is given to the aspects related to Article XXIV, for understanding the GATT/WTO jurisprudence on RTAs.

## IV.2. EEC – Member States Import Regimes for Bananas[3] (Bananas I)

### IV.2.1. Background and Facts of the Case

The EEC countries were traditionally high importers of bananas. Since 1988, the EEC had been the world's largest importer of bananas, followed by the United States and Japan. In 1991, the EEC import of bananas was estimated as approximately 38 per cent of the world imports. [4] In the total banana supplies in the EEC, two thirds of the imported fresh bananas originated in Latin American countries. Major suppliers of Latin American bananas to the EEC in that period were Ecuador, Costa Rica, Colombia, Panama and Honduras. All EEC Member States, except Spain, imported Latin American bananas,[5] though to widely varying degrees. In contrast, Spain did not

[3] The Panel Report (un-adopted) is available as GATT document DS32/R of 3 June 1993. The analysis of the case is based on the Panel Report. Appropriate references are given wherever other sources are relied on.

[4] In 1991, the EEC imported some 4 million tons of fresh and dried bananas. Among the total import of bananas 3.7 million tons constituted the import of fresh bananas, as per FAO sources (DS32/R 1993: paragraph 12).

[5] Germany, which accounted for approximately one third of EEC banana imports, imported almost all its bananas from Latin America. Similarly, Belgium, Denmark, Ireland, Luxembourg and the Netherlands imported nearly exclusively from Latin American suppliers (DS32/R 1993).

import third country bananas, consuming bananas produced domestically in the Canary Islands.[6] ACP (African Caribbean and Pacific) countries also imported bananas to some EEC Member States. ACP bananas were primarily imported by the United Kingdom and France. Major suppliers of ACP bananas to the EEC in 1991 were Cameroon, Cote d'Ivoire, St. Lucia, Jamaica, St. Vincent and Dominica.

Imports of bananas into the EEC were not subject to a common policy as on 31 December 1992, but since 1963 the EEC had maintained a consolidated common external tariff on bananas of 20 per cent *ad valorem*. In the various Member States of EEC, there were several different national import systems for bananas.

This being the circumstances, by virtue of Article 163(1) of the fourth Lome Convention signed in 1989, the imports of bananas from ACP countries started to enter the EEC duty free. Under Protocol 5 of the fourth Lome Convention, the EEC was committed to maintain the traditional advantage of ACP banana suppliers on those markets. The Protocol provided that, "no ACP state shall be placed, as regards access to its traditional markets and its advantages on these markets in a less favourable situation than in the past or at present." Apart from this, individual EEC States maintained certain national restrictions on non-ACP bananas. These were listed and reported to the GATT as an Annex to Regulation (EEC) 288/82, the EEC Regulation relating to the common system applicable to imports.[7]

As on 31 December 1992, Belgium, Denmark, Ireland, Luxembourg and the Netherlands used the tariff as sole border measure and these countries mainly imported Latin American bananas. However, all other EEC Member States allowed duty free access for ACP bananas. Under the Treaty of Rome, Germany was allowed to maintain tariff free quota for imports of bananas from all sources. France, Greece, Italy, Portugal and the United Kingdom restricted imports of bananas by means of various quantitative restrictions and licensing requirements. Spain maintained a prohibition on import of bananas.

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[6] Domestically produced bananas were also consumed in France, Greece and Portugal (DS32/R 1993).
[7] All individual EEC Member State import regimes were scheduled to expire on 30 June 1993. In February 1993, the EC Council adopted Regulation (EEC) No. 404/93 to establish a common market organization for bananas, including, *inter alia*, a new import regime to be effective from 1 July 1993 (DS32/R 1993: paragraphs 13-16).

The core of the complaint raised against the EEC related to the above restrictions imposed on the importation of Latin American (non-ACP) bananas by the individual country regimes that were in operation at the end of 1992. National import regimes effective in the EEC at the end of 1992 included, tariff free quota applied in Germany for bananas from all sources; 20 per cent duty on non ACP bananas and duty free access for ACP bananas in Belgium, Denmark, Ireland, Luxembourg and the Netherlands; various quantitative restrictions and licensing procedures in France, Greece, Italy, Portugal and the UK and the *de facto* prohibition of banana imports in Spain.

### IV.2.2. Complaints and Contentions of the Parties

Four of the complainants, viz., Costa Rica, Guatemala, Nicaragua and Venezuela requested the Panel to find that the banana import regime maintained by Belgium, Denmark, France, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain and the United Kingdom were inconsistent with Articles I, II, XI and XIII as well as Part IV of the General Agreement and that their regimes were not justified by any of the exceptions of the General Agreement. It was also contended that the above infringements amounted to nullification or impairment of benefits accruing to Costa Rica, Guatemala, Nicaragua and Venezuela under the General Agreement. Accordingly, the complaining parties requested the Panel for findings on the above violations and to recommend to the CONTRACTING PARTIES to request the banana import regimes maintained by the above mentioned EEC Member States be brought into conformity with the provisions of the General Agreement.

Apart from this, another complaining party, Columbia considered that the EEC's banana import regime violated Articles I, II, VIII, XI, XIII, XXXVI and XXXVII. Further, the import regime nullified or impaired benefits accruing to Colombia under the General Agreement. Colombia also requested the Panel to recommend to the CONTRACTING PARTIES to request the EEC to modify its banana import regimes to make them consistent with the General Agreement.

On the other side, the EEC requested the Panel to find that the banana import regimes were in conformity with General Agreement. In supporting their view, the EEC contented that the subsequent practice of the CONTRACTING PARTIES had

conferred legality for the EEC banana import regime and that the complaining parties were "estopped" from invoking their rights under Part II of the General Agreement. Further it was submitted that the quantitative import restrictions maintained by its Member States on bananas were justified under Article XI:2(c), Article XXIV taken in conjunction with Part IV or the provisions of the existing legislation clause in Article I:1(b) or corresponding provision in the relevant Protocols of Accession. The EEC also submitted that the tariff preferences accorded to the ACP countries were justifiable under Article XXIV when taken in conjunction with Part IV of the General Agreement.

### IV.2.3. Main Arguments of the Parties

This section looks into the main arguments put forward by the parties in substantiating their claims. The submission of the parties on various aspects is discussed in brief except for the legal arguments raised with respect to Article XXIV and its relation with the other provisions which is of relevance for this study.

Apart from certain procedural objections, one of the major contentions of the complaining parties was that the regimes regulating banana import from the third country suppliers constituted a violation of Article XI. In response to this, the EEC maintained that the measures challenged were eligible for exception under Article XI:2. The complaining parties further argued that the measures in question did not fall under Article XIII category and even if otherwise, it was in violation of the provisions of Article XIII since it was being administered in a discriminatory manner. They also argued that the EEC had no right to deviate from the concessions agreed under Article II with respect to the measure in question since it was made without any reservation. The EEC, however, objected any ruling on the issue since it was not raised during the consultations.

In defence to the alleged violations of various provisions of the General Agreement, the EEC argued that the subsequent practice of the CONTRACTING PARTIES had modified the obligations of the contracting parties under Part II of the GATT and the complaining parites were not eligible to raise the claim under the principle of 'estoppel.' Further they argued that the regime under question was eligible for

exemption under the Existing Legislation Clause.[8] The major defence advanced by the ECC under Articles I, XXIV and Part IV was as under.

### IV.2.3.a. EEC Arguments under Articles I, XXIV and Part IV

EEC took the view that the banana import regime in question was justifiable since the preferential systems between the United Kingdom and its dependent territories, as well as between France and its dependent territories were originally covered by Article I:2 in combination with Annexes A and B of the General Agreement. They held that upon accession to the EEC, these preferences were still covered by Article XXIV:9 (DS32/R 1993: paragraph 216).

The complaining parties had claimed that the banana import regimes of some EEC member states infringed the most-favoured-nation clause in Article I of the General Agreement by establishing different discriminatory treatment of imports of bananas from Latin America (DS32/R 1993: paragraph 207).

In its arguments, the EEC admitted that they were according preferential tariff for ACP countries, but argued that they were under obligation to extend preferential treatment for ACP countries by virtue of the Lome IV Convention. They took the firm stand that the Lome IV Convention had laid the foundation for the free-trade area between the EEC and the ACP countries. The preferential treatment of products originating in ACP countries by them was at the core of Lome IV Convention and its predecessor conventions. They considered that those conventions created a free-trade area in the sense of Article XXIV:5(b) and 8(b) taken in conjunction with Part IV of the General Agreement. It was noted that imports of bananas originating in ACP countries entered the EEC free of duties under Article 168(1) of the Lome IV Convention and the quantitative restrictions existing in some Member States were not applied to ACP bananas by virtue of that provision. The EEC also advanced the argument that the competitive disadvantage of the ACP bananas required them to extend preferential treatment for the ACP bananas and noted that those competitive disadvantages were not offset by the 20 per cent tariff applied in most member states (DS32/R 1993: paragraphs 217, 218).

[8] The complaining parties opposed the argument of the EEC by saying that the EEC had no right under the existing legislation clause as they have never notified any of the impugned regimes or laws in question under the existing legislation clause.

Further, they argued that assessing or adjudicating on the validity or compatibility of their trade agreement with the ACP countries by the Panel was beyond the terms of reference and would lead to inevitable procedural consequences. They argued that the Panel should, therefore, refrain from making findings on that issue. It also pointed out that a Working Party had been established for that purpose, which would in due course start its examination. In such circumstances, it would be inappropriate for the Panel to try and second-guess, on the basis of Article XXIII:2. The CONTRACTING PARTIES' examination and finding would be based on a different procedure, in particular Article XXIV:7(b). In support of the point, the EEC argued that the complaining parties had not asked the Panel in their conclusions to make recommendations on the compatibility of the preferential regime with that of the General Agreement. Further, Article XXIV:7(b) provided for a specific procedure for the examination of agreements creating customs unions and free-trade areas which might lead to recommendations of the CONTRACTING PARTIES with respect to the conformity of the said agreement with the General Agreement. For substantiating the above argument, they relied upon an un-adopted Panel Report in the *Citrus Case.*[9]

The EEC *reiterated* that the preferential treatment given for ACP countries was under the creation of a free trade area on the basis of the Lome IV Convention. They explained that in the free-trade arrangement, full reciprocity was not expected from the ACP countries for the preferential treatment accorded to them. They argued that there was no obligation in the General Agreement to do so in order to qualify for a free trade area, if such a free-trade area was created between developed and developing countries. In its arguments the EEC also stated that, if the preferential treatment of the ACP countries provided for in the Lome IV Convention and its predecessor conventions was to be declared inconsistent with the General Agreement, it would mean that it would be almost impossible to create a free-trade area between developed and developing countries.

The EEC further submitted that both the tariff preference and preferential treatment with respect to quantitative restrictions were justified under the Lome IV Convention for the following reasons:

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[9] Report of the Panel in *EEC-Tariff Treatment of Imports of Citrus Products from Certain Countries in the Mediterranean Region*, GATT Document L/5776 of 7 February 1985, paragraph 4.16 was referred to.

- Article XXIV:5 contained an exception not only to Article I but also to Article XI (and, accordingly, to Article XIII). Within a free trade area, as defined in Article XXIV:8(b), "...other restrictive regulation of commerce (except, where necessary, those permitted under Article XI...XIII...) are eliminated on substantially all the trade between the constituent territories in products originating in such territories." The preference, therefore, could not be limited to tariff measures but also included all other restrictive measures.

- In accordance with Article XXIV:5(b), restrictive measure could be maintained if they existed before the establishment of the free trade area. There could be no doubt that all the quantitative restrictions presently applied pre-existed even the GATT. It was, therefore, not the establishment of the free-trade area between the EEC and the ACP countries that had, in any way, reinforced those measures (DS32/R 1993: paragraph 222).

Furthermore, the EEC argued that Protocol No. 5 of the Lome IV Convention explicitly provided that:

> "no ACP state shall be placed, as regards access to its traditional markets and its advantages on those markets, in a less favourable situation than in the past or at present."

They argued that the above provision had to be read as an obligation on the EEC to ensure traditional market access and advantages for the ACP countries (DS32/R 1993: paragraphs 219-223).

The complaining parties rejected the above contentions of the EEC and argued that the requirements laid down by Article XXIV was not being met by the Lome Conventions and that the trade arrangement between EEC and ACP countries did not fall under any category permitted under Article XXIV. They argued that the successive Lome Conventions had not met the requirements set forth in Article XXIV, paragraph 5 and 8. Those provisions required that should there be a binding undertaking to establish a free-trade area as well as a plan or schedule for the establishment of such an area, and that, duties and other trade restrictions should be eliminated with respect to substantially all the trade between the parties. They further argued that none of the above requirements were being met and hence it could not be said that the ACP countries, under the Lome Convention, had entered into an undertaking with the EEC to establish a free trade area (DS32/R 1993: paragraphs 230-231)..

The complaining parties also questioned the legality of applying Article XXIV in conjunction with Part IV of the General Agreement. They maintained the view that Part IV obligations could not be invoked to justify the non-compliance of Article XXIV requirements. They argued that, neither the letter of Part IV nor the spirit underlying its adoption could produce an interpretation that enabled Part IV to be used to replace the obligation of the most-favoured-nation clause or the requirement of reciprocity set out in Article XXIV. They also rejected the argument of the EEC that reciprocity requirement of Article XXIV was not essential under a broad interpretation of the Interpretative Note *Ad* Article XXXVI:8 of the General Agreement. They argued that the text of the Note in no way could waive the reciprocity requirement of Article XXIV. Moreover, they argued that it was never the purpose of Part IV to discriminate among developing countries but it was intended to be applied on a most favoured nation basis to all developing countries. The complaining parties also replied to the arguments of the EEC by stating that though it was not their intention to obtain a ruling on the Lome Convention, the fact that the EEC was using it as a justification for infringement of Article I meant that the Panel had to take a position in the matter in order to fulfill its terms of reference (DS32/R 1993: paragraphs 230-236).

In addition to the above grounds for denying the claim of the EEC for exception under Article XXIV, Colombia stated that the EEC's preferential arrangements with Lome countries did not constitute an "interim agreement" leading to the creation of a free-trade area. To qualify, interim agreements must, when created, "include a plan and schedule for the formation of such a...free trade area within a reasonable length of time" (Article XXIV:5(c)). The EEC's notification of its preferential arrangements with Lome Convention signatories was not accompanied by any such plan or schedule nor had the preferential arrangement led to the formation of a free-trade area within a reasonable length of time. Further, Colombia urged the Panel to reject the notion of interweaving Article XXIV and Part IV suggested by the EEC (DS32/R 1993: paragraphs 239-242).

The complaining parties also objected to the defence raised by the EEC under Part IV and argued that the principles and objectives set forth in Part IV represented an expression of solidarity between the more developed contracting parties and all

developing countries and hence there was nothing in the provisions of Part IV to authorize the granting of trade benefits which discriminated among different groups of developing countries (DS32/R 1993: paragraphs 244, 253).

### IV.2.4. Findings of the Panel

The Panel initially found that the measures taken by the EEC Member States were inconsistent with Article XI:1, not justified under Article XI:2(c)(i) and not justified under the Existing Legislation clauses through which the EEC States became the contracting parties. It also rejected the arguments based on subsequent practice and estoppel raised by the EEC and ruled on the questions of applicability of Articles XI, XXIV and Part IV.

In respect of Articles XI and XXIV, the Panel considered the argument of the EEC that the restrictions and prohibitions on import of bananas, even if inconsistent with Article XI:1, were nonetheless consistent with the General Agreement as they were covered under the provisions of Article XXIV. On this aspect, the Panel concluded that:

> "...Article XXIV:5 to 8 permitted the contracting parties to deviate from their obligations under other provisions of the General Agreement for the purpose of forming a customs union or free trade area, or adopting an interim agreement leading to the formation of a customs union or free-trade areas, but not for any other purpose. Article XXIV:5 to 8 therefore did not provide contracting parties with a justification for restrictive import measures as such; it merely provide them – within the limits set out in this provision – with a justification for not applying to imports originating in such a union or area the restrictive import measures that they were permitted to impose under other provisions of the General Agreement. The Panel therefore considered that the import restrictions on bananas could not be justified by Article XXIV" (DS32/R 1993: paragraph 358).

In respect of Article XXIV and Part IV, the two major contentions raised by the EEC were that the tariff preference on bananas granted by certain Member States, although inconsistent with Article I, was covered by Article XXIV of the General Agreement taken in conjunction with Part IV and that the question could not be examined under the procedures of Article XXIII since Article XXIV:7 provided for specific procedures for examination of the free-trade areas by the CONTRACTING PARTIES. After examining the above claim and quoting from relevant adopted panel

reports,[10] the Panel noted that even if the procedures of Article XXIV prevail over the provisions of Article XXIII it would do so only in those cases in which the agreement for which Article XXIV was invoked was *prima facie* the type of agreement covered by the provision of Article XXIV. It concluded that under the relevant provisions of Article XXIV, the present agreement in question could not be considered as so. Further, on the argument of the EEC to consider the agreement under Article XXIV in conjunction with Part IV, the Panel found that the requirement of Article XXIV could not be modified by the provisions of Part IV. It also noted that the Part IV of the General Agreement did not permit contracting parties to accord preferences inconsistent with Article I. On the above finding the Panel reasoned that the Part IV of the General Agreement was intended to create obligations for developed contracting parties *additional* to those contained in the other parts of the Agreement. It was not intended to permit developed contracting parties to *subtract* from those obligations, in particular not from those under Article I.

### IV.2.5. Conclusions of the Panel

In view of the aforesaid findings and reasons, the Panel concluded that

> "...the quantitative restrictions maintained by France, Italy, Portugal, Spain and the United Kingdom on imports of bananas were inconsistent with Article XI:1 and were not justified by Article XI:2(c)(i), Article XXIV or the existing legislation clauses in the protocols through which these EEC member states had become contracting parties. The Panel recommends that the CONTRACTING PARTIES request the EEC to bring these restrictions in conformity with the General Agreement."

The Panel also concluded that the preference accorded by the EEC to imports of bananas originating in ACP countries was inconsistent with Article I and that a legal justification for the preference could not emerge from an application of Article XXIV to the type of agreement described by the EEC in the Panel's proceedings, but only from an action of the CONTRACTING PARTIES under Article XXV. It, therefore, recommended that the CONTRACTING PARTIES request the EEC to bring the

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[10] Reports of the Panel in *Republic of Korea – Restrictions on Import of Beef – Complaint by Australia*, GATT Document L/6504 of 24 May 1989, paragraph 97 (adopted on 7 November 1989); *Republic of Korea – Restrictions on Import of Beef – Complaint by New Zealand*, GATT Document L/6505 of 24 May 1989, paragraph 113 (adopted on 7 November 1989); *Republic of Korea – Restrictions on Import of Beef – Complaint by the United States*, GATT Document L/6503 of 24 May 1989, paragraph 119 (adopted on 7 November 1989).

preference into conformity with the General Agreement unless, in accordance with the provisions of Article XXV, the EEC was authorized to maintain their preference.

### IV.3. EEC – Import Regime for Bananas[11] (Bananas II)

#### IV.3.1. Background and Facts of the Case

The background of the case is also the same as the *Bananas I* case[12] discussed above. The complaint in this case related to the EEC import regime for bananas introduced on 1 July 1993. The facts of the complaint were as under:

On 1 July 1993, the EEC introduced a common market organization for bananas under the Council Regulation (EEC) 404/93 (hereinafter, the Regulation), replacing the various national banana import systems in place in the Member States previously. The Regulation aimed at creating a common regime for the import of bananas to the EEC. It consisted of five separate titles, which established uniform rules on common quality and marketing standards; producers' organizations and concentration mechanisms; assistance; trade with third countries; and general provisions (DS38/R 1994: paragraph 11).

The Regulation established four categories of suppliers: traditional imports from ACP countries; non-traditional imports from ACP countries; imports from non-ACP third countries and the EEC bananas. Imports of bananas from traditional ACP suppliers entered duty-free upto maximum quantity fixed for each traditional supplying country. Imports of non-traditional[13] ACP bananas and bananas from third countries[14] were subject to a tariff quota. Bananas from ACP countries entered duty-free within this quota whereas third country bananas were subject to a tariff of 100 ECUs per ton. Imports above the tariff quota were subject to a tariff of 750 ECUs per ton for bananas from ACP countries and to 850 ECUs per ton from third countries. All imports of

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[11] The Panel Report (un-adopted) is available as document DS38/R of 11 February 1994. The analysis of the case is based on the original Panel Report. Appropriate references are given wherever other sources are relied on.

[12] *EEC – Member States Import Regimes for Bananas*, The Panel Report (un-adopted) is available as document DS32/R of 3 June 1993.

[13] Non-traditional ACP bananas were those quantities above the traditional quantities supplied by the traditional ACP-countries and those quantities supplied by the ACP countries which were not traditional suppliers.

[14] 'Third countries' were the banana exporting countries other than the ACP countries.

bananas from third countries were contingent on an import license and subject to a security deposit. Operators were also categorized according to their prior marketing standards and were allocated percentage of tariff quotas. Operators were to obtain import licenses on the basis of the average quantities of bananas that they had sold in the last three years (DS38/R 1994: paragraphs 11-14).

### IV.3.2. Complaints and Contentions of the Parties

Columbia, Costa Rica, Guatemala, Nicaragua and Venezuela, who were aggrieved by the measures of the EEC, brought in the complaint and requested the Panel to find that the import regime for bananas introduced by the EEC as on 1 July 1993 was inconsistent with Articles II, XI and XIII of the General Agreement. Some of them also requested the Panel to find that the import regime was inconsistent with Article I. Among the complaining parties, Colombia, Guatemala and Venezuela made a further request to find that the impugned measure of the EEC was not in conformity with the provisions of Articles III and VIII. In addition, Colombia raised the argument that the EEC acted inconsistently with the provisions of Article XVI.

However, in defending the complaint, the EEC requested the Panel to find that the banana import regime was in conformity with the provisions of the General Agreement. They maintained that the preferential tariff treatment granted to imports of ACP bananas was justified under Article XXIV:5, read in the light of Part IV of the General Agreement. Further, they held that the Article XXVIII procedure initiated by the EEC was not covered by the mandate of the Panel and an examination under Article II by the Panel had become unnecessary in the light of the EEC's proceedings under Article XXVIII. They also reiterated the stand taken in the *Bananas I* case that the Panel established under Article XXIII had no jurisdiction to examine the overall consistency of a free trade agreement formed under Article XXIV.

### IV.3.3. Arguments of the Parties

The complaining parties argued that the new measures introduced by the EEC were in violation of Article II:1(a). They alleged that the Regulation in question also violated Article I of the General Agreement as well as Articles III, VIII, XI, XIII and XVI. The EEC rejected the arguments of the complaining parties stating that the Regulation was

not in violation of the above provisions but could well be justified on their broad interpretation. They also argued for exemption under Article XXIV and Part IV of the General Agreement.

### IV.3.3.a. Arguments related to Article XXIV and Part IV

The EEC raised the same or similar defence that they had unsuccessfully argued in the Banana I case. They contented that, even if inconsistent with Article I:1 of the General Agreement, the tariff preferences accorded to bananas from ACP countries were justified under Article XXIV read in the light of Part IV of the General Agreement. They pointed out that, the preferential treatment of ACP countries was essential for the EEC for political, economic and legal reasons. They argued that the obligation that duties and other restrictive regulations of commerce should be eliminated "on substantially all trade" had in fact been fulfilled in the case of the Lome IV Convention because, for example, in 1990 more than 97 per cent of the EEC imports from ACP countries were admitted duty free. In 1991 it was estimated that more than 99 per cent of the ACP exports entered the EEC at a zero tariff rate. It was also estimated that of the total two-way trade between the EEC and the ACP state, a very high percentage was admitted duty free. Further the EEC submitted that pursuant to Article 174 of the Lome IV Convention, they did not expect immediately full reciprocity for the preferential treatment granted to the ACP products. Article XXIV read in the light of Article XXVI:8 and a footnote thereto, fully justified the lack of formal reciprocity in the Lome IV Convention.

According to them, it was clear from the annotation *Ad* Article XXVI:8 that the provision had to be read together with "any other procedure under this Agreement." The exception from Article I found its basis in Article XXIV:5 alone and the EEC had not suggested that it could be found in Part IV. But Article XXIV, paragraphs 5 and 8 when construed in the light of Article XXXVI:8 permitted the establishment of free-trade areas between developed and developing countries without immediate full reciprocity. Applying these principles, the EEC had reached the conclusion that the language, context, object, purpose and drafting history of the footnote confirmed the view that the principle of non-reciprocity was meant to be applicable to "any other procedure" under the General Agreement, thus including Article XXIV:8(b) (DS38/R 1994: paragraphs 32-39).

The complaining parties rejected the above arguments of the EEC by saying that the parameters laid down by Article XXIV were precisely what prevented the trade treatment granted by the EEC to the beneficiaries of the Lome IV Convention from falling within the scope of that Article. The trade regime established under the Lome IV Convention was neither a customs union nor a free-trade area between the ACP countries and the EEC but a unilateral and non-reciprocal relationship not provided for in Article XXIV. The complaining parties referred to the reasoning and finding of the Panel in *Bananas I* in substantiating their view. They further argued that the letter of neither the provision of Part IV nor the spirit in which they were adopted could lead to an interpretation thereof enabling it to be used to replace the obligation of the most-favoured-nation clause or the reciprocity requirement laid down in Article XXIV.

The complaining parties suggested that the Panels were not expected to take into account any "special historical, cultural and socio-economic circumstances" claimed by any contracting parties, when called upon to examine the GATT legality of a contracting party's rules or regulations "in the light of relevant GATT provisions." They further argued that the non-reciprocity provided for in Article XXXVI of the General Agreement referred to trade negotiations carried out in a multilateral framework and not to negotiations of any other kind. It was pointed out in that respect that, when note to paragraph 8 of Article XXXVI referred to "any other procedure under the Agreement", it had logically to be understood to be referring to other procedures of a similar nature to those of the Article cited in the provisions.

Moreover, the EEC submitted that the Panel had no jurisdiction to examine the overall consistency of the Lome IV Convention with Article XXIV, the view it had pleaded in the *Bananas I* case. They argued that position by rejecting the ratio laid by the *Bananas I* Panel. They submitted that the *prima facie* principle as elaborated by the first Banana Panel could not be applied to such type of agreement as covered by Article XXIV for substantive, procedural and historic reasons. In support of this, the EEC stated that the question whether a given agreement fulfilled the conditions of a free-trade agreement could only be answered after full examination of the agreement concerned and not on the basis of a superficial *prima facie* examination. They added that in the context of proceedings before a panel established under Article XXIII, it

was inappropriate to use the *prima facie* criterion in order to judge the consistency of free trade agreements with the substantive provisions of Article XXIV:4 *et seq*. They emphasized that Article XXIII procedures could not be applied in order to examine the legality of an Article XXIV – type agreement as a whole. They were of the view that there were valid procedural reasons which excluded an examination of the compatibility of the Lome IV Convention with the provisions and conditions of Article XXIV by the Panel. They pointed out that the Lome IV Convention had been notified[15] to the GATT on 16 December 1992 and had been examined by a working party. The duplication of a working party procedure and a panel procedure was not only undesirable, but also contrary to the procedural rules contained in the General Agreement. They also submitted that it was relevant that none of the working parties established to examine the Lome Conventions and its predecessor agreements had concluded that they were contrary to the principles of the General Agreement or Article XXIV (DS38/R 1994: paragraphs 45-49).

Rejecting the above arguments of the EEC that the consistency of Lome IV Convention could not be examined under Article XXIII, the complaining parties responded that Article XXIII made clear that dispute settlement could be pursued whether or not a special review group was pending. Likewise, the terms of reference for the present case instructed a review in the light of all relevant provisions of the General Agreement. Further, they clearly indicated that special review procedures and dispute settlement were quite different procedures, and could be pursued freely at any time by the contracting parties. The complaining parties argued that to accept the EEC's arguments would indeed lead to a situation of total legal insecurity and defencelessness for contracting parties which, in the face of nullification or impairment of benefits accruing to them under the General Agreement, would be deprived of recourse to the dispute settlement procedures established under Article XXIII when another contracting party failed to fulfill its obligations under the General Agreement, as provided for in paragraph (a) of Article XXIII. The complaining parties relied on the ratio laid down by *Bananas I* Panel by submitting that *arguendo*, Article XXIII was not applicable to issues on which the CONTRACTING PARTIES were competent to adopt decisions or recommendations under established procedures, as in the case of Article XXIV, the fact was that in the present case the Panel was not

[15] The notification is in GATT Document L/7153/Add. 1 dated 3 March 1993.

dealing with an agreement that was *prima facie* of the kind provided for in Article XXIV.

### IV.3.4. Findings of the Panel

The Panel examined the issues raised by the parties under various provisions and separately noted its findings on each specific issue. The Panel observations and findings on Article I and XXIV are discussed in detail. The other major findings of the Panel are summarized below.

On the issue of tariff binding, the Panel found that the specific tariffs applied by the EEC on imports of bananas since 1 July 1993 accorded treatment to imports of bananas less favourable than that provided for in the EEC's Schedule of Concessions and were therefore inconsistent with the EECs obligations under Article II:1. On the issue of tariff quotas, the Panel held that the EEC measures permitting the import of bananas under one tariff rate upto a specified amount, and any additional amount at a higher tariff rate were, as such, not inconsistent with Article XI:1. With respect to the non-automatic licensing, the Panel held that the existence of non-automatic license did not change the nature of the tariff quota and was, as such, not inconsistent with Article XI:1. Further, on the issue of Article XIII, the Panel found that the EECs tariff quota for imports of bananas did not discriminate between sources of supply in the sense of Article XIII. However, on the issues of Articles III and I, the Panel found that the preferred allocation of part of the tariff quota to importer who purchased EEC and ACP bananas was inconsistent with Article III:4 and Article I:1. On Article VIII, the Panel ruled in favour of the EEC and noted that the security deposit required by the EEC of the operators wishing to import bananas was consistent with the terms of Article VIII:1(a). In respect of Article XVI, after appreciating the evidence, the Panel held that the complainants failed to demonstrate that the EEC had acted inconsistently with Article XVI:1. The Panel also considered the argument by the participating ACP countries, endorsed by the EEC that the preferences under question were justified under Article XX(h) as being undertaken in pursuance of an inter governmental commodity agreement. After examining the requirements under Article XX(h), the Panel noted that neither the Lome Convention not its predecessor agreements had been notified to the CONTRACTING PARTIES as commodity agreements covered under Article XX(h), *inter alia*, the said agreement was not open for other countries to

join and did not meet the requirements under Article XX(h). The Panel therefore concluded that Article XX(h) could not justify the inconsistency with Article I:1 of the EEC's banana preferences.

### IV.3.4.a. Findings on Article I – Preferential Tariff Treatment

Alleged inconsistency with Article I:1 of the General Agreement constituted the core of the complaint raised by the complaining parties. The complaining parties considered that the discrimination allowed by the Regulation violated Article I:1. It was submitted that the duty on bananas imported by the complainants was 100 ECUs per ton within the tariff quota and 850 ECUs per ton outside it, while the like product from ACP countries were more favourably treated as a fixed quantity was exempted from tariff quota altogether and paid no duty. Further, quantities could enter duty free inside the tariff quota and any remainder entered under a duty of 750 ECUs per ton, 100 ECUs per ton less than that imposed on over-quota of third country bananas and this amounted to violation of Article I:1.

The EEC did not argue that its differential tariff rates on bananas were consistent with Article I:1, rather it claimed for exemption under Article XXIV and Part IV.[16]

On examination of the facts, the Panel found that the preferential treatment applied for the ACP bananas was not granted immediately or unconditionally to the like product originating in the territories of the complaining contracting parties and hence the EEC's preferential tariff treatment of imports of bananas was inconsistent with Article I:1.

### IV.3.4.b. Findings on Article XXIV – Free Trade Areas

The major defence raised by the EEC against many alleged violations of the provisions of General Agreement including Article I:1, by the complaining parties was the claim that its banana import measures, even if inconsistent with Article I were justified under the provisions of Article XXIV. According to the EEC, free-trade areas within the meaning of Article XXIV had been established between the EEC and the ACP countries by virtue of the Fourth ACP-EEC Convention (Lome IV Convention).

[16] This part will be dealt with in the following section.

The EEC maintained that the Panel could only examine "specific measures" under the procedures of Article XXIII and should refrain from examining the over all consistency of the Lome Convention with Article XXIV, since Article XXIV:7 provided for special procedure for such an examination. Complaining parties rejected the above views and submitted that the Lome IV Convention was not a free trade agreement under the meaning of Article XXIV and the Panel had the absolute mandate to examine the issue.

Initially, the Panel examined the challenge of EEC regarding the competency of the Panel established under Article XXIII for looking into the overall consistency of a free-trade area.

The Panel began its examination by noting that the CONTRACTING PARTIES' decision relating to the various Lome Conventions had not explicitly decided on that issue. It also observed that the notifications of the Lome Conventions to the CONTRACTING PARTIES had not specifically referred to Article XXIV. Further, it noted that neither the examination nor the adopted reports on the examination of Lome Convention was carried out under the framework of Article XXIV. Hence, it considered that the decisions of the CONTRACTING PARTIES relating to the examination of the Lome Convention did not establish that the procedures of Article XXIV:7 necessarily applied to them (DS38/R 1994: para. 157).

Before examining the agreement in question, the Panel formulated the legal framework under which it was going to examine the same. It observed that whatever the precise relationship between the procedures under Article XXIII and XXIV, the provisions of Article XXIV:7 empowered the CONTRACTING PARTIES to make recommendations *only* on agreements establishing a customs union or free-trade area, or interim agreements leading to such a union or area. It emphasized the need to first ascertain whether the agreement in question fall under the above category, notwithstanding the issue whether the procedures of Article XXIV:7 superseded those of Article XXIII:2. The Panel further made it clear that it could not accept that tariff preferences inconsistent with Article I:1 would, by notification of the preferential arrangement and invocation of Article XXIV against the objections of other contracting parties, escape any examination by a panel established under Article XXIII. It reasoned that if such view was endorsed, a mere communication of a

contracting party invoking Article XXIV could deprive all other contracting parties of their procedural rights under Article XIII:2 (DS38/R 1994: paragraphs 157, 158).

The Panel then proceeded to examine whether the Lome Convention was one of the types of agreement mentioned in Article XXIV. It examined the Lome Convention under Article XXIV:8(b) which provided that:

> "A free-trade area shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulation of commerce ... are eliminated on substantially all the trade between the constituent territories in products originating in such territories."

In the light of the above definition, the Panel noted that:

> ...the use of the plural in phrases "between the constituent territories" and "originating in such territories" made it clear that only agreements providing for an obligation to liberalize the trade in products originating in *all* of the constituent territories could be considered to establish a free-trade area within the meaning of Article XXIV:8(b). The Panel noted in this respect that Article 25 of the Lome Convention stated that trade agreements under it "shall be based on the principle of free access to the EEC market for products originating in the ACP states", but "shall not compromise any element of reciprocity for those states as regards free access."[17] The Convention therefore did not provide for any liberalization of trade in products originating in the EEC....This lack of **any** obligation of the sixty-nine ACP countries to dismantle their trade barriers, and the acceptance of an obligation to remove trade barrier only on import into the customs territory of the EEC, made the trade arrangements set out in the Convention substantially different from those of a free trade area, as defined in Article XXIV:8(b) (DS38/R 1994: paragraphs 157-159).

The Panel then proceeded to examine the argument of the EEC that the conditions set out in Article XXIV:8(b) had to be read in the light of Part IV of the General Agreement, in particular XXXVI:8. In examining the relevant provision and the note to the provision, the Panel identified that it had to deal with the interpretative issue: could a limitation on the expectation of reciprocity in procedures under the General Agreement be understood to include procedures leading to the formation of a non-reciprocal free trade area between developed and developing countries?

After a detailed examination of the provision, the Panel concluded that the wording and underlying rationale of the Note to Article XXXVI:8 suggested that those

[17] See also Articles 168 and 175 of the Lome Convention [footnote in original].

provisions were not intended to apply to negotiations outside the procedural framework of the General Agreement, such as negotiations of a free trade area. The Panel also observed that the previous panel finding and drafting history of Part IV supported such an interpretation. On the above reasons, the Panel found that the provisions of Part IV of the General Agreement, in particular Article XXXVI:8 could not be interpreted as altering the rights and obligations of the contracting parties under Article XXIV.

Thereafter, the Panel proceeded to examine whether the Lome Convention, even if accepting the interpretation of Article XXIV:8 and Part IV as suggested by the EEC, qualify to be an agreement under Article XXIV:5. The Panel noted that:

> "...Article XXIV:5 covers the formation of free trade areas only 'as between the territories of contracting parties,' while the Lome Convention included many non-contracting parties. The text of Article XXIV:5 makes it clear that a free-trade agreement with a country that is not a contracting party, absent a waiver from the CONTRACTING PARTIES, cannot justify infringements of the rights of third contracting parties to most-favoured-nation treatment pursuant to Article I. This clear wording is confirmed by the drafting history, which records that the procedure by Article XXIV:10 were included in the General Agreement to permit an approval by the CONTRACTING PARTIES of the customs union and free trade areas that include non-contracting parties."

With the above finding, the Panel further concluded that, even if the Lome Convention were to meet the requirements of a free trade area as defined in Article XXIV:8(b), it could not justify under Article XXIV:5, the preferential banana import tariffs which were extended in contravention of Article I:1 to ACP countries that were not contracting parties.

Pursuant to the above findings, the Panel concluded that the Lome Convention was not an agreement of the type covered by Article XXIV. This Article could not therefore justify the inconsistency with Article I of the tariff preferences for bananas accorded by the EEC to the ACP countries.

### IV.3.5. Remarks by the Panel

Before giving its final conclusions the Panel observed that though well aware of the economic and social effects of the measure for the parties involved, the mandate of the Panel was to examine the impugned measures in terms of their legal consistency

with the General Agreement. Recalling, that the purpose of those procedures was not to modify the rights and obligations under the existing provisions in the light of social and economic considerations, the Panel however added:

> "...the CONRACTING PARTIS have at their disposal other procedures under the General Agreement, including Article XXIV:10 and XXV:5 that are designed to allow CONTRACTING PARTIES to take into account, in view of the Panel, economic and social considerations. The adoption of this report would not prevent the CONTRACTING PARTIES from taking action under any of these Articles. The Panel also wishes to emphasize that nothing in its report would prevent the parties to the Lome Convention from achieving their treaty objectives, including the objective of promoting the production and commercialization of bananas from ACP countries through the use of policy instruments consistent with the General Agreement."

**IV.3.6. Conclusions and Recommendations**

On the above findings and reasons, the Panel concluded that:

(a) the tariff quota on import of bananas was not inconsistent with Article XI and XIII;
(b) the security requirements and other formalities connected with the importation of bananas were not inconsistent with Article VIII;
(c) the EEC had not acted inconsistently with its obligation under Article XVI: 1 to discuss, upon request, the possibility of limiting the subsidization of bananas.

The Panel further concluded that:

(a) the specific duties levied by the EEC on imports of bananas were inconsistent with Article II;
(b) the preferential tariff rates on bananas accorded by the EEC to ACP countries were inconsistent with Article I and could neither be justified by Article XXIV nor by Article XX(h); and
(c) the allocation of import licenses granting access to imports under the tariff quota was inconsistent with Article III and Article I and could neither be justified by Article XXIV nor by Article XX(h).

Based on these conclusions, the Panel recommended that the CONTRACTING PARTIES request the EEC to bring its tariffs on bananas and allocation of its tariff quota licenses into conformity with its obligations under the General Agreement.

## IV.4 Turkey – Restrictions on Imports of Textiles and Clothing Products: Panel Report[18]

### IV.4.1 Background and Facts of the Case

It is known that the trade in textiles and clothing has remained outside the traditional GATT/WTO framework due to the complexities and controversies inherently associated with it.[19] Totally different rules and regimes existed for textile trade throughout the GATT period upto the Uruguay Round in which the Members agreed on the Agreement on Textiles and Clothing (ATC),[20] which came into force on 31 December 1994. The ATC successfully aligned the textiles trade into WTO framework by 2005 by phasing out all existing discriminatory restrictions. In the context of the dispute examined herein, Turkey had not maintained any quantitative restrictions (hereinafter, QRs) on imports of textile and clothing products under the ATC, which only allowed QRs which were in existence one day before the ATC came into force.[21]

Earlier, on 12 September 1963, Turkey and the Council and Member States of the then European Economic Community (EEC) had signed the Ankara Agreement[22] which entered into force on 1 December 1964. This Agreement formed the basis of the Association (in the sense of Article 278 of the Treaty of Rome) between Turkey and the European Communities envisaging that its objectives would be reached through a customs union which would be established in three progressive stages: preparatory, transitional and final. Starting in 1973, Turkey embarked on the gradual alignment of its customs duties to the EC Common Customs Tariffs (CCT) as

[18] The analysis of the case is based on the Report of the Panel available as document WT/DS34/R of 31 May 1999. Appropriate references are given wherever other sources are relied on.
[19] For a detailed study on Textiles and Clothing trade see generally Bagchi (2001), *International Trade Policy in Textiles: 50 Years of Protectionism*, Geneva: International Textile and Clothing Bureau.
[20] The legal text of the *Agreement on Textiles and Clothing* is available in WTO (1995).
[21] See Article 2 of the ATC.
[22] GATT Document L/2155/Add.1 dated 12 March 1964

scheduled. The Ankara Agreement and the subsequent instruments[23] concluded in the context of the Association between Turkey and the European Communities during the 1970s were notified to the GATT Contracting Parties under Article XXIV:7 of the GATT 1947. The entry into force of "the final phase of the customs union" between Turkey and the European Communities was notified to the WTO on 22 December 1995 under Article XXIV of the GATT.[24] Negotiations between Turkey and EC – Association Council from 1993 to 1995 culminated in Decision 1/95,[25] to enter into force on 1 January 1996 which set out the modalities for the final phase of the Association between Turkey and the European Communities. In addition to the elimination of customs duties and alignment of the CCT, it contained provisions for the harmonization of Turkey's policies and practices in all areas covered by the Association where that was deemed necessary "for the proper functioning of the Customs Union." Decision 1/95 included specific provisions with respect to trade in textiles and clothing, in particular in Article 12, supplemented by related statements by both parties. Such provisions called for Turkey's adoption of relevant EC regulation concerning imports of textiles and clothing, in particular Council Regulation 3030/93, which provided for the bilateral agreement with supplier countries to be implemented by a set of EC quantitative limits on certain imports and for a system of import surveillance. Pursuant to the failure to reach an agreement with some 28 countries including India, Turkey applied unilateral restrictions or surveillance regimes to imports of products whose export to the European Communities was also under restraint. Turkey applied QRs as of 1 January 1996, on imports from India of 19 categories of textile and clothing products.

On 21 March 1996, India requested consultations with Turkey pursuant to Article 4.4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) and Article XXIII:1 of the GATT regarding the unilateral imposition of QRs by Turkey on the import of the broad range of textile and clothing products from India as from 1 January 1996 (WT/DS34/1 dated 25 March 1996). India and Turkey did not enter into consultations due to disagreement on the appropriation of participation of

[23] This includes 1970 Additional Protocol to the Ankara Agreement and the 1971 Interim Agreement (GATT Document L/3554 dated 8 September 1971) as well as the Supplementary Protocols to the Ankara Agreement and Interim Agreement (GATT Document L/3980 dated 17 January 1974).
[24] WT/REG22/N/1 dated 23 December 1995.
[25] Decision 1/95 is reproduced in WT/REG22/1 dated 13 February 1996.

the European Communities in such consultations, and consequently the dispute could not be resolved at the stage. The Dispute Settlement Body was informed accordingly on 24 April 1996 (WT/DSB/M/15 dated 15 May 1996: 3-5).

In a communication dated 2 February 1998, India requested the DSB to establish a panel to examine the matter in the light of the GATT and the Agreement on Textiles and Clothing (ATC), in accordance with Article 6.2 of the DSU (WT/DS34/2 dated 2 February 1998). In its communication, India claimed that the restrictions imposed by Turkey were inconsistent with Turkey's obligations under Article XI and XIII of the GATT and were not justified by Article XXIV of the GATT, which did not authorize the imposition of discriminatory QRs and that the restrictions were inconsistent with Turkey's obligations under Article 2 of the ATC. India also claimed that the restrictions appeared to nullify or impair benefits accruing to it directly or indirectly under the GATT and the ATC. On 13 March 1998, DSB established a panel[26] pursuant to the request of India (WT/DSB/M/43 dated 8 April 1998: 6). Third parties[27] reserved their rights under Article 10 of the DSU. They also made their submissions during the proceedings.[28]

### IV.4.2. Main Claims and Defence Raised by Parties

Apart from certain preliminary issues,[29] the parties raised the respective claims and defence as follows.

India claimed that the quantitative restrictions imposed by Turkey on imports of textile and clothing products from India since 1 January 1996 were inconsistent with Articles XI:1 and XIII of the GATT and with Article 2.4 of the ATC. India also claimed that Article XXIV did not constitute a defence to such violations

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[26] DSB established the Panel to look into the request of India with the following standard terms of reference: "To examine in the light of the relevant provisions of the covered agreements cited by India in document WT/DS34/2, the matter referred to the DSB by India in that document and to make such findings as will assist the DSB in making recommendations or giving the rulings provided for in those agreements."

[27] Hong Kong, China; Japan; the Philippines; Thailand and the United States had reserved their third party rights (WT/DS34/R 1999: paragraph 1.7)

[28] The summary of arguments presented by the Third parties is available from paragraph 7.1 to 7.123 of the Panel Report (WT/DS34/R dated 31 May 1999).

[29] The preliminary issues raised by Turkey were regarding the sufficiency of the Panel request (DSU Article 6.2, identification of issues), the non-participation of European Communities as respondent, the need to exhaust the TMB procedures and the inadequacy of consultations (WT/DS34/R 1999: paragraphs 3.1-3.50).

Turkey in response claimed that the restrictions it applied on import of 19 categories of textile and clothing products from India were justified under Article XXIV of GATT, as these measures were adopted pursuant to and on the occasion of formation of its customs union with the European Communities.

Burden of Proof

The Panel recalled that the rules on burden of proof had become well established in the WTO and noted that

(a) it was for the complaining parties to establish the violations it alleged;
(b) it was for the party invoking an exception or an affirmative defence to prove that the conditions contained therein were met; and
(c) it was for the party asserting a fact to prove it.[30]

Appreciating the above position in the present case, the Panel noted that it was therefore India to demonstrate *prima facie* that Turkey's measures violated the provisions of Article XI and XIII of GATT and Article 2.4 of the ATC. Since Turkey did not deny the existence of QRs but submitted an affirmative defence based on the application of Article XXIV, it was for Turkey to bear the burden of proof in that respect.

### IV.4.3. Main Arguments of the Parties

This section highlights the main arguments raised by the parties, in particular to the interpretation and application of Article XXIV.

#### IV.4.3.a. Articles XI:1 and XIII of GATT

India submitted that the QRs imposed by Turkey on imports of textile and clothing were clearly inconsistent with Articles XI:1 and XIII: 1 of the GATT. Turkey replied that its restrictions on imports of textiles and clothing from a number of third countries were consistent with Article 2 of the ATC on the basis of the provisions of Article 2.4. It argued that once a measure was justified under Article 2.4 of the ATC,

[30] Panel Report on *Argentina – Measures Affecting Imports of Footwear, Textile, Apparel and Other Items* adopted on 22 April 1998 available as WT/DS56/R, paragraphs 6.34-6.40.

the debate about its consistency with the obligations arising from Article XI and XIII of GATT became redundant.

### IV.4.3.b. Article 2 of ATC

India submitted that Article 2 of the ATC permitted WTO members to continue to apply, during the transition period provided for, restrictions on textile and clothing products that were in force on the day before the entry into force of the Agreement (that is, 31 December 1994), under the MFA. Article 2.1 also required such restrictions to be notified to the WTO. India urged the panel that Turkey had not maintained restrictions on imports of textiles and clothing products from India on 31 December 1994 nor had notified any such measure to the WTO with respect to India. It also noted that Article 2.4 of the ATC also provided that "[n]o new restrictions in terms of products or Members shall be introduced except under the provisions of this Agreement or relevant GATT provisions." India specified that the only provision under the ATC by which a Member could introduce QRs was Article 6 of ATC which provided for transitional safeguard mechanism, and pointed out that Turkey had not invoked that provision for justifying the impugned measure. To the above argument, Turkey's main reply was that its measures were justified under Article XXIV of GATT, which was to be considered as a "relevant GATT provision" in the sense of Article 2.4 of the ATC.

### IV.4.3.c. Article XXIV of GATT

#### IV.4.3.c.i. Relationship between Article XXIV and other GATT provisions

In respect of Article XXIV, India submitted that what was at issue in the dispute was not whether the Turkey – EC customs union met the requirements of Article XXIV:5(a) but whether this provision provided an authorization to impose, on the occasion of the formation of a customs union, new barriers to the trade of third members, inconsistent with Article XI:1 of GATT and Article 2.4 of the ATC.

Turkey responded by saying that the plain meaning of Article XXIV, in particular XXIV:4 and XXIV:5 was that the provisions of GATT did not prevent the imposition of a regulation of commerce at the institution of a customs union, as long as on the

whole that was not more restrictive than the general incidence of the duties and regulations of commerce applicable in the constituent territories prior to the formation of the customs union. It was of the view that the consistency with WTO rules of the measures challenged by India was to be determined by reference to Article XXIV:5-8 of the GATT and not to other GATT provisions.

India disputed Turkey's claim that Members forming a customs union might impose new restrictions on imports from third WTO members by meeting only the two requirements set out in paragraphs 5(a) and 8(a)(ii) of Article XXIV.

**IV.4.3.c.ii. Article XXIV:5(a)**

India argued that any interpretation of Article XXIV:5(a) that would entail an authorization to impose new barriers to the trade of third Members was excluded by the general principle set out in Article XXIV:4 which recognized the purpose of a customs union as "not to raise barriers to the trade" of other Members. India also highlighted the requirement in Article XXIV:6 to compensate in the event of raising the tariff as part of formation of customs union. It pointed out that if tariff concessions under Article II could not be ignored by Members who are forming customs union, then an interpretation that permits to ignore the Members' obligations under Article XI of the GATT and Article 2.4 of the ATC could not be justified.

Turkey considered that provisions of Article XXIV:5(a) should be read as permitting the introduction of restrictive regulations of commerce to the trade of third countries, provided that the overall incidence of duties and other regulations of commerce were not higher or more restrictive after the completion of the customs union than before. In its view, Article XI:1 had to be read in conjunction with Article XXIV, concluding that measures whose application constituted a requirement of the Turkey – EC customs union were deemed to be justified under Article XXIV. Turkey argued that the derogation authorized by Article XXIV:5 was not limited to a particular GATT rule, but encompassed all those rules from which derogation was necessary to permit the formation of customs unions (WT/DS34/R 1999: paragraphs 6.57, 6.62, 6.67).

India urged the Panel to interpret Article XXIV:5 in accordance with the principles of interpretation set out in Articles 31 and 32 of the Vienna Convention on the Law of

the Treaties. These principles required an interpretation in accordance with the ordinary meaning to be given to the terms of Article XXIV:5 in their context and in the light of the object and purpose of the GATT. According to India, Article XXIV:5 authorized merely the formation of a customs union or free trade area. For further interpretation, the object and purpose mentioned in Article XXIV:4 and 6 were relevant, and this could not be interpreted as providing a justification for measures raising barriers to the trade of third members. India further added that an interpretation of the provisions on subsequent practice would not lend support to Turkey's interpretation of the provision (WT/DS34/R 1999: paragraphs 6.68, 6.72, 6.73, 6.74).

Disagreeing with the above arguments of India, Turkey pointed out that while the GATT expressly stated that its provisions "shall not prevent the formation of a customs union" (the chapeau of Article XXIV:5), it took account of the pre-existing obligations of members of a customs union vis-à-vis other GATT contracting parties by the requirement in Article XXIV:5(a) relating to the customs tariff and the common regulation of commerce of the customs union (WT/DS34/R 1999: paragraphs 6.80, 6.81).

**IV.4.3.c.iii. Article XXIV:8(a)**

India's main contention with respect to Article XXIV:8 was that the obligations under Article XI:1 of the GATT and Article 2.4 of the ATC were not modified by Article XXIV:8(a)(ii) of the GATT. India was of the view that the sub paragraph merely defined one of the requirements to be fulfilled by an RTA to qualify as a customs union within the meaning of Article XXIV. The provision could not possibly be interpreted to imply that members, in fulfilling that requirement, were entitled to ignore their WTO obligations. Another argument put forward by India was that if there existed a conflict between the provisions of Article 2.4 of the ATC and those of Article XXIV:8(a)(ii) of the GATT as Turkey claimed, the provisions of Article 2.4 of the ATC prevailed to the extend to the conflict. India considered Turkey's defence based on the notion of a conflict of obligation as without any legal basis. Further, India argued that European Communities and Turkey could meet their obligations under Article XXIV of the GATT and Article 2.4 of the ATC by not imposing any restrictions on import of textiles and clothing. In this respect, India argued that in all

areas in which their import duties or regulations differed, the European Communities and Turkey were able to implement border controls ensuring that only products originating in their respective territories would benefit from the preferential treatment under the trade agreement. Given the absence of a complete harmonization of external policies, India pointed out that the Decision 1/95 explicitly safeguarded the parties' right to impose the necessary controls in those areas. India was of the view that any immediate harmonization of import restrictions on textile and clothing products were unnecessary with respect to the EC-Turkey trade agreement referred. For substantiating this, India pointed out that the European Communities and Turkey were applying different import duties and regulations in respect of many sectors, policy instruments and trading partners (WT/DS34/R 1999: paragraphs 6.84, 6.86, 6.87, 6.95, 6.98, 6.106, 6.113-6.117).

India further argued a point that the type of agreement concluded between the European Communities and Turkey was not governed by those provisions of Article XXIV that related to completed customs unions but fell into the category of interim agreements leading to the formation of a customs union. In support of this argument, apart from previous panel rulings, India referred to discussions on the said agreement in the CRTA, where the European Communities themselves had stated that the harmonization of certain policies could take place at the end of transitional periods. According to India, that amounted to admission that the agreement was in effect an interim agreement leading to the formation of a customs union. India further noted that Turkey had claimed in the CRTA that it might, consistently with Article XXIV, apply import policies different from those of the European Communities in a few areas.[31] However, before the Panel, it claimed that, to conform to Article XXIV, it had to apply the same policies as the European Communities in the field of textiles and clothing. India argued that these two legal claims could not be simultaneously accepted by the Panel (WT/DS34/R 1999: paragraphs 6.127 – 6.130).

In justifying its measures under Article XXIV of the GATT, Turkey submitted that Article XXIV:8(a)(ii) required it to apply to third countries import restrictions similar to those applied to the same countries by the European Communities. Turkey

[31] Agriculture, steel and other "sensitive" industrial products, preferential trade agreements, the GSP, anti-dumping duties, countervailing measures and safeguards.

contented that in order to qualify as a customs union, the Turkey – EC customs union had to cover substantially all trade as required by Article XXIV:8(a)(ii) – it had obviously to cover trade in textiles and clothing products which represented 40 per cent of Turkey's sales in the EC. Further, it argued that if such trade had to be covered, the Turkey-EC customs union had to have a common regulation of commerce with other countries in accordance with Article XXIV:8(a)(ii). With respect to ATC and TMB, Turkey was of the view that TMB was the appropriate forum to determine the relationship between the ATC and the GATT as such relationship depended on an interpretation of the ATC. Turkey reiterated its position that the issue could not be considered by the Panel unless examined by the TMB (WT/DS34/R 1999: paragraphs 6.89, 6.94, 6.100, 6.101).

Turkey claimed that over 98 per cent of trade between Turkey and EC was covered by Turkey-EC customs union and thus it had met the requirements under Article XXIV:8. It was also submitted on behalf of Turkey that there were no alternative solutions to the imposition of quantitative limits. Turkey indicated that maintaining the regulations of commerce applied prior to the formation of Turkey-EC customs union would be equivalent to excluding the goods, imported into Turkey under Turkey's pre-customs union regulations of commerce, from the coverage of the customs union. Rejecting the Indian allegations that the customs union between Turkey and the EC was in fact an interim agreement, Turkey elaborated on the various steps and phases of developing the customs union and concluded that Indian arguments above were groundless (WT/DS34/R 1999: paragraphs 6.107, 6.110, 6.111, 6.137, 6.135, 6.136, 6.137).

### IV.4.4. Nullification or Impairment

Turkey contended that the customs union benefited third countries and could not be described as having raised the barriers to their trade with Turkey. It affirmed that, overall, the customs union had resulted in the lowering of the general incidence of duties and other regulations of commerce. Placing various trade data, Turkey argued that there was improved market access to Turkey and imports had in fact grown, after the formation of the union including in the case of India. Turkey claimed that the restrictions at issue had "no economic substance" and that India was therefore not subject to nullification or impairment.

While coming out with different trade figures, India argued that there was serious and significant decline in India's exports of restricted products to Turkey. Further, it noted that the presumption that measures inconsistent with the GATT impaired the benefits accruing to a member under the GATT could not be rebutted with a demonstration that the restrictions had no trade effect. India maintained the view that the existence of QR "should be presumed to cause nullification or impairment not only because of any effect it had on the volume of trade but also for other reasons."

Another argument raised by Turkey was that since India repeatedly rejected Turkey's offer to negotiate, in effect, even if India's benefits were nullified or impaired, the chain of causation between the measures challenged and the nullification and impairment was broken. In support of this, Turkey stated that general principle of law said that one could not seek redress for harm that one had brought out oneself by not taking measures that would have prevented or at least mitigated the harm caused by another party.

Rejecting the above view, India stated that the principle of international law cited by Turkey could not apply when a WTO member refused to accept a partial implementation of the obligation incurred by another member.

### IV.4.5. Findings of the Panel

On the basis of the arguments put forth by the parties and examining and analyzing the legal text governing the subject and the available jurisprudence, the Panel arrived at the following findings:

#### IV.4.5.a. Identification and Attribution of the Measure at Issue

The Panel requested Turkey to conform that the quantitative restrictions at issue were those listed in India's first submission. Turkey acknowledged that the quantitative restrictions in place correspond to the measures referred to by India in its first submission. Though, Turkey accepted the existence of quantitative restrictions it maintained the view that it cannot be held individually liable for those restrictions as they resulted from the implementation of its customs union with the European Communities.

On the above issue, the Panel noted that the parties agreed that the quantitative restrictions at issue were those listed by Turkey in its responses to the Panel's various questions on those issues. Regarding the claims of Turkey that it was not individually responsible, the Panel noted that the measures were implemented through formal action by Turkey and that the measures were published by Turkey in its Official Gazette. On examination of various facts on record, the Panel found that the measures under examination were enacted, implemented and were applied, by the Turkish government and did not impose any obligation on any other national or supranational authorities. Thus, on their face, the measures at issue appeared to be measures taken by Turkey and enforceable on Turkish territory only. On the above findings and reasoning, the Panel concluded that the measures at issue were quantitative restrictions adopted by the Turkish government in 1996, 1997 and 1998 against 19 categories of textile and clothing products imported from India. Even if these measures were taken in the ambit of the customs union, they were implemented, applied and monitored by Turkey, for application in the Turkish territory only. Therefore, they were Turkish measures.

**IV.4.5.b. Scope of the Dispute**

Regarding the scope of the dispute, Turkey argued that the measures at issue were adopted as a consequence of its regional trade agreement with the European Communities and hence the WTO compatibility of the agreement and all its measures was to be determined exclusively with reference to Article XXIV of the GATT and not by any other provisions of the WTO Agreements.

On examining the above claim of the Turkey, the Panel reiterated that provisions contained in paragraph 12 of the Understanding on Article XXIV of GATT and noted that the provision provided that the panels have jurisdiction to examine "any matters 'arising from' the application of those provisions of Article XXIV." Panel further observed that the term "any matters" clearly included specific measures adopted on the occasion of the formation of a customs union or in the ambit of a customs union. Regarding the extent of examination, the Panel concluded that the examination will be limited to the question whether in this case, on the occasion of formation of Turkey-EC customs union, Turkey was permitted to introduce WTO incompatible quantitative restrictions against imports from a third country.

### IV.4.5.c. Claims under Article XI and XIII of GATT

Thereafter, the Panel examined the claim of India that the Turkish measures violated the provisions of Article XI and XIII of the GATT and Article 2.4 of the ATC. In analyzing the provisions contained in Article XI and XIII, the Panel noted that the prohibition on the use of quantitative restriction formed the cornerstone of the GATT system. The Panel also observed that prohibition of quantitative restrictions was one of the fundamental obligations of GATT and the practice of the Members had shown an interest in favour of phasing out quantitative restrictions. In the absence of opposition from Turkey, the Panel concluded that the measures at issue, on their face, imposed quantitative restrictions on imports and were applicable only to India and therefore India has made a *prima facie* case of violation of Articles XI and XIII of the GATT.

### IV.4.5.d. Article 2.4 of the ATC

The Panel also examined India's claim that the measure in issue also violated Article 2.4 of the ATC. On examining the relevant provisions of the ATC, the Panel noted that the ATC only permitted restrictions those which were in place at least a day before 1 January 1995 and it needed to be notified to the WTO. Further, the ATC allowed new restrictions only in the case of safeguard measures (Article 6 of the ATC) or pursuant to Articles 2.14 and 7 of the ATC when a Member did not comply with the requirements of the agreement. In this context, the Panel noted that Turkey did not have any MFA restrictions in place; it could therefore not make any notification pursuant to Article 2.1 of the ATC. Accordingly, any restriction on textiles and clothing applied by Turkey appear on the face to be "new", as defined in Article 2.4 of the ATC. In this regard, Panel refused to accept the argument of Turkey that its measures were not new because the European Communities had a similar measure in place.

On the question of jurisdictional issue raised by Turkey, the Panel noted that since the matter in issue was not applied pursuant to the ATC and as it involved a GATT provision, the Panel had jurisdiction over the matter.

### IV.4.5.e. Conclusion on India's Claims

On the above examination and findings, the Panel held that unless the measures under examination were justified by Article XXIV (Turkey's defence) they were inconsistent with the provisions of Articles XI and XIII of the GATT and they would necessarily violate also Article 2.4 of the ATC.

### IV.4.5.f. Turkey's Defence based on Article XXIV of GATT

#### IV.4.5.f.i. Article XXIV:5(a)

One of the major arguments of Turkey in raising its defence was that the provisions of Article XXIV:5(a) should be read as permitting, at the time of the completion of a customs union, the introduction of restrictive regulations of commerce to trade of third countries, provided that the overall incidence of duties and other regulations of commerce was not higher or more restrictive after the completion of the customs union than before. India argued that the terms of Article XXIV:5 did not provide a legal basis for measures otherwise incompatible with the GATT/WTO rules. India pointed to Article XXIV:6 which provided a mechanism to compensate the increasing of a tariff on the occasion of creation of a customs union and argued that the absence of a corresponding provision for the imposition of quantitative restrictions testified that it was not allowed.

On the examination of the provisions of Article XXIV:5(a) and as elaborated upon and clarified by the 1994 Understanding on Article XXIV, the Panel noted that the provision provided for an "economic test" for assessing whether a specific customs union was compatible with Article XXIV. Further, the Panel noted that the language of Article XXIV:5(a) was general and not prescriptive. While it authorized the formation of a customs union, it did not contain any provision that either authorized or prohibited, on the occasion of the formation of a customs union, the adoption of import restrictions otherwise GATT/WTO incompatible, by any of the parties forming the customs union.

### IV.4.5.f.ii. Concurrent Interpretation of Article XXIV:5(b)

The Panel noted that it was relevant to find that paragraph 5(a) and 5(b) contained similar wordings. Paragraph 5(b) corresponding to the free-trade areas which contained the similar language did not require them to harmonize their other trade regulation with third countries and the interpretation of the provision did not allow them to violate GATT/WTO provisions in their effort to harmonize their external trade policies. Consequently, the Panel noted that there was no basis for the argument that the terms of paragraph 5(a) authorized members to adopt GATT-inconsistent measures in forming the customs union, while 5(b) did not, when both had similar language.

### IV.4.5.f.iii. Article XXIV:4 – Purpose of a Customs Union

The Panel noted that the purpose laid down in Article XXIV:4 was relevant in interpreting paragraph 5. The Panel pointed out that the use of the term "accordingly" in the starting of paragraph 5 rendered that paragraph 4 was especially relevant to the application of the provisions in paragraph 5. It reiterated that Article XXIV:4 provided that the purpose of a customs union should not be to raise barriers to the trade of other members.

### IV.4.5.f.iv. Article XXIV:6 – Provisions for Renegotiation of Tariff

Article XXIV:6 provided for compensation in the case of tariff binding increase. The Panel noted that there was no corresponding provision for quantitative restrictions and it was to be understood that it was because quantitative restrictions were generally prohibited by GATT/WTO.

On the above examination and findings, the Panel concluded that there was no legal basis in Article XXIV:5(a) for the introduction of quantitative restrictions otherwise incompatible with GATT/WTO; the wording of sub paragraph 5(a) did not authorize the Members forming a customs union to deviate from the prohibitions contained in Article XI and XIII of the GATT or Article 2.4 of the ATC.

### IV.4.5.f.v. Article XXIV:8

Another main defence raised by Turkey was that Article XXIV:8(a)(ii) required it to apply to third countries, the same regulations of commerce, including import restrictions as those applied by the European Communities to the same third countries. Further, they submitted that to meet the substantially all trade criteria in Article XXIV:8(a)(i), it had to cover trade in textiles and clothing products which represented 40 per cent of Turkey's exports to the European Communities. Turkey added that, for such trade in the sector to be covered, the constituent members of the Turkey-EC customs union must have common tariffs and a common foreign trade regime with other countries in accordance with Article XXIV:8(a)(ii). Turkey submitted that it had no other alternative available.

India was of the view that the provision could not be reasonably interpreted to imply that Members in fulfilling those requirements are entitled to ignore their WTO obligations. India also pointed out the difference existing between Turkey and EC in external trade policies in a number of areas.

After examining the arguments, the Panel identified that the issue before it was whether Article XI and XIII of the GATT on the one hand and Article XXIV:8(a)(ii) on the other hand, could be interpreted so as to avoid a conflict requiring that one provision yields to other. The Panel noted that the terms of sub-paragraph 8(a)(ii) did not explicitly authorize Members of a customs union to violate GATT rules in their relation with non-constituent members. Further, it noted that the sub-paragraph 8(a)(i) allowed parties to maintain certain restrictions of commerce on their trade with each other, including quantitative restrictions. This implied that even for "substantially all trade originating in the constituent countries" to be covered, certain WTO compatible restrictions could be maintained. The maintenance of such an internal restriction could obviate the need for identical external trade policies. The Panel was of the view that the flexibility inherent in sub-paragraph 8(a)(ii) allowed for harmonious interpretation. The Panel considered that constituent members having "comparable" trade regulations having similar effects with respect to the trade with third countries, would generally meet the qualitative dimension of the requirements of sub-paragraph 8(a)(ii).

Recalling that Turkey and EC maintained different external trade policies in a number of areas, Panel noted that Decision 1/95 envisaged that the European Communities may continue to apply its system of certificates of origin should Turkey fail to conclude agreements with third countries, similar to the agreements already in place between those countries and the European Communities. Panel held that, thus, there were administrative means available to the European Communities and Turkey, and in particular rules of origin, in order to ensure that no trade diversion occurred, while respecting the parameters of sub-paragraph 8(a)(i) and at the same time sub-paragraph 8 (a)(ii).

On the above findings and interpretations, the Panel held that Article XXIV:8(a)(ii) did not authorize Turkey in forming a customs union with the European Communities, to introduce quantitative restrictions on textile and clothing products that would be otherwise incompatible with GATT/WTO, nor did it require that Turkey introduce restrictions on import of textiles and clothing which would be inconsistent with other provisions of the WTO Agreement.

Assessing the object and purpose of the regional trade agreements in a wider context, the Panel compared and drew principles from the preamble of the GATT 1994, the WTO Agreement 1994, the Understanding on Article XXIV and Article XXIV which laid down the object and purpose of regional trade agreement, and concluded that the objectives of regional trade agreements and those of the GATT and the WTO have always been complementary, and therefore should be interpreted consistently with one another with a view to increasing trade and not to raise barriers to trade and also that the provisions of Article XXIV (together with those of the 1994 Understanding on Article XXIV) did not constitute a shield from other GATT/WTO prohibitions, or a justification for the introduction of a measure which was considered generally to be *ipso facto* incompatible with GATT/WTO.

**IV.4.5.g. Nullification and Impairment**

On the Indian claim of nullification and impairment, Turkey argued that a violation of GATT/WTO provision constituted only a presumption of nullification or impairment and the WTO law required that an alleged breach of a Member's right must have an economic impact on the complaining member. Turkey also raised the argument that

India had itself broken the chain of causation between the measures challenged and the nullification by rejecting Turkey's offer to negotiate.

On the other hand, India argued that the presumption mentioned in Article 3.8 of the DSU was not rebuttable by the submission of evidence alleging that there were no actual adverse effects for the measure. Relying on various previous panel reports, India asserted that a demonstration that no adverse trade impact had occurred even was insufficient to rebut the presumption under Article 3.8 of the DSU.

Considering the ratio laid down by various previous panel reports and on examining the trade data submitted by the parties, the Panel noted that assuming *arguendo* that India's overall exports of clothing and textile products to Turkey have increased from their levels of previous years, it would not be sufficient to rebut the presumption of nullification and impairment caused by the existence of WTO incompatible import restrictions. Panel also rejected the argument of Turkey that India's nullification and impairment of its WTO benefits have resulted from India's own action or absence thereof.

**IV.4.6. Conclusions of the Panel**

On the above findings and reasons, the Panel concluded that:

> "...the measures adopted by Turkey on 19 categories of textile and clothing products are inconsistent with the provisions of Article XI and XIII of GATT and consequently with those of Article 2.4 of the ATC. We reject Turkey's defence that the introduction of any such otherwise GATT/WTO incompatible import restrictions is permitted by Article XXIV of GATT.
>
> ...to the extent that Turkey has acted inconsistently with the provisions of covered agreements, as described in the preceding paragraph, it has nullified or impaired the benefits accruing to the complainant under those agreements.
>
> The Panel recommends that the Dispute Settlement Body request Turkey to bring its measures in conformity with its obligations under the WTO Agreement" (WT/DS32/R 1999: paragraphs 10.1-10.3).

## IV.5. Turkey – Restrictions on Imports of Textile and Clothing Products: Appellate Body Report[32]

### IV.5.1. Background of the Appeal

The factual background of the appeal was the same as noted above.[33] On 26 July 1999, Turkey notified the Dispute Settlement Body (DSB) of its intention to appeal certain issues of law covered in the Panel Report and the legal interpretations developed by the Panel. The main arguments of the parties were as under:

### IV.5.2. Arguments of the Parties

#### IV.5.2.a. Turkey – Appellant

Turkey appealed the Panel's finding that Article XXIV of the GATT 1994 did not allow it to introduce quantitative restrictions on textile and clothing products from India, upon the formation of its customs union with European Communities. Turkey argued that the Panel erred in presuming the existence of a conflict between, on the one hand, Article XI and XIII of the GATT 1994 and Article 2.4 of the ATC, and, on the other, Article XXIV of the GATT 1994. Turkey was of the view that Article XXIV permitted the common regulation of commerce of a customs union in a particular sector to be determined by one of the members' lawful quantitative restrictions in that sector, if the unified regulations were not on the whole more restrictive than the previous regulations of the members. Further Turkey contented that the right available for WTO members to establish a customs union under Article XXIV was an autonomous right and not an "exception" from other GATT obligations.

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[32] The analysis of this section is based on the original Appellate Body Report available as WTO Document WT/DS34/AB/R of 22 October 1999. Appropriate references are given where other sources are relied on.

[33] Turkey applied quantitative restrictions from January 1996 on imports from India for 19 categories of textile and clothing products. Turkey introduced these measures in the context of the Turkey-EC Association Council Decision of 1/95 of March 1995, setting out certain modalities for the final phase of Association between Turkey and the EC for the completion of a customs union. India took the matter before the WTO Dispute Settlement and requested the Panel in the light of the GATT and the WTO Agreement on Textiles and Clothing (ATC), claiming that quantitative restrictions imposed by Turkey on Indian products were inconsistent with Turkey's obligation under GATT Article XI and XIII and that it was not justified by Article XXIV. The Panel considered the claims by India and reached the conclusion that the quantitative restrictions were inconsistent with the provisions of Article XI and XIII of GATT 1994 and consequently with those of Article 2.4 of the ATC and rejected Turkey's defence that the introduction of any such otherwise GATT/WTO incompatible import restrictions is permitted by Article XXIV of the GATT 1994.

Turkey argued that the Panel failed to properly interpret the ordinary meaning of the text of Article XXIV, and, in particular, the chapeau of paragraph 5 of that Article. According to Turkey, the ordinary meaning of the chapeau of paragraph 5 demonstrated that Article XXIV confers on WTO Members a right to enter into a customs union to derogate, under certain conditions, from their GATT obligations, including, but not limited to, their obligations under Article I. Turkey rebutted the Panel view and urged that there was no textual support for the Panel's conclusion that Article XXIV permitted derogation from Article I, but not from other GATT provisions. In support of this, Turkey pointed out the chapeau of Article XXIV:5 which stated that "the provisions of this Agreement" shall not prevent the formation of a customs union. Turkey rebutted the Panel's conclusion that Article XXIV:5(a) "does not authorize Members forming a customs union to deviate from the prohibitions contained in Article XI and XIII of GATT or Article 2.4 of the ATC." Turkey claimed that the Panel misinterpreted the ordinary meaning of Article XXIV:5(a). The specific pleading of Turkey was that Panel ignored the chapeau to Article XXIV:5 which stated that no GATT 1994 provision shall "prevent" the formation of a customs union as long as certain conditions set out sub-paragraph 5(a) were satisfied. Turkey claimed that Panel ignored the chapeau and hence the conclusion arrived at was erroneous.

Further, Turkey argued that the Panel's reading of Article XXIV:5(a) was erroneous since it rendered the provision a 'nullity.' According to Turkey, the "economic test" established by sub-paragraph 5(a) applied to the duties and regulations of the particular customs union as a whole, not, as stated by the Panel, to the duties and regulations of the particular members. Turkey also raised the objections that the Panel misinterpreted the context of Article XXIV:5(a) by "the immediate context" analysis, and failed to appreciate the chapeau of Article XXIV:5(a) and misinterpreted Articles XXIV:5(b), XXIV:4, XXIV:6 and the location of Article XXIV in Part III of the GATT 1994. Turkey argued that the Panel also failed in properly interpreting the ordinary meaning of Article XXIV:8(a). According to Turkey, the Panel erred by failing to examine the entire context of Article XXIV:8(a), and, therefore, overlooked the independent nature of sub-paragraph 8(a)(i) and 8(a)(ii), and their relationship in the broader context of Article XXIV. Another claim raised by Turkey was that if not allowed to impose the measure in question, it would exclude 40 per cent of Turkey's

exports to the European Communities under the customs unions and that would eventually lead to inconsistency with Article XXIV:8(a)(i). It would lead to the challenge that the proposed customs union would not cover "substantially all trade" and, therefore not consistent with Article XXIV. Turkey also rebutted the observation of the Panel that it had several alternatives to the imposition of quantitative restrictions. Turkey questioned the logic of that suggestion and failed to see how the Panel could conclude that Turkey had a duty to opt for one of the suggested alternatives as long as the measures challenged by India had not resulted in the common regulation of commerce of the Turkey-EC customs union being on the whole more restrictive than the regulations of Turkey and the EC before the formation of the customs union. Turkey also contended that the wider context of Articles XXIV:5 and XXIV:8 and the object and purpose of the *WTO Agreement* did not support the Panel's interpretation. It also argued that the Panel drew wrong conclusion from the past GATT/WTO practice. In rebutting the view of the Panel that there was no agreement or acceptance that Article XXIV *authorized* or required the introduction of otherwise GATT/WTO inconsistent measures upon the formation of a customs union, Turkey recalled the example, that during the accession of Sweden to the EC, Sweden adopted quantitative restrictions similar to those challenged in the case. Turkey was of the view that Panel erred however, by not reviewing whether the GATT/WTO practice *prohibited* the introduction of such measures.

**IV.5.2.b. India – Appellee**

India argued that the Panel's ruling that Article XXIV did not authorize the introduction of quantitative restrictions in the present case was well found and was according to the recognized principles of interpretation set out in Articles 31 and 32 of the *Vienna Convention on the Law of the Treaties*. India argued that Article XXIV:5 needed to be interpreted in the context of Article XXIV:4. Based on the context provided by Article XXIV:4, Article XXIV:5 could not be interpreted to provide a justification for measures raising barriers to the trade of other WTO Members who were not party to the customs union. India further pointed out that the absence of a corresponding provision for compensation for the introduction of new quantitative restrictions unlike for the case of increase in tariff duties under Article XXIV:6, made clear that Article XXIV was not meant to authorize the imposition of quantitative

restrictions. Rebutting Turkey's general claims of legal error, India argued that the Panel had not presumed a conflict between the provisions of Article XXIV and the provisions of Article XI and XIII of the GATT 1994 and Article 2.4 of the ATC. India was of the view that the Panel had never stated that Article XXIV was an exception to the GATT obligations. The Panel finding was only that Turkey made an "affirmative defence" based on Article XXIV. In response to the Turkey's claim that Article XXIV:5 permitted the formation of a customs union as long as the economic assessment in sub-paragraph 5(a) was fulfilled, India argued that Article XXIV defined the purposes for which a WTO Member could deviate from other GATT provisions, but did not define the provisions themselves. India was of the view that only those provisions of the GATT 1994 that "prevented" the formation of a customs union could provide the basis for a defence under Article XXIV. Further, under the terms of Article XXIV:5, the formation of a customs union was not "prevented" by the obligations set out in Article XI of the GATT 1994 and Article 2.4 of the ATC. India also argued that Turkey failed to explain why the mere fact that a type of measure was regulated in Part III of the GATT 1994 demonstrated that the other parts of GATT 1994 no longer applied. Rejecting Turkey's objection that the Panel failed to consider the chapeau of Article XXIV:5 in its examination of Article XXIV:5(a), India claimed that the Panel in fact conducted a thorough textual and contextual analysis. India also submitted that the immediate context of Article XXIV:5(a) supported the Panel's interpretation that the provision did not authorize the introduction of quantitative restrictions. Further, India was of the view that the text of Article XXIV:5(b), Article XXIV:4, Article XXIV:6, as well as the placement of Article XXIV in Part III of GATT 1994 and also the wider context of Article XXIV:5 and XXIV:8 and the object and purpose of the WTO Agreement supported the Panel's interpretation of those provisions. India also rejected the claim of Turkey that the Panel did not properly interpret the ordinary meaning of Article XXIV:8(a). India pointed out that Turkey failed to take into account that the right to form a customs union was not absolute and the Panel's interpretation did not prevent Turkey from forming a customs union with the European Communities. India also argued that the Panel drew correct conclusions from the GATT/WTO practice and pointed out that the Sweden's adoption of quantitative restrictions during the accession to the EC was in a different context as it was an accession and not an agreement for customs union. In addition to all these, India made many general submissions like Article XXIV of

the GATT 1994 could provide a justification for quantitative restrictions had never been accepted under GATT 1947. The Agreement between Turkey and EC explicitly recognized the possibility that Turkey might not be able to introduce quantitative restrictions and hence suggested a system of certificates of origin to overcome the situation and India also argued that the agreement provided for the formation of a customs union between Turkey and EC in a future date and therefore constituted, at most, an interim agreement for which Turkey did not have to impose the same restrictions as imposed by the EC.

**IV.5.2.c. Third Parties**

Hong Kong, China; Japan and the Philippines participated in the proceedings as third parties and submitted their respective views in appeal. Hong Kong, China argued that it could be contrary to the stated purpose of regional agreements set out in Article XXIV:4 to interpret the chapeau to Article XXIV:5 to permit the raising of barriers to trade in violation of Articles XI and XIII of the GATT 1994. They were also of the view that under Article XXIV:8(a), a customs union need not result in a total alignment of the external trade regimes of the constituent territories.

Japan argued that regional trade agreements were only allowed if they were complementary to the multilateral trading system and if they complied with the rules set out in Article XXIV of GATT 1994. Japan also submitted that Article XXIV did not function as a "waiver" which allowed derogation from the basic tenets of the multilateral trading system.

The Philippines argued that Turkey's quantitative restrictions were not justified because they were on the whole more restrictive than the general incidence of regulations of commerce applicable in the constituent territories prior to the formation of the customs union, in contravention of Article XXIV:5(a). Philippines also submitted that the grounds upon which measures were permitted under Articles XI, XII, XII, XIV, XV and XX were, by their nature, specific to the Member concerned and, accordingly, could not be grandfathered.

### IV.5.3. Examining Article XXIV and Panel Findings

The Appellate Body thoroughly examined the Article XXIV and its interpretation in the light of the Panel Report appealed from.

In examining the Panel Report, the Appellate Body noted that the Panel referred to the chapeau of paragraph 5 of Article XXIV only in a passing and perfunctory way. The chapeau of paragraph 5 was not central to the Panel's analysis which focused instead primarily on paragraphs 5(a) and 8(a). Appellate Body observed that the chapeau of paragraph 5 of Article XXIV was the key provision for resolving the issue in appeal. It referred to the relevant part as

> Accordingly, the provisions of this Agreement *shall not prevent*, as between the territories of contracting parties, the formation of a customs union...; *Provided* that.... (emphasis added).

Accordingly the Appellate Body, to determine the meaning and significance of the chapeau of paragraph 5, the text of the chapeau, and its context, relied on paragraph 4 of Article XXIV. After examining the ordinary meaning of the chapeau, it noted that it meant that the provisions of the GATT 1994 shall not make impossible the formation of a customs union. In examining the text of the chapeau, the Appellate Body concluded that the wording indicated that Article XXIV could justify the adoption of a measure which was inconsistent with certain other GATT provisions only if the measure was introduced upon the formation of a customs union, and only to the extent that the formation of the customs union would be prevented if the introduction of the measure was not allowed.

The Appellate Body upheld or agreed with the interpretation given by the Panel for the term "substantially all the trade" and "substantially the same" duties in Articles XXIV:8(a)(i) and 8(a)(ii) respectively that the above terms offered "some flexibility" to the constituent members of a customs union while liberalizing trade and aligning the duties and other regulations of commerce. However, the Appellate Body, cautioned that the degree of "flexibility" that those provisions allowed was limited. However, the Appellate Body disagreed with the Panel's finding that:

> ...as a general rule, a situation where constituent members have "comparable" trade regulations having similar effects with respect to the trade with third

> countries, would generally meet the qualitative dimension of the requirements of sub-paragraph 8(a)(ii) (Panel Report, Paragraph 9.151).

The Appellate Body noted that the sub-paragraph 8(a)(ii) required the constituent members of a customs union to adopt "substantially the same" trade regulations. In its view, "comparable trade regulations having similar effects" did not meet that standard. According to the Appellate Body, a higher degree of "sameness" was required by the terms of the sub-paragraph 8(a)(ii).

In examining the text of the chapeau of Article XXIV:5, the Appellate Body noted that the phrase "provided that" was an essential element of the text of the chapeau and according to them, Article XXIV could only be invoked as a defence to a finding that a measure was inconsistent with certain GATT provisions to the extent that the measure was introduced upon the formation of a customs union which met the requirements in sub-paragraph 5(a) of Article XXIV relating to the "duties and other regulations of commerce" applied by the constituent members of the customs union to trade with third countries.

The Appellate Body agreed with the Panel view on Article XXIV:5(a) in the light of paragraph 2 of the Understanding on Article XXIV which provided:

> ...that the effects of the resulting trade measures and policies of the new regional agreement shall not be more trade restrictive, over all, than were the constituent countries' previous trade policies (Panel Report, Paragraph 9.121)

and also agreed on the Panel view that there was:

> an "economic" test for assessing whether a specific customs union is compatable with Article XXIV (Panel Report, Paragraph 9.120).

Further, the Appellate Body observed that the chapeau of paragraph 5 could only be interpreted with constant reference to paragraph 4. In their view, the word "accordingly" in the beginning of paragraph 5 could only be read to refer to paragraph 4 of Article XXIV which immediately preceded the chapeau. On the above ground, the Appellate Body ruled that, the chapeau of paragraph 5 and the conditions set forth therein for establishing the availability of a defence under Article XXIV, must be interpreted in the light of the purpose of customs union set forth in paragraph 4. On the basis of the above analysis, Appellate Body stated that Article XXIV defence to

justify any GATT inconsistent measure was available only when two conditions were fulfilled. First, the party claiming the benefit of that defence must demonstrate that the measure at issue was introduced upon the formation of a customs union that fully met the requirements of sub-paragraph 8(a) and 5(a) of Article XXIV. And, second, that party must demonstrate that the formation of that customs union would be prevented if it were not allowed to introduce the measure at issue. Analyzing the Panel Report in the light of above conditions, the Appellate Body observed that, the Panel, in that case, did not address the question of whether the regional trade agreement between Turkey and the European Communities was in fact a "customs union" which met the requirements of paragraph 8(a) and 5(a) of Article XXIV. The Panel maintained that "it is arguable" that Panels do not have jurisdiction to assess the overall compatibility of a customs union with the requirements of Article XXIV (Panel Report, Paragraph 9.53). The Panel also considered that, on the basis of the principle of judicial economy, it was not necessary to assess the compatibility of the regional trade agreement between Turkey and the European Communities with Article XXIV in order to address the claims of India (Panel Report, Paragraph 9.54). Based on such reasoning, the Panel assumed *arguendo* that the arrangement between Turkey and the European Communities was compatible with the requirements of Article XXIV:8(a) and 5(a) and limited its examination to the question whether Turkey could be permitted to introduce the quantitative restrictions at issue. The Appellate Body also refrained from examining the above issue on the reason that the specific issue was not appealed before them. However, in that context, the Appellate Body recalled its earlier ruling in *India – Quantitative Restrictions on the Imports of Agricultural, Textile and Industrial Products*[34] on the jurisdiction of the panels to review the justification of balance-of-payments restrictions under Article XVIII:13 of the GATT 1994.

With respect to the second condition, the Appellate Body agreed with the Panel finding that had Turkey not adopted the same quantitative restrictions that were applied by the European Communities, that would not have prevented Turkey and the European Communities from meeting the requirements of sub-paragraph 8(a)(i) of Article XXIV, and consequently from forming a customs union. The Appellate Body also appreciated the finding of the Panel that there were other alternatives available to

[34] WTO Document WT/DS90/AB/R of 23 August 1999, paragraphs 80 – 109.

Turkey and the European Communities to prevent any possible diversion of trade, while at the same time meeting the requirements of sub-paragraph 8(a)(i). The Appellate Body noted that a system of certificates of origin would have been a reasonable alternative until the quantitative restrictions applied by the European Communities were required to be terminated under the provisions of the ATC.

On the above reasons and findings, the Appellate Body concluded that Turkey was not, in fact, required to apply the quantitative restrictions at issue in the appeal in order to form a customs union with European Communities. Turkey had not demonstrated that the formation of a customs union between Turkey and the European Communities would be prevented if it were not allowed to adopt those quantitative restrictions. Therefore, the defence afforded by Article XXIV under certain conditions was not available to Turkey in the case and Article XXIV did not justify the adoption by Turkey of those quantitative restrictions.

### IV.5.4. Findings and Conclusions of the Appellate Body

For the reasons set out in the report, the Appellate Body concluded that the Panel erred in its legal reasoning by focusing on sub-paragraph 8(a) and 5(a) and by failing to recognize the crucial role of the chapeau of paragraph 5 in the interpretation of Article XXIV of GATT 1994, but upheld the Panel's conclusion that Article XXIV did not allow Turkey to adopt, upon the formation of a customs union with the European Communities, quantitative restrictions on import of 19 categories of textile and clothing products which were found to be inconsistent with Article XI and XIII of the GATT 1994 and Article 2.4 of the ATC.

The Appellate Body also made it clear that the present ruling was only with respect to the issue in appeal and that there was no finding on the issue whether quantitative restrictions inconsistent with Article XI and XIII of the GATT 1994 will ever be justified by Article XXIV. It also stated that they had not made findings on many other issues that may arise under Article XXIV and resolution of those issues must await another day.

## IV.6. Conclusion

The pre-Uruguay Round period has witnessed a number of issues/disputes on the application and interpretation of Article XXIV in various trade disputes. GATT Panels have addressed issues related to Article XXIV and have also distanced itself from ruling on many vital legal questions related to Article XXIV. This was because the issue of whether GATT Panels have jurisdiction to review the compatibility of RTAs with Article XXIV was unsettled. GATT Panels gave a very narrow interpretation to Article XXIV as they viewed as having an absence of a clear language giving it the authority to decide cases related to Article XXIV, thus indicating an absence of jurisdiction over Article XXIV disputes. However, GATT Panels have also laid down legal principles in the interpretation of Article XXIV which are worth highlighting for their pragmatic analysis but which carry little legal weight because of their un-adopted status. In both *Bananas I* and *Bananas II*, the Panels correctly pointed out that Article XXIV disputes fall under the jurisdiction of GATT Panels. The Panels in both the cases were of the view that the parties which invoke Article XXIV as a defence has the burden of proving that they have met the Article's requirements.

The question of judicial scrutiny was resolved by the Uruguay Round Understanding on Article XXIV. The WTO Panels and Appellate Body confirmed the authority of WTO Panels to adjudicate the RTA related issues in some of the disputes like *Turkey – Textiles* case and *Mexico – Tax Measures on Soft Drinks and other Beverages*[35] case. In the recent years, there have been a few disputes citing violation of Article XXIV provisions, but mostly Article XXIV has been invoked as a defence to otherwise GATT/WTO inconsistent measures. A finding that the measure at issues is inconsistent with Article XXIV contains the implicit finding that the RTA involved is an agreement under Article XXIV. Thus resurfaces the issue whether the Panels have the jurisdiction to access the overall compatibility of an agreement with the requirements of Article XXIV, which is "arguably" different from adjudicating on RTA related issues. So far no such issue has come up before the DSB directly which becomes all the more significant in view of the often inconclusive determination on

[35] *Mexico – Tax Measures on Soft Drinks and other Beverages* Case, Panel and Appellate Body Reports, WTO Documents WT/DS308/R and WT/DS308/AB/R dated 7 October 2005 and 6 March 2006 respectively.

the agreements by the WTO. Moreover, with a significant number of agreements in the services sector as well as under the Enabling Clause, the legal examination becomes all the more cumbersome.

Another significant point that could be observed is that the issue of compatibility as well as the extent of Article XXIV provision has been left unaddressed often on the principle of judicial economy. A review of some cases (*US – Wheat Gluten*, *US – Line Pipe*, etc.) indicates that the issues in dispute have been resolved without addressing Article XXIV provisions. Thus there is a perceivable trend of reluctance to address the issues pertaining to regional exception. In fact, *Turkey – Textiles* is the only available case where the Panel and Appellate Body have substantially dealt with the provisions of Article XXIV.

In *Turkey – Textiles* case both the Panel and the Appellate Body approved the competence of Panels to review judicially the legality of RTAs pursuant to Article XXIV of the GATT 1994. While the Panel held a narrow view on the scope of Article XXIV that it provides only the customs unions with a basis for measures otherwise incompatible with the MFN principle in Part I of GATT, the Appellate Body held that it may be invoked as a general defence to the WTO-inconsistent measures. Appellate Body narrowed down the room for interpretation of Article XXIV by holding that the provisions in paragraphs 5 to 8 are to be interpreted in the light of the purpose and object laid down in paragraph 4 of Article XXIV. The Panel and the Appellate Body could not provide clarity on interpretation of some terms like 'substantially all' and 'substantially the same.' Still it shed some light on the possible interpretation of these terms and the Appellate Body expressly cautioned that the flexibility offered by these terms is limited. However, as rightly pointed out by the Appellate Body, the resolution of many other issues that may arise under Article XXIV must await another day. Undoubtedly, the emerging jurisprudence on the subject will provide enhanced legal rigour to Article XXIV in a way that permits the GATT/WTO system to sufficiently deal with the challenges posed by the proliferation of RTAs.

In the light of the examination of legal provisions for regional exception and the related jurisprudence, it would be interesting to look into country practices on RTAs. The following chapter examines the Indian approach to RTAs and critically examines the legality of its agreements with the relevant GATT/WTO provisions.

# Chapter V

## Indian Approach to Regional Trade Agreements

### V.1. Introduction

Although a firm supporter of multilateralism,[1] India has engaged increasingly in bilateral and regional trade agreements in the recent years.[2] This pursuit of regionalism has raised several issues and questions regarding India's faith in the multilateral system[3] – after being an ardent supporter of multilateralism, how it explains the rationale for preferential trade without weakening the multilateral process; if the Indian practices indicate that the non-discrimination principles under the multilateral rules could be reconciled with the regional preferences and to what extent, etc. In this context, the present chapter broadly examines India's policy and practices on regional trade to understand some of these issues.

### V.2. Indian Position on Regionalism

The Indian concerns on regionalism were expressed at the Geneva Ministerial Conference[4] (1998) as under:

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[1] Statements of Indian Ministers at various Ministerial Conferences – Montreal (1988), Brussels (1990), Uruguay (1994), Singapore (1996), Geneva (1998), Seattle (1999), Doha (2001), Cancun (2003), Hong Kong (2005) – have the underlying theme of strengthening the multilateral trading system as an engine to push the development aspect of trade for developing and less developed countries. The texts of Minister's Statements are available at the Department of Commerce (2010a) website, URL: www.commerce.nic.in/trade/international_trade_md_statements.asp [Accessed on 31 May 2010].

[2] Since the signing of Bangkok Agreement (presently known as Asia Pacific Trade Agreement) in 1975, India has signed agreements with other developing countries (such as GSTP); with neighbours like Sri Lanka, Bhutan, Afghanistan etc.; within the region like SAFTA and also outside the region with Chile, Singapore etc. Recent developments include agreements with other economic groupings like Association for South East Asian Nations (ASEAN) and MERCOSUR. The agreement with Singapore goes beyond the negotiations on goods, to include services and investment (WT/TPR/S/182 dated 18 April 2007). Towards the conclusion of the study, India has signed a host of agreements with Korea, Japan, Malaysia, Nepal etc. (which are not examined in detail) and many more are in the pipeline. Refer Table on Indian RTAs annexed to the chapter (Table V.2).

[3] The Union Minister of Commerce and Industry, Mr. Anand Sharma stated at New Delhi on the occasion of announcement of the Foreign Trade Policy, 2009-2014 on 27 August 2009 that "India remains committed to the successful conclusion of the Doha Development Round. We are in favour of establishing a rule based, fair and equitable global multilateral trading regime, which has development as its core objective. However, it must respond to the aspirations of millions of people of the developing world" (Government of India 2009).

[4] This is drawn from the statement of the Minister Mr. Ramakrishna Hegde at the Geneva Ministerial Conference (1998) available as document WT/MIN (98)/ST/36 dated 18 May 1998.

> "There has also been an increasing trend in the past in favour of regionalism. While regional economic groupings have resulted in increased trade among the countries in the region, there is inherent danger of discrimination against third countries. Article XXIV of GATT specifically recognizes regional arrangements as an exception to the multilateral system. While we recognize the positive effect of regional groupings that are consistent with the principles of multilateral trading system and also the special needs of developing countries as enunciated in the Enabling Clause, we fear that the proliferation of such arrangements may weaken the framework of the system. The rules relating to such regional arrangements need to be clear and precise and should ensure that market access for third countries is not denied or reduced. Otherwise, we will, over the years, have a situation where the multilateral system becomes largely irrelevant" (WT/MIN(98)/ST/36 dated 18 May 1998).

India has always expressed in clear terms its preference for regional trade agreements within the framework of multilateral rules (WT/TPR/G/182 dated 18 April 2007: 34). While India continued to attach primacy to the multilateral trading system to improve living standards, it has considered that RTAs are building blocks that supplement the gains from multilateral trade liberalization (WT/TPR/S/182/Rev.1 dated 24 July 2007: 23). India has adhered to the Doha Declaration recognition that regional trade agreements could play an important role in promoting the liberalization and expansion of trade and in fostering development and has also agreed to the Doha mandate for 'negotiations aimed at clarifying and improving disciplines and procedures under the existing WTO provisions applying to regional trade agreements and that negotiations shall take into account the developmental aspects of regional trade agreements' as per paragraph 29 of the Doha Declaration (WT/MIN(01)/DEC/1 dated 20 November 2001). Subsequently, India presented a "*Discussion Paper on RTAs*" (TN/RL/W/114 dated 6 June 2003) seeking to examine the legal framework of RTAs in the light of the Doha mandate. It has been mentioned therein that the multilateral framework for international trade under the WTO rule based system has to be strengthened by addressing issues of concern emerging on account of formation of large number of RTAs including their impact on development. Though the RTAs are an alternative window of trade liberalization as well as an alternative framework of development between more limited sets of countries or economies, it is important that they complement multilateral trade liberalization and not create complications for that goal or occur at the cost of trade or development of countries not members of particular RTAs (TN/RL/W/114 dated 6 June 2003). Again, it is noticeable that the Indian position has been guided by the "developmental aspects" of RTAs that it should

complement the pro-development multilateral trade and should not hinder the development process. This could be viewed as the impetus for the majority of Indian agreements notified under the Enabling Clause.[5] The Indian proposal has strongly suggested that any attempt to dilute the Enabling Clause would be contrary to the spirit of WTO framework as well as of the Doha Ministerial Declaration and has elaborated as under:

> "The character of the Enabling Clause should not be altered in any way as it is inextricably linked to the development needs of developing countries. The development dimension of the Enabling Clause is that while developing countries seek greater economic integration with other countries, they also need to have enough policy space to be able to adjust to greater competition in the domestic markets or to calibrate their market liberalization to their individual level of development. It also provides them flexibility in making structural adjustments, a mechanism to build public consensus for trade liberalization led reforms and also a laboratory to learn the lessons of market opening without paying a prohibitive price in terms of social and economic upheavals, that may, at times, be paid when such an opening up is at the multilateral level" (TN/RL/W/114 dated 6 June 2003).

India has thus apprehended that the proposed notification and examination of the Enabling Clause RTAs in the CRTA would cause enormous burden on developing countries, which would not be justified in view of the relatively small share of world trade covered under such RTAs.

The following sub sections examines the Indian proposal for disciplines on RTAs, the responses to the proposal and the recent proposal (2009) by India on WTO's engagement with RTAs.

### V.2.1. Indian Proposal for Disciplines on RTAs

The main proposals put forth by India for effective multilateral regulation of RTAs are as follows:[6]

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[5] Decision of the CONTRACTING PARTIES on *Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries* (L/4903 dated 28 November 1979).

[6] This section is drawn from the India's *Discussion Paper on RTAs* available as TN/RL/W/114 dated 6 June 2003. Separate reference is given where other sources are relied on.

(a) Clarify the Disciplines on "substantially all the trade" issue

According to India, the formation of an RTA should be welfare enhancing for the participants. Meaningful welfare gains required closer economic integration between the economies of the participants by extending the RTA to as large a proportion of the trade as possible. The practice of leaving out sectors like agriculture from integration, even in the RTAs between developed countries formed under GATT Article XXIV limited the trade creation and consequently the welfare gain to participants. Therefore, India has submitted that Members may define "substantially all the trade" for the purpose of GATT Article XXIV in terms of both (i) a threshold limit of the HS tariff lines at the six-digit level and (ii) the trade flows at the various stages of implementation of the RTA.

(b) Retain the Enabling Clause Flexibilities

As mentioned already, India has strongly disapproved the proposals to bring RTAs signed under the Enabling Clause between developing countries within the ambit of GATT Article XXIV transparency mechanism, that is, to subject such agreements to review under the Committee on Regional Trade Agreements (CRTA). India has considered the Enabling Clause as an integral provision inextricably linked to the development needs of developing countries by allowing sufficient policy space and flexibilities to such countries to suit their levels of development in the process of economic integration intended under RTAs. Subjecting these RTAs to more rigorous disciplines of Article XXIV would on one hand cast enormous burden on the developing countries which would not be justified in view of the relatively small share of world trade under such RTAs. Therefore, according to India, it is not advisable to change the notification requirements under the Enabling Clause and the existing system of notifying such RTAs to the Committee on Trade and Development (CTD) should continue.

(c) Elaborate Transparency Provisions

According to India, the substantial growth of RTAs formed under GATT Article XXIV and the inability of the CRTA to effectively examine them indicates an urgent need to clarify the principle concerning notification and examination of such RTAs.

Therefore, India has proposed a two-step process for notification of an RTA. An outline of the new agreement could be notified to the WTO at the time of signature of the RTA, but prior to its ratification, and a second notification could be made after the RTAs ratification, but before its entry into force, which could be a full and detailed notification. It would be important to ensure that the initial notification requirement would not very burdensome and it could largely be based on public announcements made. The first of the two-step notification could act as a kind of database and a monitoring mechanism for receiving a detailed notification later on. It would also be useful to define a timeframe for notifying changes to the RTA in the lines of the Agreement on Import Licensing Procedure.[7]

India has considered further that in view of the increasingly comprehensive and complex character of RTAs, it would be useful if WTO members can be made familiar with the various provisions of an RTA at as early a stage as possible of its establishment and could also be presented with an analysis of its impact on the multilateral trading system. The WTO Secretariat should compile a "prior factual analysis" of the RTAs on the basis of the information provided by the RTA members as well as information available in the public domain like research papers of reputed institutions.[8] In addition, there could be a fixed periodicity of summary review of existing RTAs depending on the share of their trade on lines of the present Trade Policy Review Mechanism (TPRM). To enable the WTO Secretariat to carry out such regular assessment of RTAs based on the share of the trade flows, there should be a requirement for RTA members to submit data concerning trade. This could help in understanding at a broader level as to whether the RTA has served or is serving to create overall expansion of trade. India has thus regarded that such a two-tier system of notification and review process could ensure greater transparency and accountability of the RTAs to the multilateral trading system.

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[7] Article 5 of the Agreement on Import Licensing Procedure provides for notification by members which institute licensing procedures or changes in procedures to the Committee on Import Licensing established under the Agreement within 60 days of publication.

[8] Given the concerns of some members regarding the use of information in public domain, India has suggested further discussion on the scope of materials to be used from public domain (TN/RL/W/114 dated 6 June 2003: paragraph 11).

(d) Examine Rules of Origin as 'Other Regulations of Commerce'

India has explained that the Preferential Rules of Origin (PRO) under RTAs serve the same purpose as common tariff in the customs union, that is, to regulate the entry of goods in the RTA and in that sense they could be understood as a regulation of commerce. A complete harmonization of preferential rules of origin would neither be practical nor desirable as such rules are often derived from production and trade structures in place between the RTA members and are designed to meet certain specific requirements as identified by the RTA parties. Therefore understanding certain factors like limitation of harmonization[9] in the case of preferential rules of origin; difficulties raised by these rules like creating trade diversionary effects or barriers to trade of non-RTA members;[10] going beyond the reasonable requirement of substantial transformation criteria in rules of origin envisaged under the value addition criteria;[11] defeating the market access conditions for goods of Globalized System of Preferences' (GSP) beneficiary countries;[12] providing cumulating provisions to the benefit of selected non-RTA members to the exclusion of others[13] etc. are fundamental. Accordingly, India has given certain recommendations that (i) it

[9] The harmonization of PROs would require a re-negotiation of the WTO Agreement on Rules of Origin as preferential rules are kept out of the harmonization exercise under it. Moreover, the experience of harmonizing non-preferential rules of origin under the Agreement has been highly disappointing till date.

[10] One such identified element is the requirement in some PROs that the raw material used for the next stage of product conversion taking place in the RTA member country should be sourced from one of the RTA member countries. For instance, there is a requirement in the PRO of a major RTA that for a large category of fabrics, made-up articles and apparels to get the benefit of preferential tariffs under that RTA, these should contain yarn or fibre made in a RTA member country. This third country will have to use yarn sourced from a RTA member country, as otherwise, the processor of the fabric into the made-ups or apparels located in the RTA member country would not be able to avail preferential tariff for his manufactures under RTAs. Often, the pressure on third-countries to source raw materials from distant RTA members makes their final product uncompetitive vis-à-vis the production carried out in RTA member countries. Often, this could lead to investment diversion due to the pressure to set up manufacturing bases for intermediate raw materials near or within the RTA member countries (TN/RL/W/114 dated 6 June 2003).

[11] India has presented another instance of complex origin rules in an RTA wherein for clothing and coats to be entitled to the benefit of preferential tariff, the requirement that linings should originate from the fabric stage from one of the RTA member countries. Such requirement for particular originating items to give origin to a product would have underlying trade objectives and are obvious trade barriers (TN/RL/W/114 dated 6 June 2003).

[12] If the value addition norms of PRO between developed countries are made less stringent than the value-addition norms under the GSP schemes operated by any one of the countries, then it would fail or nullify the rationale of the GSP scheme itself. Hence the suggestion that such value-addition norms of PROs of RTAs between developed countries should not be less stringent than the value addition norms provided under the GSP scheme of either developed countries (TN/RL/W/114 dated 6 June 2003)

[13] The prevalence of the system of diagonal cumulation between the various RTAs or for some countries vis-à-vis an RTA, without any formal agreement would often provide better market access to some countries that are not members of an RTA to the exclusion of others. This, according to India is not in conformity with Articles XXIV:4 and XXIV:5 of GATT 1994.

would be useful for Members to identify and compile anomalous and trade restrictive PROs; (ii) arrive at an understanding that rules of origin are other regulations of commerce and they shall meet the criteria set forth in GATT Article XXIV:4 and XXIV:5 namely, that they do not raise barriers to the trade of non members of RTAs; (iii) certain tests be set to meet this criteria like test of proportionality, least-trade restrictiveness and non-violation of fundamental provisions of GATT, including GATT Article I; (iv) some specific criteria that would be included to meet these test be included.[14] Thus India has suggested that PROs being very important aspects of RTAs should be given a prominent place in the examination of RTAs.

(e) Address TBT/ SPS Regulations and Standards on MFN basis

India has observed that the provision for harmonization of rules of recognition for Sanitary and Phytosanitary (SPS) or Technical Barriers to Trade (TBT) measures between RTA members on a fast track procedure or a simplified procedure, could act as barriers to the exports for non-RTA members.[15] Also, the RTA practice of mutual recognition of each other's certification agencies, standardizing bodies and in some cases mutual recognition of standards under their Mutual Recognition Agreements (MRAs) to facilitate trade does not per se be considered as a pre-condition for the formation of RTAs and lack a legal justification under Article XXIV. Therefore there is no justification to deny such recognition opportunities on MFN basis to non-RTA members if they so desire. India has suggested that first, there should be an understanding on the norms and procedures under which the standardizing bodies and certification agencies are mutually recognized between the RTA members, which would be notified to the CRTA or CTD as the case may be. Also, there could be further understanding that the RTA members would afford adequate opportunity for other interested members to negotiate their accession to such an MRA or arrangement

[14] Such specific criteria to be provided has to include the following: (a) there should be no requirement that the raw material used for the next stage product conversions should be 100 per cent originating in a RTA member country; (b) there should be no insistence for use of particular originating items to give origin to a product; (c) value addition norms of PROs for RTAs between developed countries should not be less stringent than the value addition norms provided under GSPs provided by developed country members; (d) system of diagonal cumulation would not be adopted by RTA members, etc. (TN/RL/W/114 dated 6 June 2003).

[15] This according to India is because such fast track procedures are not followed for non-RTA members and therefore, their goods are denied market access till such time as the normal and time taking procedure for non-members are complied with. The additional time and costs involved for non-RTA members is a market access barrier because such factors add to the cost of the exported product (TN/RL/W/114 dated 6 June 2003)

or to negotiate comparable ones with them within similar time frame and similar simplified procedures as existing for the RTA members.

(f) Harmonize Rules for Trade Defence Measures

India has submitted that the primacy of the WTO rules in the area of trade defence measures, namely anti-dumping, countervailing and safeguard measures should be maintained. The specific Indian proposals include measures (i) to affirm the principle that the provisions of Article XXIV would not permit derogations from the principle of MFN treatment for safeguard measures so that excluding the members of RTAs from the purview of safeguard action initiated by one of the members of the RTA is avoided; (ii) to arrive at an understanding that derogation from the standards of safeguards investigation for taking action only against RTA members could be permitted when tariffs are increased from preferential level upto MFN level whereas the disciplines of the WTO Agreement on Safeguards would apply for raising duty above the MFN level; (iii) to arrive at an understanding that in the application of regulations governing imposition of anti-dumping or countervailing duties between the RTA members, the parameters set for injury determination, or the time frame set for imposition of duties would not be different from that provided for in the relevant WTO Agreements. Such measures would help to have harmonized WTO and RTA rules in the area of trade defence measures and would thus strengthen the multilateral rules in this important area.

(g) Extend New Disciplines on Existing RTAs

India has strongly disapproved the proposals to grandfather the existing RTAs and to apply the results of negotiations under the Doha mandate from a future date. According to India, given the fact that maximum proliferation of RTAs has taken place during the 1990s and that this trend continues unabated during the present decade, it would be extremely important to analyze the impact of such RTAs on the multilateral trading system by applying the results of the ongoing negotiations on improvement and clarification of provisions of RTAs which hopefully would include improved transparency clauses. If the results of the negotiations are not applied to existing RTAs, it would lead to the anomaly of applying the results only on future

RTAs whereas the emerging disciplines are based on the experiences with existing RTAs.

### V.2.2. Responses to the Indian Proposal

It could be observed that the above Indian proposals to the WTO have generated considerable discussions in the subsequent meeting of the Negotiating Committee on Rules (TN/RL/M/9 dated 10 July 2003). The participant delegations who discussed the proposals generally shared the Indian views on the relationship between RTAs and multilateral trade liberalization and also recognized RTA's role in assisting developing countries to integrate into the multilateral trading system. Various participants also joined in support of the two-stage notification proposal, although some questioned whether it fully addressed the problem of timely notification, in particular for developing countries and other members that had particular constitutional constraints. Most of the participants viewed that the timeframes remained to be carefully considered and sought clarification on whether such a two-step process would apply to all the RTAs. India clarified that the two-step notification aimed at taking into account domestic legislative constraints and that information provided at that stage should not surpass the level of details contained in press announcements made at the time of signing RTAs. The idea of requesting a factual analysis of notified RTAs to the Secretariat met with strong support and the references made to TPRM were found meriting further consideration. India elaborated that the TPRM-type periodicity mechanism was an idea to link it to trade flows. Various delegations welcomed the prominence given to RTA regulatory frameworks in the submission and argued that these should not work as a barrier to trade for third parties.

The definition of substantially all trade (SAT) proposed was met with skepticism as to how it could ensure that a sector of the economy was not excluded from the RTA. Some participants noted that this concept referred to trade as a whole and did not provide for a sectoral approach, and that SAT could not be simplified into a mathematical formula only, as it contained both quantitative and qualitative aspects. India returned that if a significantly high threshold was agreed to define SAT, there might not be a need for dealing with any possible sectoral exclusion. Also, the comments on preferential rules of origin prompted further consideration of the issue

by the group and its inter-linkage with GSP-related trade. There were disagreements with the Indian views of harmonization and recognition procedures of TBT and SPS measures as well as its analysis of MRAs. Regarding the trade defence measures, divergent views were expressed on the extent to which parties to RTAs might apply other restrictive regulations of commerce in their intra-trade and how these would relate to the WTO rules. It was noted however that this issue, in particular as it referred to anti-dumping and safeguard measures, also merited further consideration. On the question of exempting the existing RTAs from any future new rules, it was generally felt that the question of grand fathering of existing RTAs should be addressed once the group had a more concrete outline of possible improvement of the rules. However, India cautioned against any such exemption to existing RTAs as these represented at least 50 per cent of the world trade (TN/RL/M/9 dated 10 July 2003).

Noticeably, several participants disagreed with the Indian view that the fact of directly notifying the RTA among developing countries to the CRTA would alter parties' rights under the Enabling Clause, and that changes in the CTD review procedures would entail additional burden for the parties. In their opinion, a single-window approach would ensure administrative efficiency and a better understanding of RTAs by members, without prejudicing the nature of the Enabling Clause or the rights and obligations of the Members under that clause. Also, noting the inadequacy of the reviews, they stressed that, if carried out in the CRTA, the review would be done on the basis of terms of reference and procedures adopted by the CTD and would therefore be made less burdensome than those carried out under Article XXIV. Further it was noted that, while any dilution of the provisions of the Enabling Clause would be contrary to the spirit of the Doha Ministerial Declaration, this Declaration should not be subject to an over-restrictive interpretation; in that sense, increased transparency should apply to all RTAs, including those notified under the Enabling Clause. However, India responded that because of their relatively small number, a review of Enabling Clause RTAs in the CRTA would not add any value to the situation prevailing at that date; rather it would be advisable to review the CTD procedures. The question remained whether a notification of RTAs under the Enabling Clause to the CRTA would be the first step for a more rigorous test of these agreements. It was finally reiterated that RTAs under the Enabling Clause, which basically consisted of an exchange of tariff preferences had a different meaning than

those under GATT Article XXIV and their review should take place in the CTD. It could be clearly observed that India has been very defensive of its stand on Enabling Clause RTAs and has indicated its unwillingness to compromise the "development dimension" of the RTAs in ensuring their compatibility with the multilateral trading system.

It has been asserted that the Indian proposal aimed at reaffirming the important systemic issues, despite the intensive work being pursued on transparency at the procedural front. However, India has also been part of the broad agenda arrived at during Cancun to reach a provisional decision on transparency and to accelerate the WTO work on clarification and improvement of RTA disciplines under existing WTO provisions, taking into account the developmental aspects of RTAs (JOB(03)/150/Rev.2 dated 13 September 2003). By 2005, clearly the transparency of RTAs as well as disciplines that ensure complementarities of RTAs with WTO have been identified as major issues of systemic interest in RTAs considered by the Negotiating Group on Rules. The "Transparency Mechanism for Regional Trade Agreements" (WT/L/791 dated 18 December 2006) announcement has been a significant achievement in these lines. It contained provisions for early announcement and notification requirements in line with the Indian proposals, by incorporating the following features like entailing a two-step procedure for notifying the negotiations or signature as well as operationalizing of new RTAs (WT/L/791 dated 18 December 2006: paragraphs 1-4); obligating the RTA parties to provide specified data on notified RTAs to the WTO Secretariat (WT/L/791 dated 18 December 2006: paragraph 7(a), Annex); the Secretariat to prepare a factual presentation of RTAs, with permission to use data from other source taking into account the view of the parties in furtherance of factual accuracy (WT/L/791 dated 18 December 2006: paragraphs 7-9); parties to submit short written report on the realization of the liberalization commitments in the RTAs as originally notified (WT/L/791 dated 18 December 2006: paragraph 15); flexibilities to developing countries in terms of time frames, furnishing of data, technical support etc (WT/L/791 dated 18 December 2006: paragraphs 8, 19, Annex: paragraph 4).

In spite of these developments, it could be noted that the growing number of RTAs continue to be an issue for the multilateral trading system and in congruence with the

Indian view, there has been acceptance for the need to ensure that the two approaches to trade opening continue to complement each other. The task of encouraging convergence between the RTAs and multilateral trading system already under the Doha mandate has not made significant progress. However, the parallel development of the transparency mechanism has been successful in providing factual information on a large number of RTAs. In this context and in the run upto the 2009 Ministerial Conference, India has made a submission to the General Council containing certain proposals to improve the functioning and efficiency of the WTO as a rule based system with specific proposals on the RTAs (WT/GC/W/605 dated 3 July 2009).

### V.2.3. India's Recent Proposal on WTO's Engagement with RTAs[16]

The Indian proposal to the General Council on *Strengthening the WTO*[17] has considered the WTO's engagement with the RTAs as one of the major areas of concern and what further could be done by the WTO to reduce the adverse impact of RTAs on multilateral trade. According to India, the fact that the RTAs are proliferating and most of the global trade is conducted on preferential terms is undisputed. The work in WTO on RTAs which focused entirely on evaluating the RTAs for their compatibility with the GATT/WTO provision was for long log-jammed. Members could neither definitely establish standards for the examination or evaluation, and even where they had clear yardsticks such as for 'reasonable length of time', they could not agree whether indeed the RTAs under examination met the standards or not. As a response to this situation, the RTA Transparency Mechanism evolved as an early and provisional outcome of the Doha mandate, which has proven to be successful by contributing to dissemination of important information on existing RTAs. It is therefore India's view as well to reap the benefits of the Transparency

[16] This section is drawn from the document WT/GC/W/605 dated 3 July 2009. Separate reference is given where other sources are relied on.

[17] The Indian communication contains a set of five proposals which are intended to enhance the usefulness of the WTO and to make the system more relevant, vibrant and user friendly for both the member states and the larger trading community. It includes specific proposals on (i) Trade Information System based on Member Notifications; (ii) Revitalizing WTO Committees; (iii) WTO's engagement with RTAs; (iv) Omnibus Legal Instrument for preferential market access to LDCs and (v) Reaffirming primacy of international standards and standard setting for WTO obligations (WT/GC/W/605 dated 3 July 2009). According to the Indian Minister for Commerce and Industry, Mr. Anand Sharma, at the Plenary Session of the WTO Ministerial Conference in Geneva during 29 November to 2 December 2009, these proposals are designed to improve the capacity of the WTO to provide better services to the Members without in any way diluting its fundamental structure based on consensus and also seeks to enhance transparency, inclusivity and efficiency (WT/MIN(09)/ST/35 dated 30 November 2009).

Mechanism and devise further reviews and best practices guidelines for reference based on the knowledge gathered through them.[18] The specific Indian proposals in this direction may be broadly categorized as under:

(a) Implement Permanent Transparency Mechanism

According to India, the RTA Transparency Mechanism has contributed immensely to members' understanding of the contents of the RTAs. The success of the existing mechanism is also reflected in the desire of the membership to design a similar mechanism for the unilateral preference schemes as well. Therefore, given the accepted benefits of the RTA Transparency Mechanism and the expectation that the transparency mechanism on preferential schemes will be as useful, the Ministers could now agree to implement both on a permanent basis, albeit with in-built provisions for periodic review (WT/GC/W/605 dated 3 July 2009: paragraph C: 3).

(b) Prepare Annual RTA Reviews

India has considered that the basic problem with the examination of RTAs in the WTO has been the lack of a clear understanding amongst the members about the yardsticks of trade coverage, implementation periods, means to evaluate trade diversion, etc. In the present environment of multiplicity of such agreements involving all varieties of obligations, it is and will remain a challenging task to come to any common understanding on them and consequently a strict evaluation of any RTA would remain a difficult task. Therefore, India has considered that while the work on the substantive issues continued in the Negotiating Group on Rules, it would be useful to, in parallel, put in place measures that would allow the Members to move further on implementing the Transparency Mechanisms and best utilize the knowledge gathered on the RTAs through them. In this context, India has suggested that the Secretariat may be requested to prepare an annual RTA Review. This publication, based on the factual presentations prepared by the Secretariat on individual RTAs, would inter alia review horizontally, across RTAs, the trends in content and structure of the RTAs that have come into effect during the year concerned (WT/GC/W/605 dated 3 July 2009: paragraph C: 6, 7).

[18] This has been specifically the proposed modality of the Negotiating Committee on Rules in their statement before the 2009 Geneva Ministerial Conference (TN/RL/W/246 dated 27 November 2009).

(c) Develop Non-binding Best Practice Guidelines by CRTA

India has further considered that based on the trends detected in the annual review, the Members in the CRTA may examine from an educative perspective ways to reduce the adverse impact of RTAs on multilateral trade. Aspects like trade coverage; substantially all trade; reasonable length of time; non-trade issues; preferential rules of origin etc. can be examined. To the extent that there is consensus, the outcome could be a series of non-binding "best practices/guidelines" on various elements or aspects of RTAs for reference by members in negotiating future RTAs. In this way there would not just be greater insight about RTAs, but WTO would be able to influence the evolution of the RTAs based on the trends over the past years (WT/GC/W/605 dated 3 July 2009: paragraph C :8).

Thus it has been stressed that the WTO's engagement with the RTAs was a critical issue to be addressed if the organization was to remain the fulcrum of the global trading system. India's proposal broadly sought direction from the Ministers that (i) the WTO enhance its engagement with the RTAs for greater transparency about their content and intent; (ii) the Secretariat assist Members in gaining the needed insight on RTAs and (iii) Members in the CRTA build this information into best practices for negotiating new RTAs. These proposals were considered by the General Council Meeting and the countries considered the proposals, particularly on RTAs, positively and constructively as important issues for the future of WTO itself. Delegations[19] favoured increased transparency and shared India's views on the need to look more closely at RTAs and their impact on the multilateral trading system, but expressed the concern if the necessary work is to be carried out in the relevant Negotiating Groups. It was agreed that the proposals required further discussions ahead of the 2009 Ministerial Conference and hence shall be discussed in an appropriate forum and form (WT/GC/M/121 dated 7 October 2009). Subsequently, the Director-General in his letter to the Ministers (18 November 2009) mentioned that in the area of RTAs, guidance is required on how to better collate information across RTAs and evaluate commonalities and differences between their main features and their main policy

[19] The discussions on the Indian proposal on RTAs in the General Council meeting of 28 July 2009 are available as document WT/GC/M/121 dated 7 October 2009: The submissions by various parties like the EC (paragraph 91); Canada (paragraph 88); Australia (paragraph 93); New Zealand (paragraph 97); Switzerland (paragraph 100); Dominican Republic (paragraph 103); Chile (paragraph 105) and Oman (paragraph 108) are contained therein.

instruments. Also, in the Geneva Ministerial Conference (2009) there were suggestions that the WTO Transparency Mechanism has worked quite well, but there is still room for improvement, through making the mechanism permanent, highlighting better the common element in different RTAs and introducing an annual review (WT/MIN(09)/18 dated 2 December 2009). In line with the Indian proposal, it has been recommended by the Negotiating Group on Rules that the information thus available may be used further to develop a work programme in the CRTA dealing with a range of substantive issues or topics concerning RTAs. The work on these topics/ issues could form the basis of discussion in the CRTA and could be used by the Negotiating Group on Rules to reflect better on the next steps in the process to clarify the WTO rules on RTAs (TN/RL/W/246 dated 27 November 2009) – the end goal being to achieve a built in agenda for pursuing substantial agenda in RTAs.

In short, it could be said that the Indian proposal for reform of disciplines on RTAs is on the table and it is to be seen what evolves out of further discussions on the proposed reforms. The Indian stand is broadly on the adoption of non-binding disciplines on RTAs which could have a persuasive impact; these disciplines are to be based on a close monitoring and review of the developing trends in RTAs and the final goal would be to subject RTAs to better disciplines devised within the framework of multilateral rules.

### V.3. Indian Engagement in RTAs: An Overview

As it is known, though a strong contender for the multilateral regime for regulation of international trade under the aegis of the WTO, India has not been left out of the global wave of regionalism. India nevertheless considered RTAs as building blocks that supplement the gains from the multilateral trade liberalization, though it has expressly attached significance to participation in agreements within the framework of WTO. In fact, the recent times have witnessed an increasing emphasis on India's economic partnership arrangements with various countries and regions. India had signed the Bangkok Agreement as early as in 1975 and also the agreements with other developing countries under the Global System of Trade Preferences (GSTP) in 1988. It has been instrumental in setting up the South Asian Association for Regional Co-operation (SAARC) whose major achievement in 1995 was the conclusion of the negotiations on trade preferences within the framework of the SAARC Preferential

Trading Arrangement (SAPTA). The Agreement on setting up the South Asia Free Trade Area (SAFTA) was signed by member countries in January 2004 and a phased liberalization programme under its aegis has been implemented from 1 July, 2006 (WT/TPR/G/182 dated 18 April 2007). It has accelerated the sub-regional integration programme beyond SAPTA by negotiating agreements with some of its immediate neighbours. In this regard, India has bilateral trade agreements with neighbouring LDCs namely Bhutan and Nepal which provides them preferential access. A Free Trade Agreement between India and Sri Lanka was made operational in March 2000, after which countries have initiated negotiations in 2004 to widen the ambit to a Comprehensive Economic Partnership Agreement (CEPA) which covers wider co-operation in services, investment etc. Another PTA has been signed with Afghanistan on 6 March 2003 which provides for establishing a PTA between the two countries to promote harmonious development of economic relations and free movement of goods through reduction of tariffs.

India's intra-regional initiatives have been expanded by signing a Framework Agreement on Comprehensive Economic Co-operation with the Association of South East Asian Nations (ASEAN) in 2003 and a Framework Agreement for establishing a Free Trade Agreement with Thailand. India is also a member of a regional grouping named Bay of Bengal Initiative for Multi-sectoral Technical and Economic Co-operation (BIMSTEC) with which FTA negotiations have already begun in 2004 (UNDP 2005). The other already concluded agreements include the Comprehensive Economic Co-operation Agreement (CECA) with Singapore with effect from August 2005 which includes an integrated package of agreements covering trade in goods, services and investment, bilateral agreements on investment promotion, protection and co-operation, Double Taxation Avoidance Agreement, Air Services Agreement and Open Skies for Charter Flights and also a work programme for co-operation in a number of areas like health care, education, media, tourism etc. Also, beyond the regional level, the PTA with Chile has been signed on 8 March 2006 which provides for tariff preferences to each other on a mutually approved list of products, and further examination for entering into a Free Trade Agreement between the two countries is underway. More recently, in 2009, as a part of the policy of market expansion, India has signed a Comprehensive Economic Partnership Agreement with South Korea and also a Trade in Goods Agreement with ASEAN which has come into force from 1

January 2010 – which are in line with its "Look East Policy" as well. Also, a Preferential Trade Agreement has been concluded with the MERCOSUR (Government of India 2009a). Further, India has made early notification of negotiations with BIMSTEC, EU, the European Free Trade Area (EFTA) and the South African Customs Union (SACU) to the WTO which are in various stages of negotiations (WTO RTA Database 2011). In February 2011, towards the end of this study, India has signed two important Comprehensive Agreements with Japan and Malaysia (Department of Commerce 2011 and 2011a). The Department of Commerce (2010) has also published on India's current engagements with the Gulf Co-operation Council (GCC), Mauritius, and also indicated a list of agreements in pipeline with China, Australia, New Zealand and Indonesia for which Joint Study Groups are in various stages (Department of Commerce 2009). Informal discussions with Ministry of Commerce officials have indicated the probability of future agreements with Canada, Egypt, Israel, Russia and Turkey; Trilateral FTA between India-MERCOSUR-SACU and also the Indian Ocean Rim-Association for Regional Cooperation. Due to the variety of Indian agreements and depending on the level of completion, the Indian Agreements may be broadly catergorised as per the Table on Indian RTAs annexed to the chapter (See Table V.2). Also, there are other arrangements/agreements/MOUs (for trade/ economic cooperation) with countries like Nepal, Bangladesh, DPR Korea, Finland, Maldives, Mongolia, Pakistan, Vietnam, Russia and the US which cannot be strictly classified as RTAs.

### V.4. Negotiating RTAs: Indian Practice

Negotiating RTAs is comparatively a new exercise for the Indian trade policy makers. India started off with RTAs by negotiating with the traditional Indian trade partners and immediate neighbours. Gradually, the Indian approach to regionalism also changed and now India is emerging as an aggressive player in RTAs. Though the trade policy formulation and implementation in India remains with the Department of Commerce in the Ministry of Commerce and Industry, the essential decision to embark upon RTAs is rather political. The process of negotiating any RTA generally starts with the Joint Declaration of the Political Heads of the respective countries of their wish to have closer economic ties through trade agreements. The Declaration is usually followed by the announcement of a Joint Study Group (JSG) which

constitutes government officials and research organizations from the participating countries. The JSG explores the possibility of a trade agreement between the countries. The JSG is required to submit the Report to the respective governments. Based on the JSG Report the countries proceed with the negotiations. In some cases, Joint Task Force (JTF) is also appointed to study in detail the feasibility of the trade agreement. JTF does in-depth study on various aspects as required and submits its Report to the governments. Initially the countries exchange their 'wish-list' which contains the sectors and tariffs where liberalization is sought from the other side. After working on the wish-list, the countries prepare their offer list and embark upon the negotiations. Negotiating positions are formulated by the Department of Commerce in consultation with other key Ministries such as the Ministry of Finance, Agriculture, Textiles, Industry as well as the Ministries relating to any of the subject matters under consideration. In this process, it also consults the governments of the States and Union Territories, Industries and Farmers Association, Trade Bodies, Research and Academic Institutions and other stakeholders. However, the effectiveness of this consultation process is often criticized. Being a democratic country with a federal system of government, it is possible that ineffective consultations may invite criticisms for lack of transparency. Trade Agreements which may have an impact on the state's economies may be criticized for non giving sufficient consideration for the particular state. In this regard, many of the state governments in India do not have an effective mechanism in place to study the impact of various trade agreements being negotiated by the Centre. However, a decision on signing an RTA is finally taken by a High-Power Committee, Trade and Economic Relations Committee[20] headed by the Prime Minister of India.

[20] Constituted on 3 May 2005, the Trade & Economic Relations Committee is an institutional mechanism for evolving the extent, scope and operational parameters of our economic relations with other countries in a coordinated and synchronized manner. The Committee is serviced by the Prime Minister's Office, which may obtain assistance as required from any Ministry/Department/Agency of Government. The Committee constitutes (a) Prime Minister (Chairman); (b) Finance Minister; (c) Commerce & Industry Minister; (d) External Affairs Minister; (e) Deputy Chairman, Planning Commission; (f) Chairman, Economic Advisory Council; (g) Chairman, National Manufacturing Competitiveness Council; (h) National Security Adviser; (i) Principal Secretary to PM (Convenor). The Secretaries of the Departments of Economic Affairs, Revenue, Commerce, Industrial Policy & Promotion as well as Secretary, Planning Commission and Foreign Secretary, are permanent invitees to the meetings of the Committee. The Chairman may invite any other Minister/Officer to any meeting of the Committee depending upon the context.

## V.5. Examining Selected Indian RTAs Notified to the GATT/WTO

The following section examines some of the Indian Agreements notified to the GATT/WTO for its compatibility with the multilateral rules. The assessment has been done on the basis of the relevant legal text available.[21]

### V.5.1. Asia Pacific Trade Agreement (APTA)

The Asia Pacific Trade Agreement (APTA), preVIIously known as the Bangkok Agreement was signed in 1975 as an initiative of the United Nations Economic and Social Commission for Asia and Pacific (UN-ESCAP) wherein the countries agreed on a list of products for mutual tariff reductions. The original members were Bangladesh, India, the Republic of Korea, Lao People's Democratic Republic and Sri Lanka. Lao PDR has not issued customs notification on the tariff concessions granted and in this respect is not an effective participating member (ESCAP 2006). China acceded to the Agreement in 2001. In November 2005, the first session of the Ministerial Council of the Bangkok Agreement adopted certain amendments to the text of the agreement and renamed it as the Asia-Pacific Trade Agreement (APTA)[22] and notified as such to the WTO (WT/COMTD/N/22 dated 27 July 2007). The Agreement is open for accession by any developing member country of ESCAP (Article 30).

#### V.5.1.i. Nature and Scope of APTA

The objectives of APTA are to promote economic development through a continuous process of trade expansion among the developing member countries of ESCAP and to further international economic co-operation through the adoption of mutually beneficial trade liberalization measures consistent with their respective present and future development and trade needs (Article 2). The programme of trade liberalization under the Agreement broadly includes (i) the provision for periodic negotiations for tariff reductions by participating states with a view to expand the Agreement (Article 4); (ii) the application of tariff concessions by participating states as set out in their

[21] The Agreements are examined on the basis of the developments as of 31 May 2010.

[22] The text of the Agreement is available at the URL: http://www.doc.gov.lk/web/AsiaPacificTradeAgreement/AgreementAPTA.pdf [Accessed on 31 May 2010].

respective National List of Concessions (Article 5); (iii) gradual relaxation of non-tariff measures which may affect the importation of products covered by the National List of Concessions (Article 6); (iv) special concession to be applied to the least developed country participating states (Article 7); (v) preservation of value of concessions including mutually acceptable compensatory action where value of preference is reduced or abrogated (Articles 9 and 10); (vi) scope for expanding the coverage of the agreement by co-operation in areas like harmonization of standards, mutual certification of products, macro economic consultations, trade facilitation measures and trade in services (Article 11); (vii) provision for co-operation in matters such as customs administration, standardization of procedures and formalities related to mutual trade, adoption of a common tariff nomenclature and harmonization of rules of origin and of dumping (Article 12). The Agreement provides for applying safeguard measures (Article 17) and Balance of Payment restrictions (Article 18) subject to the broad condition that the pre-conditions and circumstances for the legitimate application of these measures shall, as far as practicable, be the same as provided in the respective WTO provisions. The Agreement also allows for exception for measures necessary for the protection of national security, protection of public morality, protection of human, animal and plant life and health, and the protection of articles of artistic, historical and archaeological value (Article 35). The Agreement provides for consultations for the remedy of particular trade disadvantages to participating states (Article 19), for adjustment of non-compliance issues (Article 20) and for settlement of disputes (Article 20) through consultations. Like any other multilateral agreement, it also contains provisions for accession (Article 30); withdrawals (Article 32); amendment (Article 33) and entry into force of concessions (Article 34); amendments to the agreement (Article 26); non-application (Article 36); reservation (Article 37); depositary (Article 38) and registration (Article 39) of the Agreement.

The institutional arrangements (Chapter V of the Agreement) includes a Standing Committee consisting of representatives of the Participating States which performs the duties of reviewing the application of the Agreement, carrying out consultations, making recommendations and taking decisions as required, and in general, undertaking whatever measures may be required to ensure the adequate implementation of the objectives and provisions of the Agreement (Article 22). Also,

a Ministerial Council is established for the purpose of supervising, coordinating and reviewing the implementation of the Agreement, which meets every two years (Article 23). There have been various Rounds of Trade Negotiations and after the Third Round of Trade Negotiations which entered into force on 1 September, 2006. It is estimated that a total of 4270 products are covered by concessions under the Agreement and an additional 589 products for LDCs, with an average margin of preference of 26.8 per cent generally and 58.8 per cent for LDCs (ESCAP 2006). India has offered tariff preferences on 570 products and an additional 48 products for the LDC members (WT/TPR/S/182/Rev.1 dated 24 July 2007). The Fourth Round of Negotiations were initiated in 2009 which targeted an average of 50 per cent margin of preference on 50 per cent tariff lines along with framework agreements on trade facilitation, trade in services, investments and non-tariff measures. The framework agreements on trade facilitation and investments have been agreed upon and were expected to be adopted in the Ministerial Council of December 2009 along with the results of negotiations for tariff concessions (Department of Commerce 2010). As per the latest reports available, in the Third Session of the APTA Ministerial Council held on 15 December, 2009 in Seoul, Korea, has made significant progress by signing framework agreements on trade facilitation and investment and released the Ministerial Declaration. In the Declaration, they have agreed that the fourth round negotiations on tariff concession should be adopted shortly, the negotiations on specific commitments on services trade and investment to be completed within next two years, and trade facilitation and co-operation among member countries to be expanded. Framework agreement on services trade will be signed in 2010 after the approval procedure completed in each member states. In their Declaration, the ministers called for further tariff liberalization and negotiations into additional areas of co-operation. They also reaffirmed their commitment to expanding membership into a truly "Pan-Asia-Pacific Trade Agreement" (ESCAP 2009).

### V.5.1.ii. Legal Issues involved in APTA

(a) Notification of Bangkok Agreement to the GATT

One of the prominent legal issues concerning APTA was regarding the authority under which the Bangkok Agreement was originally notified to the GATT in 1976 as the Enabling Clause was adopted only in 1979. The discussions in the GATT

Working Party established to examine the provisions of the Agreement in the light of the relevant GATT provisions indicated the view of some members that the Bangkok Agreement was not aimed at establishing a customs union or free trade area in accordance with Article XXIV of the General Agreement and introduced an element of discrimination against traditional suppliers in a way which could affect their trade. Therefore, in their view, the Agreement was not covered by Article I of the GATT and Part IV did not override other parts of the Agreements, and hence a waiver of the GATT obligations under Article XXV or other appropriate decision by the CONTRACTING PARTIES was called for (L/4635 dated 1 March 1978). In reply it was submitted on behalf of the parties to the Bangkok Agreement that the participating states were fulfilling the commitments and undertakings accepted by developing contracting parties in Part IV of the GATT in a manner which was consistent with their individual development, financial and trade needs taking into account past trade developments as well as the trade interests of developing contracting parties as a whole. The given stage of developments of the participating states did not make it possible for them to enter into a customs union or a free-trade agreement. The provisions of the Agreement should be understood as intermediate, but a positive step in the direction of trade liberalization among participating states without creating obstacles to the trade of other contracting parties and did not mandate a waiver under Article XXV of the GATT (L/4635 dated 1 March 1978). It could be seen that as per the Working Party recommendation a Decision was taken by the CONTRACTING PARTIES (L/4653 dated 7 April 1978) that the participating states may implement the Agreement provided that any preferential treatment under the Agreement shall be designated to facilitate trade between the participating states and not to raise barriers to the trade of other contracting parties and subject to the following conditions and procedures:

(i) Any preferential concessions or arrangements or any similar measures introduced or subsequently modified pursuant to the Agreement shall be notified to the CONTRACTING PARTIES and all useful information relating to the action taken by the participating states shall be provided to them;

(ii) Each participating contracting party shall afford adequate opportunity for consultations at the request of any other contracting party which considers

any benefit accruing to it under the GATT may be or is being impaired unduly as a result of the Agreement. If such consultation proved unsatisfactory, the contracting party concerned may bring the matter before the CONTRACTING PARTIES who will examine it promptly and will formulate any recommendations that they consider appropriate.

(iii) The CONTRACTING PARTIES shall review the decision to allow the Agreement biennially on the basis of developments reported by participating states and in accordance with the GATT provisions and objectives of the Agreement. The CONTRACTING PARTIES may make any recommendations to the participating states as appropriate including those arising out of any consultations held in regard to the effect of the Agreement on trade of contracting parties. In the course of the review, the GATT CONTRACTING PARTIES may also take such decision regarding the operation of the Decision to permit the Agreement.

Subsequently, in the context of notification of the amendment of Bangkok Agreement as APTA in 2007, the US sought clarification regarding the authority under which the Agreement was originally notified (WT/COMTD/62/Add.1 dated 26 November 2007). The communication from China (WT/COMTD/62/Add.2 dated 2 March 2008), in reply to the US queries, indicated that the Agreement was originally made in line with the obligations of contracting parties under Article XXXVI with respect to principles and objectives of Part IV of GATT and in Article XXXVII: 4 with respect to specific commitments and a reference is made to the GATT decision of 1978 (L4653 dated 7 April 1978). It has been further clarified that the Agreement was subsequently considered as notified under the Enabling Clause in 1979, which has provision similar to Article XXXVII: 4 of the GATT. Reference is made to the notification information on the Agreement as published in this regard in the WTO official website as well.

(b) Rationale for Notifying APTA under the Enabling Clause

There have been queries on the appropriateness of the APTA's notification under Enabling Clause especially in view of the membership of the Republic of Korea, which was often estimated as having a comparatively developed status (WT/COMTD/62/Add.1 dated 26 November 2007). It has been the stand of

participating states that as an original member country of the old Bangkok agreement, Korea has participated in the Agreement since its establishment in 1976. The APTA is only an amendment to this existing Bangkok Agreement which was notified to the GATT in 1976 and has been acknowledged as a regional preferential arrangement among developing countries authorized in the Enabling Clause. The revised Bangkok Agreement or APTA is thus, not a new agreement but has just resulted from renaming in the vision of expanding trade among member countries. Thus, it was notified under the Enabling Clause and it does not require any change in original member countries maintaining their status (WT/COMTD/62/Add.2 dated 7 March 2008). However, with the changing nature and scope of the Agreement, it could be doubtful if the same agreement could be validly retained under the Enabling Clause. It could be noted that APTA is not a mere amendment to the Bangkok Agreement, as claimed. Several of the features of the old Bangkok agreement have been radically changed in the new text of APTA. For instance, (a) earlier the policy under the old agreement was harmonization of concessions contained in the Bangkok agreement with the various agreements and arrangements in which the participating states were members. The concessions made by any participating country within the framework of other preferential agreements had to be extended to the participating members of the Bangkok Agreement (L/4635 dated 1 March 1978). However, Article 14 of the amended text in APTA specifically provides that the participating states are not required to renegotiate their concessions to one another when any of the parties enter into other reciprocal preferential arrangement. Also, the present policy expressly states that the overlap in concessions list in various agreements does not matter in the implementation because each agreement is different and independent of commitments made there under. In case of overlap with other agreements, the member countries could apply the more advantageous rates (WT/COMTD/62/Add.2 dated 7 March 2008); (b) while there has been no guidelines or decisions on reduction of non-tariff measures earlier (L/4529 dated 16 September 1977), the recent trade negotiations of APTA have considered a framework agreement on non-tariff measures; (c) APTA has included a common rules of origin under the Agreement as its integral part; (d) it has been specifically provided that the participating states shall as far as practicable follow the provisions of the WTO agreements, especially in connection with trade remedy measures (Articles 12(e), 17, 18); (e) APTA involves negotiation on newer areas like trade facilitation, services, investment, etc.; (f) unlike the Bangkok

Agreement, APTA has emerged into a multilateral arrangement with detailed provisions and needs to be subject to stricter disciplines to ensure harmonization with the WTO rules. It is doubtful if such an agreement could be effectively regulated under the sketchy disciplines of Enabling Clause alone because it forms part of an earlier agreement already recognized under the Enabling Clause. In fact it could be noted that the GATT Decision (L/4653 dated 7 April 1978) authorizing Bangkok Agreement had subjected it to stricter disciplines than the present system. In view of the widening scope and ambit of these already notified agreements, the Indian arguments for TPRM model review mechanisms for examining their compatibility with the multilateral system from time to time, gains added importance.

### V.5.2. Global System of Trade Preferences (GSTP)

India is a participant in the agreement on the Global System of Trade Preferences (GSTP)[23] among developing countries which establishes a framework for exchange of trade concessions among the members of the Group of 77.[24] The agreement was signed on 13 April 1988 at Belgrade and came into force on 19 April 1988 (for India also). 44 countries[25] have ratified the Agreement and have become participants. The Agreement has been notified to the WTO Committee on Trade and Development (CTD) under the Enabling Clause (L/6564 dated 25 September 1989). The agreement broadly lays down rules, principles and procedures for conduct of negotiations and for implementation of the results of the negotiations. The coverage of the GSTP extends to the arrangements in the areas of tariffs, para-tariffs, non-tariff measures, direct trade measures including medium and long term contracts and sectoral agreements

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[23] The text of the agreement is available at the URL: http://www.unctadxi.org/Secured/GSTP/LegalInstruments/gstp_en.pdf [Accessed on 31 May 2010]

[24] The Group of 77 (G-77) was established on 15 June 1964 by seventy-seven developing countries signatories of the "Joint Declaration of the Seventy-Seven Countries" issued at the end of the first session of the United Nations Conference on Trade and Development (UNCTAD) in Geneva. The Group of 77 is the largest intergovernmental organization of developing states in the United Nations, which provides the means for the countries of the South to articulate and promote their collective economic interests and enhance their joint negotiating capacity on all major international economic issues within the United Nations system, and promote South-South cooperation for development. For further details, see the website of the Group of 77 available at URL: www.g77.org [Accessed on 31 May 2010].

[25] Algeria; Argentina; Bangladesh; Benin; Bolivarian Republic of Venezuela; Bolivia; Brazil; Cameroon; Chile; Colombia; Cuba; Ecuador; Egypt; Former Yugoslav Republic of Macedonia; Ghana; Guinea; Guyana; India; Indonesia; Iran, Islamic Republic of; Iraq; Korea, Democratic People's Republic of; Korea, Republic of; Libyan Arab Jamahiriya; Malaysia; Mexico; Morocco; Mozambique; Myanmar; Nicaragua; Nigeria; Pakistan; Peru; Philippines; Singapore; Sri Lanka; Sudan; Tanzania; Thailand; Trinidad and Tobago; Tunisia; Viet Nam; Zimbabwe are the current signatories.

(Article 4). One of the basic principles of the Agreement is that it is to be negotiated step by step, improved upon and extended in successive stages (Article 3(d)).

### V.5.2.i. Nature and Scope of GSTP

GSTP aims to promote and sustain mutual trade and the development of economic co-operation among developing countries, through exchange of concessions in accordance with the Agreement (Article 2). The Agreement is reserved for the exclusive participation of developing country members of the Group of 77 (Article 3(a)). The participants can hold rounds of bilateral, plurilateral or multilateral negotiations for further expansion of the GSTP (Article 6) and all tariff, para-tariff and non tariff concessions, negotiated and exchanged among participants in the bilateral or plurilateral negotiations shall be extended to all participants in the GSTP negotiations on a most-favoured-nation (MFN) basis. However, as an important exception to the MFN rule, the Agreement allows participant parties to the direct trade measures, sectoral arrangements or agreements on non-tariff concessions not to extend the concessions linked to such agreements to other participants, the condition being that such non-extension not to have detrimental impact on the trade interests of other participants, and when it has such effect, the matter shall be submitted to the Committee of Participants for consideration and decision (Article 9(2)). Also, the Agreement provides for grant of tariff, non-tariff and para-tariff concessions exclusively to exports originating from participating least-developed countries (Article 9(3)). The Agreement implicitly allows the participants to attach any terms, conditions and qualifications in their schedules of concessions (Article 10) and allows that the concessions under the Agreement may be modified or withdrawn after a period of 3 years, subject to the due notification process laid out (Article 11). The participant states are allowed to withhold or withdraw in whole or in part any item in its schedule of concessions in respect of which it determines that it was negotiated with a state which has not become, or has ceased to be, a participant in the Agreement (Article 12). The Committee of Participants, consisting of representatives of the governments of the participants is the chief institutional arm of the GSTP, which is responsible for reviewing the application of the Agreement and the instruments adopted, monitoring the implementation of the results of negotiations, carrying out consultations, reviewing of disputes, making recommendations and taking decisions

as required and in general undertaking the measures necessary to ensure the adequate implementation of the objectives and provisions of the Agreement. The United Nations Committee on Trade and Development (UNCTAD) services the Committee of Participants and provides administrative and technical assistance in setting up the GSTP.

The Agreement permits safeguard measures to ward off serious injury or threats of serious injury to domestic products of like or similar products, arising as a direct consequence of unforeseen substantial rise of imports enjoying preferences under the GSTP in accordance with the prescribed procedures (Article 13). It also allows measures to meet balance of payment difficulties arising during the implementation of the GSTP subject to notification and consultation procedures (Article 14). It has prescribed rules of origin as a separate annex forming an integral part of the Agreement (Article 15). Also, there is a chapter on consultation and settlement of disputes providing for amicable settlement of disputes on the basis of consultations (Article 19). The Committee of Participants could review the matters relating to interpretation and application of the provisions of the Agreement or any instrument adopted within its framework. The Agreement further contains final provisions on implementation (Article 22), depositary (Article 23), entry into force (Article 26), provisional application (Article 27), accession (Article 28), amendment (Article 29), withdrawal (Article 30), reservation (Article 31), non-application (Article 32), security exception (Article 33) and annexes (Article 34).

At the negotiating front, the Third Round of GSTP negotiations (Sao Paulo Round) initiated in June 2004 has envisaged a package of substantial trade liberalization commitments on the basis of mutuality of advantages to benefit equitably all GSTP participants (GSTP/CP/SSG/2 dated 22 April 2008). At the meeting of the GSTP Negotiating Committee in Accra in 2008, it was agreed by participants (a) to carry out the negotiations on the basis of across the board, line by line, linear cut of 20 to 40 per cent on dutiable tariff lines, to be combined with request-and-offer and/or sectoral negotiations and (b) to assume commitments on at least 70 per cent of dutiable tariff lines. India offers tariff concessions of 10 to 30 per cent margin on a limited number of tariff lines (Department of Commerce 2010). In December 2009, the Negotiating Committee of Sao Paulo Round came up with the following additional modalities –

the linear cut will be applied on the valid MFN tariff applied on the date of importation. Exceptionally, participants may apply the linear cut on MFN tariffs applied on the date of conclusion (base rate) of Third Round of Negotiations. Participants have to submit their offers by way of draft schedules of tariff concessions by the end of May 2010 at the latest, in the prescribed format. Also, participating states will have 4 months to verify their draft schedule of concessions. During the period, participants may engage in consultations and request and offer negotiations with a view to supplementing the outcome of the basic modalities on market access. Participants will notify the GSTP Secretariat no later than the end of 30, September, 2010 of their finalized schedule of concessions, which will be an integral part of the final Agreement of the Sao Paulo Round. The implementation of concessions will start upon the domestic ratification of the Final Agreement and the deposit of respective instruments by a number of participants to be defined (SPR/NC/MM/1 dated 2 December 2009).

**V.5.2.ii. Legal Issues**

(a) Complex Web of Agreements

It could be observed from the provisions of the Agreement that the GSTP would entail a complex web of agreements as a result of the peculiarities in coverage and negotiations provided under it. GSTP may involve arrangements relating to tariffs, para-tariffs, non-tariff measures, direct trade measures and sectoral agreements. It also allows for negotiations on bilateral or plurilateral basis. The non-discriminatory application of the concessions negotiated and exchanged in bilateral or plurilateral negotiations is implied. However, the exception to exclusive direct trade measures, sectoral agreements, or agreements on non-tariff concessions, though open to all participants through direct negotiations, permits multiple agreements between a subset of parties. The scope for bilateral as well as plurilateral negotiations coupled with different modalities in different components like tariffs, non-tariffs, direct trade measures, sectoral agreements etc thus ensue a complex web of agreements under the GSTP, similar to the 'noodle bowl' of RTAs. The concessions granted to LDCs forms another exclusive set of arrangements. The options for granting concessions on certain terms, conditions and qualifications; modification or withdrawal after a period of 3 years; withholding or withdrawal of negotiated concessions in respect of certain states

not being participants subsequently etc. result in difficulties in determination of existing commitments at a given time. Also the option for non-application of the agreement if parties have not entered into direct negotiations with each other or where either of the parties does not consent to, adds to the existing unstable structure of the Agreement. Such a complex structure of commitments within the GSTP scheme could raise practical difficulties in regulation and administration of trade under these agreements. Moreover, this structure of agreements exceeds the scope of arrangements envisaged under the Enabling Clause provisions. The fact that the GATT/WTO examination of the agreement and adoption of report have not been undertaken (WTO RTA Database 2011) adds to the complexity of issues as their effective compatibility with the multilateral trading system has not been subject to any objective assessment.

(b) Relationship with Sub-Regional/ Regional/Intra-regional Groupings

One of the declared principles of the GSTP is that it shall not replace, but supplement and reinforce, present and future sub-regional, regional and intra-regional economic groupings of developing countries of the Group of 77 and shall take into account the concerns and commitments of such economic groupings. Accordingly, the Agreement provides that any regional/sub-regional or intra-regional grouping of developing country members of the Group of 77 (Article 1(b)) and such grouping may participate fully as such, if and when they consider it desirable, in any or all stages of the work on the GSTP (Article 3(h)). However, the preferences applicable within the existing and future economic groupings of developing countries notified and registered in the Agreement shall retain their essential character and there shall be no obligation on the members of such grouping to extend, or the right of other participants to enjoy the benefit of such preferences (Article 18). It is adequately clear that the legal relationship between the GSTP and other economic groupings is loosely defined. In fact, the participation of certain regional groupings in the GSTP could be detrimental to the interests of non-group participants and the Agreement does not provide for any effective remedies. Also, since the preferences arrived at within the groupings are not extended to the GSTP participants, the exact scope of inter-relationship is vague and limited. It could only add to the already complex structure of agreements and relationship structure envisaged under the GSTP. Also, the Enabling Clause structure

does not provide for agreements to supplement or promote the existing regional or sub-regional or inter-regional economic grouping of developing country members. Moreover, the impact of such agreements on the GATT/WTO system is uncertain. The GSTP has not sought a harmonization of its provisions on safeguard measures, balance of payments restrictions, security exceptions etc. with the GATT/WTO provisions. Therefore, the emerging standards of trade defence mechanisms, etc. inconsistent with the existing disciplines is apprehended. The notion of special and differential treatment to developing countries is well received; however the resulting flexibilities may not be extended to weaken the multilateral system in place where the majority of members are from the developing countries.

### V.5.3. India – Sri Lanka Free Trade Agreement

India's trade ties with Sri Lanka could be traced back to the Trade Agreement of 1961[26] under which trade was carried out in freely convertible currencies and on MFN basis. As such Sri Lanka is India's second largest trade partner in the SAARC region (Department of Commerce 2010). It could be noted that India moved ahead with regionalism and negotiated one of its first bilateral free trade agreements with Sri Lanka, which could be partly ascribed to its earlier trade agreement as well as its co-operation with the country in the WTO, SAARC and under the Bangkok Agreements.

#### V.5.3.i. Nature and Scope

India – Sri Lanka Free Trade Agreement[27] was signed on 28 December 1998 and entered into force on 15 December, 2001. This agreement has been notified to the WTO pursuant to the Enabling Clause (WT/COMTD/N/16 dated 27 June 2002). The FTA recognizes that the progressive reduction and elimination of obstacles to bilateral trade through a Bilateral Free Trade Agreement would contribute to the expansion of world trade. The respective governments consider that the establishment and promotion of free trade arrangements would help in the development of their national economies and also strengthen the intra-regional economic co-operation. The institutional arrangements under the Agreement includes a Joint Committee at the

[26] The text of India – Sri Lanka Trade Agreement of 1961 is available at URL: http://commerce.nic.in/trade/ceylon.pdf [Accessed on 31 May 2010].

[27] The text of the agreement is available at URL: http://www.doc.gov.lk/web/indusrilanka_agreement.php [Accessed on 31 May 2010].

Ministerial Level to annually review the progress made in the Agreement and to ensure that the benefits of trade expansion emanating from the Agreement accrue to both parties equitably (Article XI: 1). The Committee facilitates co-operation of the parties in customs matters by establishing a Working Group on customs related issues including harmonization of tariff headings. The Committee is also to ensure further co-operation in customs matter (Article: XI: 2), settling of representations by parties on matters affecting the implementation of the Agreement (Article XI: 3). It additionally nominates one apex chamber of trade and industry in each country as the nodal chamber to represent the views of the trade and industry on the matters relating to the Agreement (Article XI: 4).

The Agreement seeks to establish a free trade area for the purpose of free movement of goods between the two countries through elimination of tariffs on the movement of goods as per the mutually agreed concessions offered and accepted by the countries contained in the annexures.[28] The Agreement affirms the principle of National Treatment as per Article III of the GATT and seeks to ensure that any State Trading Enterprises of a contracting party as per Article XVII of the GATT, does not act in a manner inconsistent with the obligations of the Parties and that it accords non-discriminatory treatment in the import from and export to the other contracting parties (Article VI).

[28] India has offered (except on 196 items listed in Annex D(i) Negative List), 100 per cent tariff concession for 1348 items by the 6-digit HS Code upon the entry into force of the Agreement (Annexure E) and a 50 per cent margin of preference on the remaining 2806 items followed by phased out tariffs upto 100 per cent in 3 years of coming into force of the Agreement. However, the concession on all items in Chapter 51 to 56, 58 to 60 and 63 (528 textile items) is restricted to 25 per cent. Tea and garments come under a special quota regime. The import of tea from Sri Lanka to India on a preferential basis is subject to an annual maximum quota of upto 15 million kilograms on a fixed tariff concession of 50 per cent. The garments under HS Chapters 61 and 62, while remaining in the Negative list is to be given 50 per cent tariff concession on a fixed basis by India subject to an annual restriction of 8 million pieces, of which 6 million pieces is to be extended the concession only if made of Indian fabric, provided that no category of garment shall exceed one and a half (1.5) million pieces per annum (Mehta and Narayanan 2006; Letters of Exchange dated 2 February 2000). Sri Lanka has offered duty-free access for 319 items by the 6-digit HS Code (Annexure F-1) and a 50 per cent reduction of tariffs for 889 items by 6-digit HS Code (Annexure F-2), with the margin subsequently deepened to 70 per cent, 90 per cent and 100 per cent respectively, at the end of the first, second and third year of the entry into force of the Agreement. Except the 1180 items in Sri Lanka's negative list without any duty preference (Annexure D(ii)), for the remaining 2724 items by 6-digit HS Code, the tariffs are to be brought down by not less than 35 per cent before the expiry of 3 years, 70 per cent before the expiry of the sixth year and 100 per cent before the expiry of 8 years, from the entry into force of the Agreement (Annexure B). Also, for two items relating to cement (HS codes 2523.21 and 2523.29) which remain on Sri Lanka's Negative List, the tariffs are to be reduced progressively in such a manner so that at the end of 8 years form the dated of entry into force of the Agreement it attracts no duty and has to be phased out of the negative list (Mehta and Narayanan 2006; Letters of Exchange dated 2 February 2000).

The FTA further provides for general exceptions to preferential treatment for protection of national security, protection of public morals, protection of human, animal or plant life and health and the protection of artistic, historic and archeological values as provided for in Articles XX and XXI of the GATT, 1994 (Article IV); permits safeguard measures on prior consultation on any product subject to preferential treatment under the FTA if it imported into the territory of a Party in such a manner and in such quantities as to cause or threaten to cause injury (Article: IX); allows domestic legislation to restrict imports where prices are influenced by unfair trade practices like subsidies and anti-dumping (Article: IX); and provides for balance of payment measures to suspend the preferential treatment provisionally (Article X). The FTA further provides that the products eligible for preferential treatment has to satisfy the Rules of Origin annexed to the Agreement (Article VII and Annexure C).

The Agreement provides for consultations (Article XII) between the parties and contains separate rules for settlement of disputes between the commercial entities of the contracting parties as well as the contracting parties themselves. Any dispute arising between the commercial entities are be referred for amicable settlement to the nodal apex chambers, which has to be settled, as far as possible, through mutual consultations by the Chambers. In the absence of an amicable settlement, the matter has to be referred to an Arbitral Tribunal constituted by the Joint Committee in consultation with the relevant Arbitration Bodies in the two countries, whose decision shall be binding (Article XIII: 1). However, any dispute regarding the interpretation and application of the provisions of the Agreement or any other instrument adopted within its framework has to be settled through negotiations failing which the matter may be notified to the Joint Committee (Article XIII: 2). The Agreement contains provisions for its termination by either contracting party by giving six months written notice (Article XIV) and for any amendment or modification through mutual agreement of parties (Article XV).

It is observed that the operation of the Agreement has resulted in an increase in trade[29] between the countries (Department of Commerce 2010). The two countries have

[29] The bilateral trade between India and Sri Lanka has grown four times in the last 9 years increasing from US$ 658 million in 2000 to US$ 2719 million in 2009 (Department of Commerce 2010). However there have been allegations of negative fall-outs particularly in the trade of copper, vanaspati, pepper etc. (FICCI 2006).

therefore initiated negotiations in August 2004 on a Comprehensive Economic Partnership Agreement which additionally covers areas like services and investment.[30]

### V.5.3.ii. Legal Issues

(a) Compatibility with GATT/WTO standards

Unlike the earlier agreements, the India – Sri Lanka FTA has included the objective of harmonious development and expansion of world trade and a Free Trade Area which is also in conformity with relevant provisions of the GATT 1994 (Article I). The expressed references to GATT/WTO provisions are also made in respect of general exceptions (Article V), state trading enterprises (Article VI) and subsidies and dumping (Article IX). However, the provisions for safeguard measures and balance of payment restrictions do not refer to reconciliation with WTO standards. Moreover, even the expressed reference does not fully confirm to GATT/WTO provisions. For example, the general exceptions contain selected exceptions from GATT Articles XX and XXI, which are to be understood as provided to therein – it appears to be a reference for the sake of referring to the meaning of terms as understood in GATT/WTO rather than for the adoption of multilateral standards. The National Treatment principle has also been installed 'as is contained in' GATT Article III. Though the FTA recognizes the rights of contracting parties to maintain or establish state trading enterprises 'as understood in' GATT Article XVII, it extends the right only to an extent not inconsistent with the obligations under the FTA. The Agreement further mandates restriction of imports by domestic regulation in the event of unfair practices like 'subsidies' or 'dumping' as understood in the relevant GATT/WTO provisions. It has not rationally illustrated the non-reference to GATT/WTO standards for safeguards and balance of payments restrictions in a similar manner, which also

[30] The salient features of the proposed CECA are: (i) For trade in goods – reduction in negative lists; review of negative lists together with the tariff reduction programme within 60 days of signing of CECA and progressive elimination of tariffs for items removed from the negative lists within a period of 3 years; (ii) For trade in services – agreement to offer their schedule of commitments at the WTO level as the base level; (iii) Investment – agreement to provide for an institutional framework to create an enabling environment for greater flow of investment between the two countries; (iv) Economic co-operation – in mutually identified sectors like fish, energy, drugs and pharmaceuticals, textiles, financial, infrastructure, tourism etc. for greater economic integration; (v) Other agreements – MRA on standards; MOU on Harmonization of Ayurvedic medicines to enable both the countries to co-operate in traditional systems of medicines; Customs Co-operation Agreement for simplifying customs procedures and expediting customs clearance; Agreement on Consumer Protection and Legal Metrology aimed at protecting the interest of consumers and creating awareness among consumers in both countries (Department of Commerce 2010)

indicates that reconciliation of the FTA with the multilateral legal system is not the underlying agenda. On the other hand, it could be seen that the Agreement has retained its flexibilities by notifying under the Enabling Clause rather than Article XXIV of the GATT.

As such, the preferential treatment refers to concessions or privileges under the Agreement through the elimination of tariffs on the movement of goods. However, the scope for a broad-based CEPA between the parties in the immediate future raises questions of validly retaining the CEPA with coverage in services, investment etc under the limited scope of the Enabling Clause.

However, in a sense, the FTA has marked the beginning of a genre of FTAs in India which expressly declares to seek conformity with the GATT/WTO provisions which is a welcome trend and could be regarded as a first step in the Indian agenda for RTAs within the framework of multilateral rules. However, the vigour and strength of this argument is to be tested in the future RTA strategies pursued by India.

### V.5.4. Agreement on South Asian Free Trade Area (SAFTA)

The South Asian Association for Regional Co-operation (SAARC) was established in 1985 as an agreement for regional co-operation among Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan and Sri Lanka at the First SAARC Summit in Dhaka. The South Asian region has attempted to intensify regional economic integration through regional, sub-regional and bilateral approaches. As a first step towards higher levels of trade and economic co-operation in the region, the SAARC Preferential Trading Arrangement (SAPTA)[31] was signed in 1993, which provided for limited preferential market access.[32] The Agreement on South Asian Free Trade Area (SAFTA)[33] signed during the 12th SAARC Summit held in Islamabad in January 2004 and came into force on 1 January 2006, supersedes the SAPTA. However the concessions granted under the SAPTA framework shall be available to the contracting states until

[31] The text of the agreement is available in the official website of SAARC at the URL: http://www.saarc-sec.org/main.php?id=44&t=2.1 [Accessed on 31 May 2010].
[32] The estimated number of tariff concessions at the end of three rounds of trade negotiations was 5100, offering 2565 items for preferential trade with margin of preferences from 10 to 90 per cent for non-LDCs alone and 50 to 100 per cent for LDCs alone.
[33] The text of the agreement is available in the official website of SAARC at the URL: http://www.saarc-sec.org/main.php?t=2.1.6 [Accessed on 31 May 2010].

completion of SAFTA's trade liberalization programme (SAFTA Article 2). The SAFTA has been notified to the WTO under the Enabling Clause (WT/COMTD/N/26 dated 24 April 2008).

### V.5.4.i. Nature and Scope

The parties to the Agreement on SAFTA are Bangladesh, Bhutan, Maldives and Nepal which are the LDC contracting states and India, Pakistan and Sri Lanka which are the non-LDC contracting states. Afghanistan which has become the eighth member of SAARC during the 14th SAARC Summit held on 3-4 April 2007 in New Delhi is due to become a party to the SAFTA as an LDC Member (Department of Commerce 2010). The SAFTA entails a sui generis system governed by the provisions of the Agreement and also by the rules, regulations decisions, undertakings and protocols to be agreed upon within its framework by the contracting parties. At the same time, the Parties affirm their existing rights and obligations with respect to each other under the WTO system as well as other treaties/ agreements to which they are signatories (SAFTA Article 3(2)(b)). It is further clarified that the provisions of the Agreement shall not apply in relation to preferences already granted or to be granted by any contracting state to other contracting states outside the framework of SAFTA and to third countries through bilateral, plurilateral and multilateral trade agreement and similar arrangements (SAFTA Article 13). This is in line with the recognition in the Preamble that such regional arrangements generally have the objective to enhance trade through the free movement of goods. However, the threshold of this commitment has been diluted in the SAFTA by removing the earlier SAPTA stipulation that "the Contracting States shall not be obliged to grant preferences in SAPTA which impair the concessions extended under the other agreements."

The institutional mechanism under SAFTA includes a SAFTA Ministerial Council (SMC) consisting of the Ministers of Commerce or Trade of the contracting states which is the highest decision-making body and a Committee of Experts (COE) with one nominee from each contracting states at the level of a Senior Economic official with expertise in trade matters. COE shall monitor, review and facilitate implementation of the provisions of the Agreement and undertake any task assigned to it by the SMC and reports to the SMC every 6 months. The SAARC Secretariat

provides secretarial support to the SMC and the COE in the discharge of their functions.

The main feature of SAFTA is the provision for a detailed Trade Liberalization Programme (TLP) for reduction of tariffs to zero to 5 per cent within 10 years of coming into force of the Agreement and this TLP would cover all tariff lines except those kept in the Sensitive List by each contracting states separately for LDCs and non-LDCs (Article 7). The scheme of TLP may be summarized as under:

**Table V.1: Scheme of Tariff Liberalization Programme in SAFTA**

| Time-frame | Commitments for Non-LDCs | Commitments for LDCs |
|---|---|---|
| In 2 years | Reduction from existing rate to 20% in equal installments. If actual tariffs are less than 20 per cent, annual reduction on a MOP basis of 10% on actual rates for each of the two years | Reduction from existing rate to 30%. If actual rates are less than 30%, annual reduction on a MOP basis of 5% on actual rates for each of the two years |
| In the next 5 years (for non-LDCs) or 8 years (for LDCs) | From 20% or below to 0-5% from the third year (in equal installments of less than 15% annually) | From 30% to 0-5% from the third year (in equal installments of less than 10% annually) |
| In 3 years (S&DT) | Tariff reduced to 0-5% for all products of LDC | -- |

Also, the states have to notify all non-tariff and para-tariff measures to the SAARC Secretariat annually which is reviewed by the Committee of Experts for their compatibility with the WTO provisions and accordingly recommend the elimination or implementation of the measure in least restrictive manner in order to facilitate intra-SAARC trade (SAFTA Article 7(4)). The Agreement also calls for elimination of quantitative restrictions in respect of all products included in the TLP, except otherwise permitted under the GATT 1994 (SAFTA Article 7(5)).

SAFTA further mandates the contracting states to consider the adoption of trade facilitation and other measures for mutual benefit like harmonization of standards, simplification of customs clearance procedure, harmonization of national customs classification based on the HS coding system, customs co-operation to resolve disputes at customs entry points, simplification and harmonization of import licensing and regulation procedures, etc. (SAFTA Article 8). The Agreement further prescribes special and more favourable treatment to the LDCs on a non-reciprocal basis (SAFTA Article 11) especially in the application of antidumping and countervailing measures; allowing flexibilities in the continuation of quantitative restrictions and other restrictions by the LDCs without discrimination; providing for direct trade measures for enhancing sustainable exports from LDCs, etc. Another remarkable feature of SAFTA is the provision for technical assistance to LDCs in particular areas negotiated separately and annexed to the Agreement (SAFTA Annex II). Also, SAFTA has recognized the possibility for the loss of customs revenue by the LDCs due to the implementation of the TLP and provides for a separate mechanism for compensation of Revenue Loss for LDC member states, annexed separately to the Agreement (SAFTA Annex III).

The Agreement contains provisions for general exceptions (SAFTA Article 14); balance of payment measures (SAFTA Article 15); detailed provisions for safeguard measures (SAFTA Article 16) with procedural mechanism and separate rules of origin (SAFTA Annex IV) as well as product specific rules of origin in selected tariff lines (SAFTA Annex IV-A) and operational certification procedures (SAFTA Annex IV-B). The Agreement has detailed Dispute Settlement Mechanism which provides for amicable settlement of disputes through consultations; referral to the Committee of Experts (COE) for investigation; appeal to SAFTA Ministerial Council (SMC) along with rules for implementation of recommendations (SAFTA Article 20). The COE also acts as a Dispute Settlement Body under the Agreement (SAFTA Article 10) and establishes a Panel of Specialists from the contracting states to facilitate independent peer review of disputes by a non-party specialist referred by the Committee.

### V.5.4.ii. Legal Issues

(a) Reconciliation with the Multilateral Trading System

It is an expressed feature of the SAFTA that it is committed to strengthen intra-SAARC economic co-operation to maximize the realization of the region's potential for trade and development and that it seeks to move towards higher levels of trade and economic co-operation in the region by removing barriers to cross-border flow of goods. At the same time, however, SAFTA undertakes to respect the rights and obligations under the WTO Agreements as well as other treaties and agreements to which the contracting states are signatories thus aiming at regional development in conformity with the existing multilateral obligations and other preferential arrangements. The Agreement specifically adopts certain GATT/WTO provisions: the contracting parties to accord national treatment to the products of other contracting parties in accordance with the provisions of GATT Article III (SAFTA Article 5); the non-tariff and para-tariff measures notified by the parties annually to be reviewed by the COE to examine their compatibility with relevant WTO provisions (SAFTA Article 7(4)); provision to eliminate all quantitative restrictions except as permitted under GATT 1994, in respect of products included in the Trade Liberalization Programme (SAFTA Article 7(5)); all investigation procedures for resorting to safeguard measures to be consistent with Article XIX of the GATT 1994 and the WTO Agreement on Safeguards,. etc. It could also be noted that several of the provisions of the earlier SAPTA have been modified which has brought the agreement in consistency with the multilateral rules, like for example, the scope of special and favourable treatment has been expanded to include a mechanism for compensation of loss of revenue to LDCs as well as a technical co-operation and assistance scheme for LDCs in a host of areas to bring it in conformity with the notion of "fuller participation of developing countries" in the Enabling Clause; safeguard measures have been elaborated to bring it in accordance with the existing disciplines; the provision for modification or withdrawal of concession under the SAPTA has been removed and the maintenance of value of concessions brought in for sustained trade liberalization commitments. The provisions for Dispute Settlement have been elaborated in the lines of procedural and institutional provisions contained in the WTO Dispute Settlement Understanding. However, certain areas like general

exceptions (SAFTA Article 14) and balance of payment provisions (SAFTA Article 15) have been retained separately and have excluded any reference to the GATT/WTO measures. Also, the rules of origin measures have been expanded and made stringent by introducing Annex IV: A product specific rules on selected tariff lines and by introducing CTH/ CTSH as well as value added criteria for conferring origin status. It cannot be therefore ignored that these measures when un-favourable to the respective production structures and trade patterns of particular contracting states, could nullify the benefits of TLP envisaged under the Agreement. Therefore, to confirm with the multilateral disciplines in all the major areas would be a significant exercise to ensure a balance between the regional and multilateral trade avenues, which furthers the Indian policy in respect of RTAs.

### V.5.5. India – Afghanistan PTA

India signed the Preferential Trade Agreement (PTA) with Afghanistan[34] on 6 March 2003 which came into force on 13 May 2003. Under the Agreement, the countries are to explore and undertake all measures to promote, facilitate, expand and diversify preferential trade in goods between them. The Agreement has been notified to the WTO under the Enabling Clause, recently on 8 March 2010 after a long period of 7 years (WT/COMTD/N/32 dated 9 March 2010).

#### V.5.5.i. Nature and Scope

The broad objectives of the Agreement are to promote the harmonious development of the economic relations between the parties through the expansion of trade; to provide fair conditions of competition for trade between the countries and to contribute to the harmonious development and expansion of world trade by the removal of barriers to trade (Article I). In pursuance of these objectives, the Contracting Parties have agreed to establish a Preferential Trading Arrangement for the purpose of free movement of goods between the parties through reduction of tariffs on the movement of goods in accordance with the provisions of Annexures A and B which forms an integral part of the Agreement (Article III). Annexure A contains the list of 8 items where preferential tariff is granted by the Government of

[34] The text of the agreement is available at URL: http://commerce.nic.in/trade/international_ta_indafg.asp [Accessed on 31 May 2010].

Afghanistan and Annexure B lists the 38 items where preferential tariff of 50 to 100 per cent is granted by the Government of India. The products covered are entitled to preferential treatment if they satisfy the rules of origin set out in Annexure C of the Agreement. The Agreement also provides for National Treatment of products imported into each others territory (Article V) and for maintaining or establishing State Trading Enterprises by the Contracting Parties (Article VI).

The Agreement allows safeguard measures on imports, with prior consultations except in critical circumstances, where imports to the territory of a Contracting Party causes or threatens to cause serious injury (Article VIII). The action taken by a Party is notified to the other Contracting Party as well as the Joint Committee established under the Agreement. The Committee enters into consultations with the concerned Contracting Party and endeavors to reach mutually acceptable agreement to remedy the situation (Article VIII: 2). The Agreement also permits the Parties to restrict imports in cases where prices are influenced by unfair trade practices including subsidies or dumping (Article IX). Also, the Parties facing Balance of Payment difficulties are permitted to suspend provisionally the preferential treatment as to the quantity and value of merchandise permitted to be imported under the Agreement (Article X). The Agreement provides for general exceptions to such actions and measures necessary for the protection of national security, the protection of public morals, the protection of human, animal or plant life and health, those relating to importation or exportation of gold and silver, the conservation of exhaustible natural resources and the protection of national treasures of artistic, historic and archaeological value (Article IV).

The Agreement provides for the establishment of a Joint Committee at the Ministerial level to review the progress made in the implementation of the Agreement and to ensure that benefits of trade expansion emanating from the Agreement accrue to both parties equitably (Article XI). The Joint Committee also accords adequate opportunities for consultation on representations made by any Contracting Party with respect to any matter affecting the implementation of the Agreement. The Committee adopts appropriate measures for settling any matter arising from such representations within a period of six months and each Contracting Party has to implement such measures immediately (Article XI: 3). The Committee also nominates one apex

chamber of commerce and industry in each country as the nodal chamber to represent the views of the trade and industry on matters relating to the Agreement (Article XI: 4). A novel feature of the Agreement is the provision for establishment of a Working Group on Customs related issues to facilitate cooperation in customs matters, which reports to the Joint Committee on its deliberations.

The Agreement further provides for consultations on matters affecting the operation of the Agreement and reference to the Joint Committee where satisfactory solution through consultations has not been possible (Article XII). The provision for settlement of disputes (Article XIII) provides for settlement of disputes between commercial entities of the parties to be referred for amicable settlement to the nodal apex chambers. Where amicable solution is not found, the matter is referred to an Arbitral Tribunal constituted by the Joint Committee in consultation with the relevant Arbitration Bodies in the two countries, for a binding decision. Any other dispute regarding the interpretation and application of the provisions of the Agreement or any instrument adopted within its framework has to be amicably settled through negotiations failing which a notification is made to the Joint Committee.

The Agreement also contains provisions for modification or amendment through mutual agreement of the Contracting Parties (Article XV) and for the duration and termination by giving six months written notice to the other Party (Article XIV).

**V.5.5.ii. Legal Issues**

(a) Limited Scope of the Agreement

The PTA between India and Afghanistan has remained an Agreement distinct from the earlier agreements. Though the Agreement has provisions comparable to the India – Sri Lanka FTA, the scope and coverage of the PTA is significantly limited. It is not adequately clear how the objective of harmonious development of economic relations between the parties can be achieved through such a limited arrangement. The Agreement deals with trade in goods and the preferential treatment has been limited to a negligible number of tariff lines which defies the 'substantially all the trade' dictum for the RTAs as per the GATT/WTO standards. Moreover, there is no such provision for periodic review or expansion of coverage of the Agreement. Any such attempt to

review or expand the provisions has not been documented so far by either party. In this circumstance, it could be doubtful to consider the arrangement under the broader category of RTAs. The only scope for further expansion of the present agreement could be traced to the provision for amendment (Article XV) which could be effectively employed for expansion and modification of the scope and coverage of the PTA to bring it in line with modern RTAs.

It is also significant to note that the PTA has been notified to the WTO only in 2010, almost after seven years since its conclusion. The non-notification has raised some doubts regarding the scope and ambit of the agreement for long. Moreover, the PTA has been notified pursuant to the Enabling Clause expressly intending to retain the flexibilities of the provision which is also pertinent since the Agreement does not confirm to the standards set by Article XXIV of the GATT.

(b) Non-reference to the GATT/WTO Standards

One of the broad objectives of the Agreement is to contribute to the harmonious development and expansion of world trade. However, it does not make any reference to the GATT/WTO standards and disciplines anywhere in the text of the Agreement. The provisions for General Exceptions (Article IV), National Treatment (Article V), State Trading Enterprises (Article VI), Rules of Origin (Article VII), Safeguard Measures (Article VIII), Domestic Legislation (Article IX), Balance of Payment Measures (Article X) etc. do not contain any reference to the corresponding GATT/WTO rules. Therefore, it has to be presumed that attaining compatibility with the multilateral rules is not an object of the parties to the Agreement. It is intended to retain the Agreement as a sui generis system, with independent rules and standards. It also in a way restricts the scope for expansion or elaboration of the given provisions by reference to the multilateral disciplines.

### V.5.6. Agreement on Trade, Commerce and Transit between India and Bhutan

India has signed an agreement on trade, commerce and transit with Bhutan[35] on 28 July 2006 which has become operational from 29 July 2006 for a period of 10 years.

[35] The text of the agreement is available at URL: http://www.commerce.nic.in/trade/bhutan.pdf [Accessed on 31 May 2010].

The Agreement has been concluded with a view to strengthen the historic ties between the two countries and to further the benefits accruing from free trade between the two countries, expansion of the bilateral trade and collaboration in economic development. As earlier also, India provides unhindered transit facilities to Bhutan to facilitate its trade with third countries (Mehta and Narayanan 2006). The Agreement has been notified to the WTO under paragraph 4(a) of the Enabling Clause (WT/COMTD/N/28 dated 2 July 2008).

### V.5.6.i. Nature and Scope

The main features of the Agreement are as under:

(a) Free trade and commerce – The Agreement seeks to promote free trade and commerce between the two countries (Article 1)

(b) Non-tariff Restrictions by Bhutan – The Agreement however permits that Bhutan may impose non-tariff restrictions on import of certain goods of Indian origin for protection of industries in Bhutan subject to the condition that such restrictions shall not be stricter than those applied to goods of third country origin (Article 2).

(c) Transit provisions – All exports of and imports to Bhutan from third countries will be free from and not subject to customs duties and trade restrictions of India. Under the Agreement, India provides for 16 entry/exit points for this purpose. The procedure[36] for such exports and imports and the documentation which are detailed in

[36] When goods are imported from third countries for Bhutan through India, the following procedure shall be observed at the Indian place of entry (referred to as the "Customs House") – (a) Clearance of goods imported for Bhutan shall be against Letter of Guarantee issued on behalf of the Government of Bhutan; (b) At the Customs House, the Importer or his agent shall present the Letter of Guarantee in the prescribed form in five copies. The last two columns pertaining to the classification of goods and duty shall by completed by the Indian customs; (c) The Customs House shall ensure that the seals are intact in case of containerized goods and in the case of non-containerized goods, after percentage check if necessary, goods may be sealed individually or the transport in which they are being carried be so sealed; (d) After having satisfied with the above procedures, the Customs House shall endorse all copies of the Letter of Guarantee. The fourth copy shall be sealed and handed over to the importer for passing on to the Indian Customs officer at the exit point in India; (e) On arrival of goods at the Indo-Bhutan border, the customs officer shall compare the two copies of the Letter of Guarantee and allow movement of goods into Bhutan after checking he seal. The fourth copy shall be returned to importer after due endorsement and fifth copy sent to the Customs House; (f) In the case of imports not reaching their destination, the customs officials of the two countries shall get in contact so as to trace the movement of the goods. In case the goods are found to have been diverted intentionally or purposely into India, the Indian authorities would invoke the Letter of Guarantee with the Transit and Liaison Office or the Representative of the Government of Bhutan in Kolkata to realize the customs duties and dues of the Government of India. Any cargo consigned to Bhutan arriving in Kolkata, Delhi, Mumbai

the Protocol to the Agreement, may be modified by mutual agreement from time to time. The Protocol also contains provisions for movement of goods from one part of Bhutan to another through the Indian territory.[37]

(d) Non tariff restrictions on Third Country Goods – Both sides may impose such non-tariff restrictions on the import of third country goods from the other's territory (Article 3).

(e) Currency – Trade Transactions may be carried out in Indian Rupees and Bhutanese Ngultrums (Article 7)

(f) Mutual Refund of Excise Duties – Each government has to provide appropriate refund to be mutually decided annually in respect of excise duties on goods of its origin exported to the other (Article 8).

(g) Annual Consultations – Considering the free movement of goods between the two countries and the possibility of the flow of goods of third country origin from one country to another, the Agreement provides for annual consultation between the two countries (Article 4)

(h) Consultation provision – The countries may enter into immediate consultation with each other at the request of either side in order to overcome such difficulties as may arise in the implementation of the Agreement satisfactorily and speedily.

(i) General Exception – Parties may maintain or introduce such measures or restrictions necessary for the purpose of protecting public morals, protecting human,

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and Chennai airports which has to move by surface transport through the Indian territory shall also follow the Import procedure as above. As per the protocol, the procedure detailed above shall apply mutatis mutandis for Bhutan's export to third countries.

[37] The procedure for movement of goods including forestry products from one part of Bhutan to another through the Indian territories is as follows – the owner of the goods for transit shall carry a Transit Declaration issued by the Bhutan customs in prescribed format. In case of third country goods, the Transit Declaration would also carry an undertaking from the customs authorities of Bhutan that the goods are meant for consumption in Bhutan only, and in cases of deflection, the laws of both Indian and Bhutan customs would become applicable. Movement of goods through India accompanied by Transit Declaration shall not be generally subject to sample checking by Indian authorities except in cases where specific information is available to Indian customs authorities about consignments carrying goods which are contraband in nature or contrary to the importability of those in any manner. At the entry point in India, the Transit Declaration pertaining to the goods of third country origin shall be presented to the Indian customs who shall endorse and return it to the owner or agent and allow movement of goods. The Transit Declaration shall be deposited with the Bhutan customs officials at the point of re-entry into Bhutan who shall release the goods after inspecting the same.

animal and plant life, implementing laws related to import and export of gold and silver bullion, safeguarding national treasures and safeguarding such other interests as may be mutually agreed upon.

(j) Special Provisions for Merchant Ships – Non-Discriminatory Treatment to Merchant Ships under the Flag of Bhutan in respect of matters relating to navigation, entry into and departure from Indian ports, use of ports and harbour facilities in India as well as loading and unloading, taxes and other levies, not extending to coastal trade.

**V.5.6.ii. Legal Issues**

(a) Scope of the Agreement

It could be seen that the Agreement between India and Bhutan includes the trade, commerce and transit provisions. The Agreement stipulates that there shall be free trade and commerce between the countries. However, the scope of the Agreement has to be broadly construed with the term "free trade and commerce" left undefined. It implies an elimination of all tariff and non-tariff measures on all the trade between the two countries except selective non-tariff measures by Bhutan to protect its domestic industries. However, the criteria for applying non-tariff measures by Bhutan are that it may be constructed "as may be necessary" for protection of industries in Bhutan and be applied non-discriminately. It is imperative that in the interests of both the countries the scope of the agreement has to be defined in clearer terms. So also, the possibility of free riding is on the higher end with no criteria as yet laid down for determining the origin, which may prompt subjective application of restrictive rules of origin which may be difficult to comply with and thus defeat the free trade objectives as such.

The Agreement further allows for non-tariff measures on import through each other's territory against free-riding by third parties. Considering the scope of transit of trade between the two countries due to geographical peculiarities, this provision assumes further importance. It could be said that, to a certain extent, this provision is against the spirit of the Enabling Clause stipulation that such arrangements envisaged under it shall not raise barriers to trade or create undue difficulties to the trade of other parties.

It is also apparent that the Agreement with Bhutan does not confirm to the general format or standards of the RTAs signed by India – the provisions are limited and broadly constructed. The procedural requirements for transit have been elaborated in a Protocol annexed to the Agreement. The rationale for such broad provisions for free trade and commerce could be traced to the historical ties between the countries and the provisions in the earlier agreements (Mehta and Narayanan, 2006). But in view of the considerable volume of trade between the countries and the strategic importance of trade, it has to be concluded that the text of the agreement has to be well defined to bring it in conformity with the emerging disciplines of the multilateral trading system.

### V.5.7. MERCOSUR – India PTA

The MERCOSUR – India PTA[38] is the first such agreement India has signed with a trading bloc outside the region. It could be considered as an indication of expansion of India's trade ambitions beyond the traditional avenues. Initially, a Framework Agreement was signed in 2003 which aimed at creating conditions and mechanisms for negotiations in the first stage, by granting reciprocal tariff preferences and in the second stage, to negotiate a free trade area between the two parties in conformity with the rules of the World Trade Organization (Ministry of Commerce 2010). As a follow up to this, the Preferential Trade Agreement (PTA) was signed in New Delhi on 25 January 2004 and it came into effect from 1 June 2009. The aim of the PTA is to expand and strengthen the existing relations between MERCOSUR and India and to promote the expansion of trade by granting reciprocal tariff preferences with the ultimate objective of creating a free trade area between the parties. The PTA has been notified to the WTO pursuant to the Enabling Clause (WT/COMTD/N/31 dated 25 February 2010).

#### V.5.7.i. Nature and Scope

The Parties to the PTA consider that the implementation of an instrument providing for the granting of fixed tariff preferences would facilitate subsequent negotiations for the creation of a Free Trade Area and has hence concluded the PTA as a first step towards the creation of a Free Trade Area between MERCOSUR and India. Annex I

[38] The text of the PTA is available at URL: http://commerce.nic.in/trade/indiamercosur/pta_indiaandmercosur.pdf [Accessed on 31 May 2010].

of the PTA contains the list of 452 products on which tariff preferences are granted by MERCOSUR and Annex II contains the list of 450 products on which tariff preferences are granted by India. The tariff preferences are applied to all customs duties in force in each Signatory Party at the time of importing the relevant product (Article 5). The Parties are also required not to apply non-tariff barriers to the products included in the Annexes (Article 7). If any additional benefits are granted by a Contracting Party in a preferential agreement with a non-party, it has to afford, upon request from the other Contracting Party, adequate opportunity for consultations on such additional benefits granted therein (Article 8).

The Agreement further provides that the products included in Annexes I and II have to meet the rules of origin in accordance with Annex III of the Agreement in order to qualify for tariff preferences (Article 12). The other restrictions on tariff preferences as per the Agreement are (i) actions and measures consistent with GATT Article XX and XXI (Article 9); (ii) preferential safeguard measures as per rules agreed in Annex IV to the Agreement (Article 15) as well as under Article XIX of GATT 1994 and the WTO Agreement on Safeguards; (iii) Anti-dumping and Countervailing measures as per respective legislations of Signatory Parties consistent with Article VI and XVI of GATT 1994, the Agreement on Implementation of Article VI of GATT 1994 and the WTO Agreement on Subsidies and Countervailing Measures (Article 17).

The Agreement also provides for National Treatment in accordance with Article III of GATT 1994 (Article 13) and for maintaining or establishing State Trading Enterprises as understood in Article XVII of GATT 1994 (Article 10). On matters related to customs valuation, the Parties are governed by Article VII of GATT 1994 and the WTO Agreement on the Implementation of Article VII of GATT 1994 (Article 14). The Parties have to abide by the rights and obligations set out in the WTO Agreement on Technical Barriers to Trade (Article 18) and the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (Article 21). Additionally, the Agreement envisages cooperation in the area of standards, technical regulations and conformity assessment procedures with the objective of facilitating trade (Article 19) and to conclude mutual equivalence agreements (Article 20). Also, the Parties have agreed to cooperate in the areas of animal health and plant protection, food safety and mutual recognition of sanitary and phytosanitary measures, through their competent

authorities, including, inter alia, by means of equivalence agreements and mutual recognition of agreements to be concluded taking into account relevant international criteria (Article 22).

The administration of the Agreement has been designated to a Joint Administration Committee composed by the MERCOSUR's Common Market Group or its representatives and by India's Secretary of Commerce or its representatives (Article 23). Any dispute arising in connection with the application of, interpretation of, or non-compliance with any provisions has to be settled in accordance with the detailed rules established in Annex V of the Agreement (Article 29). The Agreement contains provisions for amendments and modifications (Article 27 and 28) as well as for withdrawal from the Agreement (Article 32). Though the rights and obligations assumed by the Parties ceases to apply on withdrawal, it is bound to comply with obligations in connection with tariff preferences established in Annexes I and II of the Agreement for a term of one year, unless otherwise agreed upon (Article 32).

**V.5.7.ii. Legal Issues**

(a) Attempts for 'Multilateralizing Regionalism' under the PTA

It is clearly expressed that the creation of a Free Trade area between the Parties is the objective of the Agreement. To this end, the first stage of action under the Framework Agreement was aimed at increasing trade, including the mutual granting of tariff preferences which were expected to facilitate further negotiations. Subsequently, the negotiations were completed to implement the granting of fixed tariff preferences and to establish trade disciplines between the Parties, which has led to the signing of the PTA. The PTA is the first step towards the creation of a Free Trade Area. It is clearly aspired that free trade agreements contribute to the expansion of world trade to greater international stability and in particular to development of closer relations among their peoples. Such a regional integration and trade among developing countries would help the integration of participant economies into the global economy and assist the social and economic development of the people. The PTA is deeply committed to these broader objectives and goals.

The broader objectives of the PTA are in line with the regionalism versus multilateralism debate that is current. The process of economic integration envisaged under the Agreement has two faces – gradual and reciprocal liberalization of trade as well as strengthening of economic cooperation among the parties. The trade disciplines envisaged in the Agreement further this two pronged strategy. However the Agreement offers a novel prescription – strengthening the rules of international trade in accordance with the rules of the WTO. Accordingly, it prescribes a strict adherence to the GATT/WTO principles on each aspect of trade dealt with under the Agreement. For example, the PTA makes reference to GATT/WTO rights and obligations in respect of each aspect of the Agreement, that is, the provisions on the definition of customs duty (Article 6); non-tariff barriers (Article 7); General Exceptions (Article 9); State Trading Enterprises (Articles 10 and 11); National Treatment (Article 13); Customs Valuation (Article 14); Safeguard Measures (Articles 15 and 16); Antidumping and Countervailing Measures (Article 17); Technical Barriers to Trade (Article 18); Sanitary and Phytosanitary Measures (Article 21); Dispute Settlement (Annex IV), etc. expressly refer to and rely on the respective GATT/WTO disciplines. Such a strict adherence to the multilateral rules, rather than mere compatibility, is the hallmark of the Agreement and its prescription to achieve the broader ideals of economic integration and development by furthering trade between the developing and upcoming economies.

It does not consider exceeding the GATT/WTO standards in the strict sense. For example, while providing the detailed annexes in respect of rules of origin, preferential safeguards and dispute settlement, the underlying reference is to the corresponding GATT/WTO disciplines. It adopts certain procedural measures or extensions to the multilateral rules to secure the objectives laid down by the trade regime. The underlying object is to establish clear, predictable and lasting rules to promote the development of reciprocal trade and investment. However, at the same time, it reaffirms the commitments to further strengthen the rules of international trade in accordance with the rules of the GATT/WTO system.

### V.5.8. Chile – India PTA

The Preferential Trade Agreement between Chile and India [39] is said to be the first step in the promotion of economic co-operation between both the countries and its objectives are to promote through the expansion of trade, the harmonious development of the economic relations between both the countries and provide fair conditions of competition for their bilateral trade, by ensuring reciprocity in implementing the agreement and contribute in this way to the removal of barriers to trade and thereby to the harmonious development and expansion of world trade. The Agreement was signed on 6 March 2006 in New Delhi and came into force for Chile on 17 August 2007 and for India on 11 September 2007. The Agreement has been notified to the WTO in 2009 pursuant to the Enabling Clause (WT/COMTD/N/30 dated 14 January 2009)

#### V.5.8.i. Nature and Scope

As a first step in the co-operation between India and Chile, the scope and coverage of the PTA is limited to trade in goods. The PTA has envisaged preferential tariff ranging from 10 to 50 per cent offered by India on 178 tariff lines at 8-digit level in the Annexure A and tariff preferences offered by Chile on 296 tariff lines at 8-digit level with a margin of preference ranging from 10 to 100 per cent in the Annexure B. The Agreement leaves sufficient scope for expansion of the preferential treatment by providing for acceleration of elimination or reduction already set out as well as for inclusion of new products to the lists annexed and that an Agreement to this effect shall supersede the existing duty rate or staging category determined pursuant to the Schedules.

As in some of the earlier agreements, this PTA also contains provisions concerning National Treatment and state trading enterprises. The express reference to GATT/WTO provisions is made in respect of General Exceptions under Article XX and XXI of the GATT (Article XIX); Import-Export restriction in accordance with GATT Article XI (Article VIII); Global Safeguards consistent with Article XIX and the WTO Agreement on Safeguards (Article X); TBT and SPS measures as per the

[39] The text of the agreement is available at URL: http://www.direcon.cl/documentos/alcance_parcial/PTA%20Text%20final%20Ingles.pdf [Accessed on 31 May 2010].

respective WTO agreements (Article XII, XIII); customs valuation as per Article VII and WTO Agreement on Implementation of Customs Co-operation (Article XIV); Anti-dumping and Countervailing Duty matters as per respective GATT/WTO provisions (Article XVI) and an option for settlement of disputes regarding matters arising under this Agreement that are also regulated in the agreements negotiated at the WTO in accordance with the WTO Dispute Settlement Understanding (Annex E: Article 1(2)). The Agreement also undertakes the pursuit of the common multilateral goals of establishing a fair and market oriented trading system under the aegis of the WTO (Article IX) which has been a novel undertaking in an Indian Agreement.

Unlike the earlier agreements, this PTA is noted for its clarity and detail in the provisions and the remarkably long drawn out procedures – for instance, the provisions on Technical Barriers and SPS measures contain provision for bilateral co-operation in specified areas and allows for consultation where one of the parties consider that the measures taken by the other party are likely to create or have created an obstacle to trade. In these areas, the Agreement itself mentions the responsible authorities in each country to carry out the activities outlined, who shall report to the Joint Action Committee under the Agreement (Articles XII and XIII). Even the respective authorities of the contracting parties responsible for undertaking consultation under the Dispute Settlement Provisions of the PTA are provided for (Annex E: Article 2(2)). The detailed provisions on Rules of Origin (Annex C) are also noteworthy, with separate provision of definitions, detailed criteria of origin, proof of origin and procedures for the control and verification of certificates of origin. The extensive substantial as well as procedural preferential safeguard measures (Annex D) are also unique to this Agreement. Another section on Dispute Settlement Procedures (Annex E) details a three tier system of consultations, intervention of the Committees and Arbitral Proceedings including separate Rules of Procedure for arbitration proceedings. The overall architecture of the PTA could be observed as complex, extensive and technical. It is therefore doubtful if the PTA would sustainably achieve the harmonious development and expansion of trade in view of the limited tariff concessions currently offered as against the detailed rules and procedural measures secured by the Agreement. However, the scope for further negotiations moving towards a Free Trade Agreement or CECA as also mentioned in

the PTA clarifies the rationale for elaborate provisions and procedures envisaged in the PTA.

### V.5.8.ii Legal Issues

(a) Exceeding the Multilateral Disciplines in the PTA

The expressed objective of the parties is to establish a PTA as per the Agreement which is also in conformity with the relevant agreements of the WTO (Article I). This is facilitated by providing for retaining the rights and obligations in the corresponding areas like National Treatment, State Trading Enterprises, Import-Export Restrictions, Safeguards, TBT/ SPS measures, customs valuation, anti-dumping and countervailing duty matters and general exceptions. However, it could be noted on closer examination that often additional measures are provided for in the Agreement which exceeds the WTO provisions or standards. For example, Article VIII of the Agreement permits import-export restrictions in accordance with GATT Article XI "and also under the provisions of the Agreement" which justifies the separate preferential safeguard measures (Annex D) with stringent substantial and procedural standards. However, it clarifies that this Agreement does not confer any additional rights or obligations on the parties with regard to global safeguard measures pursuant to relevant GATT/WTO provisions indicating bilateral WTO-plus standards. Also, the TBT and SPS provisions while affirming the WTO rights and obligations, exceeds the corresponding WTO provisions by incorporating additional measures for bilateral co-operation, information sharing and settlement of disputes. The Rules of Origin provisions under the Annex contain comprehensive provisions on the criteria for originating goods and stringent procedures for control and verification of certificates of origin. The Agreement also adopts as sui generis dispute settlement system with an option to apply the WTO DSU for matters regulated also under the WTO which entails a host of issues pertaining to forum shopping, fragmentation of the dispute settlement bodies, conflicting jurisprudence on common issues and deviation from a multilaterally agreed rule-based system for dispute resolution.

It is understood that providing for conformity with the relevant GATT/WTO provisions in a bilateral preferential arrangement is undoubtedly intended complementary to the multilateral trading system. Such measures invariably exclude

the option of formulating rules and disciplines contrary to the multilateral disciplines by affirming the existing rights and obligations. However, this does not restrict the formulation of standards exceeding those arrived at the multilateral level – the so called "WTO-Plus" standards which are perceived as the potential device for eroding the multilateral system. The trend towards 'multilateralizing regionalism' adopted by the PTA is desirable but how far it exceeds the GATT/WTO disciplines and to what effect is to be seen in the years to come. It may not visibly affect the bilateral trade under the present limited scope PTA but the future potential for FTA/ CECA between the countries could entail a totally different result.

### V.5.9. India – Singapore Comprehensive Economic Co-operation Agreement

The Comprehensive Economic Co-operation Agreement (CECA) between India and Singapore[40] was signed on 29 June 2005 and became operational with effect from 1 August, 2005. The Agreement is the first CECA signed by India with any country and the first time India has entered into a bilateral economic integration agreement in services. The CECA is also the first agreement that India has notified to the WTO under GATT Article XXIV and GATS Article V (WT/REG228/N/1 dated 4 May 2007).

#### V.5.9.i. Nature and Scope

The CECA has been designed as an integrated package of several agreements concerning trade in goods, services, investment and economic co-operation in the fields like education, science and technology, air-services, e-commerce, movement of natural persons and intellectual property. The Agreement contains fifteen annexes which deal inter alia with tariff concessions; product specific rules of origin and operative certification procedures; investment concessions; service concessions; sectoral concession on telecommunication equipment, food products and electronic products; financial services; telecommunication services; list of professionals; and a framework for media co-operation. In the case of Singapore, customs duties on all products originating in India are eliminated on the date of entry into force of the Agreement (Annex 2B). In the case of India, Annex 2A of the Agreement contains

[40] The text of the agreement is available at URL: http://www.commerce.nic.in/ceca/toc.htm [Accessed on 31 May 2010].

four different lists which provide for the elimination of duties on imports of certain goods originating in Singapore on the date of entry into force (506 tariff lines); phased elimination of duty in five annual stages in certain products (2202 tariff lines); phased reduction in duty over a five year period (2407 tariff lines) and a list of products not subject to concessions (6551 tariff lines). As such, a total of 23.6 per cent of tariff lines are liberalized under the Agreement, corresponding to 75.1 per cent in terms of import values from Singapore for the period 2003-2005 (WT/REG228/1/Rev.1 dated 1 October 2008). However, under the first review of the CECA in October 2007, undertaken pursuant to the review mechanism for accelerating the reduction and/or elimination of customs duties (under Article 2.3.2), an additional 404 tariff lines have been offered for phased elimination of duties over 5 to 9 phases and 135 tariff lines for phased reduction in duties to be completed finally by 1 December, 2015. This is expected to achieve tariff elimination for 80.73 per cent of trade, according to India's import data (WT/REG228/3 dated 20 October 2008).

The products covered by the Agreement are eligible for preferential treatment subject to the rules of origin provisions and the product specific rules of origin (Annex 3A) prescribed in the Agreement. Further, the Agreement seeks to remove all non-tariff barriers on all imports and exports between the parties, except as allowed by the Agreement or under the WTO provisions (Article 2.4). The Agreement also provides for procedures for Anti-dumping actions (Article 2.7), subsidies and countervailing measures (Article 2.8), imposition of bilateral safeguard measures (Article 2.9), restrictions to safeguard balance of payments (Article 2.10) and other general and security exceptions (Article 2.13) as exceptions to the liberalization commitments undertaken. For trade in services, India and Singapore have drawn out specific schedules of commitments similar to the GATS schedules with respect to the sectoral classification and separation of sector specific and horizontal commitments, the latter applicable to all sectors listed. The schedules include limitations and conditions on market access and national treatment, the undertakings relating to additional commitments and where appropriate, the time frame for implementation. The parties are required to review the respective schedules at least once in 3 years or earlier at the request of either party, with a view to facilitating the elimination of substantially all remaining discrimination between the parties over a period of time (Article 7.9). The Agreement prohibits the parties from taking safeguard actions against the service and

service suppliers of the other party from the date of entry into force of the Agreement (Article 7.14). However the parties are allowed to maintain or adopt restriction on trade in services in the event of serious balance of payments and external financial difficulties or threat thereof (Article 7.17).

In the case of investments, India's schedule of commitment containing the conditions and qualifications on the National Treatment are set out in Annex 6A, while Annex 6B contains the exceptions which Singapore maintains with respect to sectors, sub-sectors or activities. The investment provisions of the Agreement requires each party to accord national treatment to investors and investments of the other Party with respect to the establishment, acquisition, expansion, management, conduct, operation, liquidation, sale and transfer of investments in the sectors listed in the respective Annexes.

The Agreement seeks to facilitate the movement of natural persons by permitting temporary entry and short-stays for business visitors, short term service providers, professionals and intra-corporate transferees traveling between both the countries. Another unique feature of the Agreement is the co-operation chapters which has identified areas where both the parties possessed complementary interests and strengths. The Agreement allows the two countries to tap each other's expertise in the areas of science and technology, media, education and IPRs.

The Agreement provides for separate chapter on Dispute Settlement between the Parties concerning their rights and obligations under the Agreement, through consultations (Article 15.3), good offices, conciliation or mediation as well as appointment of Arbitral Tribunals (Article 15.5). Unlike the other Indian agreements, the Agreement does not constitute a joint committee for institutional provision. Instead, it provides for the meeting of Ministers in charge of trade negotiations of the Parties to meet within a year of the date of entry into force of the Agreement and then biennially or otherwise as appropriate to review the Agreement (Article 16.3). The Parties may establish any working groups or committees on an ad hoc basis or otherwise to study and recommend appropriate measures to resolve any issues arising from the implementation or application of the Agreement and to consider, at either Party's request, fresh concessions or issues not directly dealt with by the Agreement (Article 16.3.2). Another novel provision is that the Agreement is open to accession or

associations, on terms to be agreed between the parties, by any country or separate customs territory (Article 16.4). Also, the Agreement has affirmed the existing rights and obligations of the bilateral and multilateral agreements to which both Parties are members, including the WTO Agreement and provides that in the event of any inconsistency between this Agreement and such other agreements, the parties shall consult with each other with a view to finding a mutually satisfactory solution (Article 16.5). The Parties have also reserved the rights to negotiate for any more favourable concessions and benefits arrived at by either party in their Agreements with third parties (Article 2.11.3).

**V.5.9.ii. Legal Issues**

The CECA with Singapore is the first agreement notified by India to the WTO under GATT Article XXIV and GATS Article V. Therefore, the Agreement has been considered by the Committee on Regional Trade Agreements (CRTA) in accordance with the Transparency Mechanism for Regional Trade Agreements (WT/L/671 dated 18 December 2006). The debate on the Agreement based on the general comments of the Parties as well as the specifics of the Agreement detailed in the Factual Presentation on the goods and services aspects, prepared by the WTO Secretariat (WT/REG228/1 dated 27 February 2008), has brought a host of legal issues pertaining to the consistency of the CECA with the WTO provisions in an unprecedented manner. Some of the major issues related to India and the clarifications given are as under:

(a) "Substantially all the trade" Requirement under Article XXIV

One major issue raised by the WTO members in the CRTA was regarding the compliance of the CECA with Article XXIV of the GATT 1994, particularly the requirement to eliminate tariffs on substantially all the trade. According, to the Factual Presentation, only 23.6 per cent of the Indian tariff lines were liberalized under the Agreement. In the view of many member states, like the EC, this was a significantly low and unambiguous coverage, which could not be understood to cover substantially all the trade. In reply, India confirmed that in the beginning 75.1 per cent of import values (2003-05) from Singapore to India were liberalized, however the agreement provides for expansion of coverage under the review mechanism.

According to the parties, the Agreement was thus dynamic. The review mechanism as illustrated in the first review of October 2007 had provided the platform for the parties to continually liberalize and integrate their markets. It has therefore been the intention of the parties to continue to increase the scope and coverage of the Agreement in such gradual manner pursuant to the reviews of the CECA. It was also pointed out that GATT Article XXIV, paragraph 8(b) does not specify that the indicator of substantially all trade has to be met at the commencement of the FTA for those FTAs which have review provisions allowing for the expansion of coverage of scope of the FTA (WT/REG228/M/1 dated 27 October 2008).

However, members like the US were not willing to accept India's contention that expanded coverage under the Agreement was a means of satisfying the "substantially all the trade" requirement. "Substantially all the trade" could be assessed only on the basis of concrete elimination of duties on specific products as provided for in the Agreement, not on what tariff liberalization might or might not be achieved in the future. Australia also took a similar stand and argued that under the given review mechanism of the CECA, there was no guarantee or firm commitment of further liberalization; an intention for future liberalization did not marry with the firm commitment to liberalize substantially all the trade under the GATT (WT/REG228/M/1 dated 27 October 2008: para. 15).

India, in its reply to the comments of other members responded that the CECA met the requirements of Article XXIV, including "substantially all the trade." As there was a lack of unanimity on the meaning of "substantially all the trade", it believed that some of the comments were judgmental and prescriptive. While the Agreement had commenced with coverage of 75 per cent of trade value, in a very short time, the Parties had used the review mechanism and further liberalized leading to the current tariff elimination on nearly 81 per cent of trade value, which constituted "substantially all the trade." While the CRTA was discussing only the tariff elimination aspects, the number of tariff lines and trade values had been subject to substantially tariff reduction, which in India's case, given that some lines had been subject to high tariffs, had provided a margin of preference, which had enhanced opportunities for trade. After the entry into force of the Agreement, there has been robust growth in trade, by more than 30 per cent per annum which India believed that, the levels of ambition had

been sufficiently met, and the Parties saw great trade opportunities. Both the Parties therefore reiterated that the agreement was dynamic and did not feel that it was stuck at a certain level of liberalization at a certain point of time. India believed that the Parties would achieve many more goals and objectives than only tariff elimination on a certain number of lines through this joint mechanism (WT/REG228/M/1 dated 27 October 2008).

(b) Inconsistency with the GATS Commitments

During the consideration of the CECA, it was pointed out that India has mentioned a horizontal commitment under Mode 3 that could not be found in India's GATS Schedule. These limitations which pertained to the approval requirements for Mode 3 market access and national treatment for equity transfers and repatriation of sales proceeds, applied to all sectors in India's CECA services schedule, including sectors in which India has existing GATS commitments. It has been questioned that these new horizontal limitations result in less liberalizing and more discriminatory commitments than India's commitments under the GATS. Also, another issue raised during the examination was regarding India's specific commitments on financial/ banking services by providing for 15 new bank branches in India to three Singapore banks over four years. It was apprehended that if such branch licenses that India has committed to provide to the designated Singapore banks would be drawn out of India's bound commitment to opening 12 bank branches per year under the GATS Schedule, it would reduce that global quota to third countries. This in effect, was perceived as contradictory to the obligation in GATS Article V:4 not to raise the overall level of barriers to the trade within the sector for other members as well as under the National Treatment obligations under the GATS Article XVII. Thus, in the area of trade in services also the apparent inconsistencies with GATS commitments were a subject of debate in the CRTA (WT/REG228/M/1 dated 27 October 2008).

In the first issue regarding the incorporation of horizontal limits not present in India's GATS schedule, it was India's stand that these commitments were not intended to prejudice its commitments under the GATS. India has bound a wider coverage of sectors under the CECA than under the GATS, and in that respect, greater market access and national treatment commitments were gained (WT/REG228/2 dated 15 September 2008). It could be interpreted that India services commitments under the

CECA and the GATS schedules were inherently different and has to be treated differently. Therefore, any such comparison was unwarranted. This argument could also be viewed as an addendum to the Indian stand that the provisions in the CECA are a result of "negotiated outcome" and specific to the CECA which aimed to liberalize the trade between the two parties (WT/REG228/2 dated 15 September 2008). It may also be regarded as an assertion of the right of parties to formulate any provision in its RTAs particular to the interests of bilateral trade, which is largely a "negotiated outcome" and that the provisions in the RTA could ensue a sui generis system of standards and disciplines particular to the interests of the participating countries.

India has further clarified that the case of additional horizontal commitment in the CECA is basically a transparency provision of the policy regime in force in India and has been incorporated in the schedule of India as per Press Note No. 1 of 2005 of the Department of Industrial Policy and Promotion (WT/REG228/2 dated 15 September 2008).

On the other major issue regarding services, India has responded to the question as to whether the commitment to Singapore would come out of India's overall GATS commitment, was primarily academic because even before India signed the agreement, it had been exceeding its bank license commitments by an average of 50 per cent per year, that was upto five or six additional branches every year since 2001. Notwithstanding this, India confirmed that the branch licenses for Singapore would come out of India's global quota. This meant, hypothetically that if India were to suddenly refuse to grant more than 12 licenses per year, which was totally different from its track record, the availability of licenses for countries other than Singapore would stand modified. However, India did not view this as a violation of GATS Article V: 4 since no new barriers were being created to trade in services with non-parties. Moreover, India reminded that both the parties were developing countries and Article V: 3(a) of the GATS clearly provided flexibility to them to take market access and national treatment commitments in accordance with their levels of development, both overall and in individual sectors and sub-sectors. On the issue of 'quota within quota', for branch licenses, India has pointed out that there was no explicit requirement to provide exclusive quotas under the FTAs. By referring to similar

instances in other FTAs[41] as illustrative, India asserted that any FTA was agreed upon with the express purpose of providing preferential treatment to the contracting parties. It was obvious that the same treatments were not extended to non-parties but it did not mean that new trade barriers had been created. According to it, there was some trade diversion, but in India's view there was much greater trade creation involved (WT/REG228/M/1 dated 27 October 2008).

It could be seen that India's defence of the CECA under the relevant GATT and GATS provisions were mainly based on the interpretation of the text of the provisions. India's WTO-consistency has evolved more as a technical issue rather than a substantial question. That its interpretation of "substantially all the trade" of GATT Article XXIV and "overall level of barriers" of GATS Article V: 4, justifies its provisions and commitments under the CECA. On the other hand, India impliedly places thrust in practices rather than in technical adherence to rules and provisions envisaged. According to India, the overall goals and objectives of the RTA which was much broader that mattered than the technicality in the number of tariff lines, number of bank branches committed etc. Therefore, the option for India has been to weigh its adherence to the multilateral rules in practice rather than in principles.

### V.6. India's Recent Agreements and Its Features

There are some RTAs concluded by India recently which indicate the recent trends and directions of the Indian approach to RTAs. This section has summarized the main features of India's recent agreements with ASEAN and Korea to understand the emerging scenario.[42]

#### V.6.1. India – ASEAN Trade Agreements

In furtherance of its 'Look East Policy,' India has initiated engagement in trade with the Association of South East Asian Nations[43] (ASEAN) starting with a Framework

[41] According to India, in the US – Singapore and the US – Chile FTAs, a quota of 5400 and 1400 H1B1 visas, respectively, had been granted. These quotas had come out of the overall global quotas of 65,000 H1B1 visas committed by the US under the GATS (WT/REG228/M/1 dated 27 October 2008).

[42] Towards the conclusion of this study, India has signed agreements with Japan and Malaysia in 2011 which are not included in the present study.

[43] ASEAN has a membership of 10 countries namely Brunei Darussalam, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, Philippines, Singapore, Thailand and Viet Nam. The details of ASEAN are available at the website http://www.aseansec.org [Accessed on 31 May 2010].

Agreement[44] on Comprehensive Economic Cooperation between the ASEAN and India which was signed in Bali on 8 October 2003. The Framework Agreement was meant to enhance economic cooperation and to work towards an India – ASEAN Regional Trade and Investment Area (RTIA) as a long term objective. The key elements of the Framework Agreement involved FTA in Goods, Services and Investment as well as Areas of Economic Cooperation. It also provided for an Early Harvest Programme (EHP) which covered areas of Economic Cooperation and a common list of items for exchange of tariff concessions as a confidence building measure. However, due to difference of opinion on Rules of Origin, the EHP agreed under the Framework Agreement could not be implemented (Department of Commerce 2010).

Subsequently, negotiations progressed under the auspices of the ASEAN – India Trade Negotiations Committee (TNC) and the Parties have signed the following agreements[45] under the Framework Agreement, in Bangkok on 13 August 2009:

(i) Trade in Goods Agreement along with its Annexes
(ii) Agreement on Dispute Settlement Mechanism
(iii) Protocol to Amend the Framework Agreement
(iv) Understanding on Article 4 of the Agreement on Trade in Goods

As such, the India – ASEAN Agreement is presently limited to Trade in Goods as this Agreement has come into force on 1 January 2010 in respect of India and Malaysia, Singapore, Thailand. The negotiations in Trade in Services and Investment are underway and expected to be concluded in 2010 (Department of Commerce 2010).

The key features of the Agreement on Trade in Goods (hereinafter the Agreement) are as under:

The main objective of the Agreement is to establish the ASEAN – India Free Trade Area covering goods by 2013 for Brunei Darussalam, Indonesia, Malaysia, Singapore and Thailand and India; by 2018 for Philippines and India; and by 2013 for India and

[44] The text of the Framework Agreement is available at the URL: http://commerce.nic.in/trade/international_ta_framework_asean.asp [Accessed on 31 May 2010].
[45] The texts of the agreements are available at the URL: http://www.commerce.nic.in/trade/international _ta_indasean.asp [Accessed on 31 May 2010].

by 2018 for Cambodia, Lao PDR, Myanmar and Viet Nam. The Agreement reiterates the importance of special and differential treatment to ensure the increasing participation of the new ASEAN member states (Cambodia, Lao PDR, Myanmar and Viet Nam) in economic integration and cooperation activities between India and ASEAN. The Agreement also reaffirms the Parties' commitments to establish the ASEAN – India Free Trade Area while allowing flexibility to the Parties to address their sensitive areas.

The Agreement provides for tariff reduction and elimination (Article 4) requiring the applied MFN tariffs on all products to be gradually reduced and where applicable, eliminated in accordance with the Specific Schedule of Tariff Commitments of each Party annexed to the Agreement. It prescribes different modalities for tariff reduction and elimination subject to the categorization of products in Normal Track[46] 1 or 2, Sensitive Track,[47] Special Products,[48] Highly Sensitive Lists[49] and Exclusion List.[50] The Schedules are drawn out for each tariff line indicating the applied MFN tariffs, category of tariff liberalization for the product and the progressive liberalization of rates on yearly basis for the period of fulfillment of commitments. The goods covered under the Agreement are accorded preferential treatment subject to the detailed Rules of Origin and Operational Certification Procedures set out in Annex 2 and Appendices (Article 7).

The Agreement also restricts non-tariff measures on imports of goods except in accordance with the WTO rights and obligations or other provisions in the Agreement. It reaffirms the Parties rights and obligations under the TBT and SPS Agreements. The Agreement enjoins each Party to accord National Treatment to the goods of the other Parties in accordance with Article III of the GATT 1994. The

[46] The applied MFN tariffs for the tariff lines placed in Normal Track has to be reduced and subsequently eliminated in accordance with a schedule for the period from 2010 to maximum 2018 for Track – 1 and from 2010 to maximum 2021 for Track – 2.

[47] For tariff lines in Sensitive Track, the applied MFN tariff rates are reduced to 5 per cent over the scheduled periods for upto 50 tariff lines and for the remaining upto maximum 4 per cent as on the prescribed end dates.

[48] Special Products refer to India's crude and refined Palm oil (CPO and RPO respectively), coffee, black tea and pepper for which the schedule of tariff reduction is drawn out in the Agreement itself.

[49] The modalities of Highly Sensitive List do not apply for Brunei Darussalam, Lao PDR, Myanmar and Singapore. Tariff lines placed in this list has 3 categories – reduction of applied MFN tariff rates to 50 per cent; by 50 per cent and by 25 per cent. The end dates for achieving such reductions vary from 2019 to 2024 for the other ASEAN members.

[50] Tariff lines in Exclusion List are subject to an annual tariff review with a view to improving market access.

transparency provisions as per Article X of GATT 1994 and the administrative fees and formalities as per Article VIII:1 of GATT 1994 are also applicable. The Parties are to apply its customs procedures in a predictable, consistent and transparent manner to further the objectives of the Agreement (Article 14). The restrictions on the preferential tariff treatment to the goods under the Agreement are – (i) modification or withdrawal of concessions by negotiation (Article 9); (ii) safeguard measures under the GATT/WTO as well as under the Agreement (Article 10); (iii) measures to safeguard Balance of Payment under the GATT/WTO (Article 11); (iv) General Exceptions under Article XX of GATT 1994 (Article 12); (v) Security Exceptions prescribed by the Agreement (Article 13) etc.

The institutional arm of the Agreement is the Joint Committee composed of the representatives of the Parties (Article 17). Any dispute concerning the interpretation, implementation or application of the Agreement has to be resolved through the procedures and mechanisms detailed in the ASEAN – India Agreement on Dispute Settlement Mechanism under the Framework Agreement. The Agreement also allows review (Article 19), adoption of legal instruments in future (Article 20) and amendment (Article 21) under the provisions.

It could be seen that the ASEAN – India Agreement on Trade in Goods is noted for the extensive tariff liberalization commitments undertaken. As elaborated in the objectives of the Agreement, the commitments are subject to special and differential concerns as well as flexibility to the parties to address their sensitive areas in trade in goods. The timeframes mutually agreed by the Parties are variable depending on the Party involved and their level of development. So also, the products are categorized according to their significance to the Parties allowing different modalities to be adopted and progressive liberalization with variable timeframes designated. The Agreement is noted for the lack of a Negative List Approach. The Exclusion Lists permitted are also subject to an annual tariff review with an object for improving market access. However, it has to be admitted that the ensuing Schedule of Commitments is complex and voluminous as it has endeavoured to incorporate divergent modalities and considerations depending on the parties as well as the subjective product categories and end dates for liberalization prescribed. Therefore, determining the precise commitments of a Party on a product category at a given point

of time becomes difficult and therefore a challenging task especially for the customs administration.

### V.6.2. India – Korea Comprehensive Economic Partnership Agreement

India has signed a Comprehensive Economic Partnership Agreement (CEPA) with Korea[51] on 7 August 2009. It is India's second comprehensive deal with any country, the first being with Singapore in 2005. This is also India's first such Agreement with an OECD country. It will come into force after it is ratified by the Korean National Assembly and the notifications to bring it into effect are made by the two countries (Department of Commerce 2009a).

The CEPA has the objective of expansion of the Parties domestic markets through the integration for accelerating their economic development and of promoting mutually beneficial economic relations. The important specific objectives of the CEPA are to liberalize and facilitate trade in goods and services and expand investment between the Parties; to explore new areas of economic cooperation and develop appropriate measures for closer economic partnership between the Parties. It also broadly affirms the commitment to fostering an open market economy in Asia and to encouraging economic integration of Asian economies in order to further the liberalization of trade and investment in the region. It further reaffirms to contribute to the expansion and development of world trade under the multilateral trading system embodied in the WTO Agreement.

The CEPA is more than a Free Trade Agreement as it covers, among other things, Trade in goods; Trade in Services; Measures for Trade Facilitation; Promotion, Facilitation and Liberalization of Investment flows; Measures for providing bilateral cooperation in identified sectors and other areas to be explored for furthering bilateral partnership. Under the CEPA, tariff are to be reduced or eliminated on 93 per cent of Korea's tariff lines and 85 per cent of India's tariff lines. It facilitates Trade in Services through additional commitments made by both countries to ease movement of Independent Professional and Contractual Service Suppliers. Both countries have committed to provide National Treatment and protect each other's investments to give

[51] The text of the Agreement is available at URL: http://commerce.nic.in/trade/INDIA%20KOREA%20CEPA%202009.pdf [Accessed 31 May 2010].

a boost to bilateral investments in all sectors except those specifically exempted from it (Department of Commerce 2009a).

The Chapter on Trade in Goods mainly provides that each Party has to reduce or eliminate its customs duties on the originating goods of the other Party in accordance with its Schedule to Annex 2-A (Article 2.4). There are various staging categories applicable to the tariff reduction or elimination of customs duties as under:

(i) EO category – Duties are eliminated on the entry into force

(ii) E5 category – Duties are removed in five equal annual stages beginning on the entry into force

(iii) E8 category – Duties are removed in eight equal annual stages beginning on the entry into force

(iv) RED category – Duties are reduced to one to five per cent from the base rate in eight annual stages

(v) SEN category – For India: Duties are reduced by 50 per cent of the base rate in 10 annual stages; For Korea: Duties are reduced by 50 per cent of the base rate in eight annual stages

(vi) EXC category – Duties are exempt from the obligation of tariff reduction or elimination

The detailed time table for tariff reduction or elimination is drawn out in Annex 2-A of the Agreement. The goods covered in the various categories are eligible for preferential tariff treatment provided they satisfy the rules of origin as set out in a separate chapter. The Parties are also required not to apply Non Tariff Measures that create unnecessary obstacle to trade in goods between the Parties, except in accordance with its rights and obligations under the WTO Agreement or in accordance with other provisions in the Agreement (Article 2.6). Each Party has to accord National Treatment to the goods of the other Party in accordance with Article III of GATT 1994 (Article 2.3). The restrictions to preferential tariffs envisaged are (i) Balance of Payment restrictions under Article XII of GATT 1994 (Article 2.8); (ii) General and Security Exceptions under Article XX and XXI of GATT 1994 (Article 2.9); (iii) Trade Remedies including Antidumping and Countervailing Duties (Section B-1) and Bilateral Safeguard Measures (Section B-2) and (iv) Technical Regulations and SPS Measures (Section C).

In order to facilitate trade under the Agreement, the Parties have agreed to a separate section on trade facilitation and customs cooperation. The underlying principle of the customs cooperation has been to adopt procedures that are simplified and harmonized on the basis of international standards while recognizing the balance between compliance and facilitation to ensure the free flow of trade and to meet the needs of the government for revenue and protection of the society (Article 5.1). Some of the measures envisaged includes maintaining simplified customs procedures for efficient release of goods (Article 5.2); automation of procedures (Article 5.3); adopting Risk Management Systems (Article 5.4); maintaining expedited procedures for Express Shipments (Article 5.5); ensuring transparency by publishing laws, regulations and procedures and providing inquiry points (Article 5.6); provision for Review and Appeal of decisions of the customs authority (Article 5.7); Advance Rulings (Article 5.8); Customs Cooperation Measures (Article 5.9); establishing Customs Committee to address customs-related issues (Article 5.10) and designating official customs contact points (Article 5.11) for effective implementation of this chapter, etc.

In trade in services, the Parties have agreed on separate Schedule of Specific Commitments containing horizontal as well as sector specific commitments undertaken, along with the terms, limitations and conditions agreed upon. The Chapter provides for National Treatment (Article 6.5) and for additional commitments with respect to measures affecting trade in services not subject to scheduling, including those regarding qualifications, standards or licensing matters (Article 6.6). The progressive liberalization provisions of the Agreement requires the Parties to review their Schedules of Specific Commitments once in every 3 years with a view to facilitating the elimination of substantially all remaining discrimination between the Parties with regard to trade in services covered in this Chapter over a period of time (Article 6.19).

In investment, the Agreement prescribes the rules and standards for treatment of investors and the investments of investors of the other Party. It provides for National Treatment to the investor as well as to the investments of the investors of the other Party (Article 10.3). It provides for "fair and equitable treatment" and "full protection and security" to the investment of an investor of the other Party (Article 10.4). It forbids performance requirements by the Parties (Article 10.5) and restricts such

requirements to appoint individuals of any particular nationality to senior management positions or any such requirement that materially impairs the ability of the investor to exercise control over its investment (Article 10.6). The Parties are also required to ensure absolute transparency in respect of its laws, regulations, administrative rulings and judicial decisions of general application as well as international agreements which pertain to or affect any matter covered by the Investment Chapter (Article 10.7). The principles contained in Articles 10.3, 10.5 and 10.6 do not apply to any non-conforming measure maintained by a Party at the central or regional level of government (set out in its respective Schedule to Annex I) or a local government, or such renewal or amendment to such measure. Also, these principles are not applied to any reservation for measures that a Party adopts or maintains with respect to sectors, sub-sectors or activities set out in their respective schedules to Annex II. The Parties have committed to undertake review of their respective Schedules of Reservations as a part of the review of the Agreement provided for. The Chapter on Investments contains other stipulations on Transfers (Article 10.10); Temporary Safeguard Measures (Article 10.11); Expropriation and Compensation (Article 10.12); Losses and Compensation (Article 10.13); Subrogation (Article 10.14); Special Formalities and Information Requirements (Article 10.15); Health, Safety and Environmental Measures (Article 10.16); Denial of Benefits (Article 10.17); Exceptions (Article 10.18); Access to Judicial and Administrative Procedures (Article 10.19) and other obligations (Article 10.20). It also contains provisions for Settlement of Disputes between the Party and Investor of the other Party (Article 10.21).

The Chapter on Competition in the CEPA aims to contribute to the protection of the benefits of trade liberalization through cooperation in the promotion of fair competition and to strengthen the Parties' cooperation and coordination on competition law enforcement. The Parties, upon request of either Party may enter into consultations in matters arising under the chapter including the elimination of anti-competition practices that affect trade or investment between them (Article 11.3). The Agreement prescribes cooperation between the Parties and consultation between the respective competition authorities for effective competition law enforcement (Article 11.4).

The Chapter on Intellectual Property Rights (IPRs) reaffirms the rights and obligations under the TRIPS Agreement and provides that each Party shall provide adequate and effective protection to intellectual property rights of the nationals of the other Party in its territory. It also stipulates that each Party may provide in its laws more extensive protection of IPRs than is accorded under the TRIPS Agreement, not inconsistent with the CEPA provisions.

The CEPA also provides for bilateral cooperation in areas like Trade and Investment Promotion, Energy, Information and Communication Technology, Science and Technology, Small and Medium Enterprises (SMEs), Infrastructure and Transportation, Audio-Visual Content, Textile and Leather, Pharmaceuticals, Tourism, Healthcare, Government Procurement, Renewable Energy Resources, etc.

The CEPA contains separate provisions for Dispute Settlement through consultations (Article 14.4), good offices, conciliation or mediation (Article 14.5) and establishment of Arbitral Panel (Article 14.6). The Agreement envisages a Joint Committee comprising the Minister of Commerce and Industry of India and the Minister for Trade of Korea or their designated officials to monitor or review the implementation of the Agreement.

### V.7. Trends in Indian Agreements and Future Strategies

The brief overview of Indian RTAs indicates that India has been increasingly in favour of RTAs in the recent times. In the foreword to India's Foreign Trade Policy 2009-2014, it has been declared that the recent engagements with Korea, ASEAN and MERCOSUR are a part of the India policy of market expansion and that India shall endeavour to deepen its trade engagement with other major economic groupings in the world (Government of India, 2009a). It could be said that there has been a noticeable change in the pattern of Indian engagement in RTAs in the current decade and a deliberate attempt towards greater economic integration via the regional route, often leading to questions on the determining motives behind such a policy shift. It has been considered that an answer to this question involves a multidisciplinary analysis covering political, strategic and economic dimensions (Mehta and Narayanan (2005); Farasat (2008)), beyond the scope of this study, but some of the possible reasons often cited are as under:

(a) One view is that India was lagging behind in the global trends of mushrooming RTAs and would have been left out of the global economic space if such initiatives were not launched (Mehta and Narayanan 2005);

(b) India's political ambitions in the South Asian region and the desire to emerge as a global power are often considered to have fuelled its pursuit of economic diplomacy through RTAs, the purpose being to extend its influence in the whole of Asian region and to effectively counter the influence of China in the region (Farasat 2008)

(c) The slow progress of negotiations at the WTO is also considered as a reason of India's shift towards regionalism (Farasat 2008). It is often considered as a natural process to resort to RTAs once the multilateral route is saturated (Shingal and Chaisse 2006). India's reluctance to be a part of the regionalization drive of the 1990s and the subsequent entry into the RTAs since mid-2003 or rather post the Cancun Ministerial (2003) are treated as evidence that the RTAs have became an attractive option on the perceived failure of the Doha Development Agenda (Farasat 2008; Chaisse et al. 2008).

(d) The potential of interactions at the regional level to enhance the capability of the developing countries to form better alliances at the multilateral fora is also said to have prompted India to use its regional alliances to yield better results for it at the WTO negotiations (Farasat 2008; Shingal and Chaisse 2006)

However, an objective assessment of the Indian practices reveals that India's engagement in the RTAs is not strictly driven by the traditional reasons[52] of countries preferring the RTAs. For India, it is not an 'alternative' route but a 'complementary' option that could strengthen the multilateral system – therefore, agreements within the permitted framework of GATT/WTO rules is preferred (WT/TPR/G/182 dated 18 April 2007). The 'RTAs for development' argument fostered by India could be witnessed from its engagement with the less developed countries in the initial years. India has been willing to give unilateral trade preferences[53] to smaller developing

[52] According to a study by Whalley (1996), some of the traditional or broad objectives of countries underlying the RTAs are (i) traditional trade gains to participating countries through reciprocal exchange of concessions on trade barriers; (ii) strengthening domestic policy reforms; (iii) increased multilateral bargaining power and (iv) multilateral and regional interplays to achieve negotiation objectives in the other fora.

[53] India has agreed to compensate the LDC members for revenue loss caused to them due to tariff reductions under the SAFTA (See, Article 11(e) of SAFTA). Similarly, under the Framework

countries under its agreements (Farasat 2008). It could be noted that Indian agreements do not follow a standard pattern – no two agreements are identical in scope and coverage – which could also point to the possibility that the strategies vary depending on the level of development of the participant countries. Also the nomenclature of the trade agreements varies from PTA to FTA, CEPA or BTIA and so on. There is also a noticeable trend of 'graduation' to a higher level of integration depending on the objectives of the agreement being met[54] - the principle being progressive liberalization commitments undertaken on the basis of performance.

However, the development versus growth debate has been plaguing Indian agreements for long. The economic viability of Indian agreements are often debated – it is often argued that the meager economic benefits that flow from some of its RTAs does not justify the administrative costs borne to allow trade under the RTA. Also, India has different RTAs with the same countries at different levels of implementation and on different terms which multiplies the administrative efforts and costs involved. It has therefore been suggested that it would serve well if India could consolidate its numerous RTAs in South Asia and Southeast Asia, into fewer, but truly regional and deeper RTAs (Farasat 2008). It is also often criticized that in the pursuit of "development" objective, the regional engagements have not benefited India as much, as the Asian counterparts have been eyeing the opening of Indian markets whereas India's market access in these countries have been limited. There have been complaints from domestic industry groups and sectors that their interests are at stake. Therefore, it would be ideal to undertake a methodical study of the impact of trade agreements and its feasibility before entering into further agreements. There have been suggestions for a coherent policy in which India should carefully adopt a common negotiating position for all its RTAs, including on crucial issues such as rules of origin, thus eliminating the piecemeal problems that keep surfacing repeatedly in operationalizing each of its RTAs (Farasat 2008). This formalization of Indian policy on RTAs is essential as India is proceeding with comprehensive

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Agreement on Comprehensive Economic Co-operation between India and ASEAN, India is allowing the new ASEAN member (Cambodia, Laos, Myanmar, Vietnam) a longer period to reduce their tariff barriers and had also proposed to give unilateral concessions to them on 111 tariff items under its Early Harvest Programme (EHP). India has also fulfilled its commitments ahead of the time schedule in its agreement with Sri Lanka.

[54] Like from SAPTA to SAFTA or from a Framework Agreement to a FTA/PTA (as sought in the case of Thailand); or from a PTA to FTA (as sought in the case of Chile); from a FTA to a CECA (as sought in the case of Sri Lanka).

agreements with the developed countries (like those with Japan, Korea, etc. and negotiations with the EU and the EFTA), for substantial market access. So also, India is seen increasingly focusing on the need to include disciplines in services, investment etc. in its regional arrangements, where it has substantial gains.[55] Clearly, the Indian practice on RTAs is expected to undergo a significant change in the coming years which rightly illustrates the significance for an examination of its agreements for their adherence to multilateral rules and also for devising better strategies consistent with Indian principles and policies on RTAs.

### V.8. Conclusion

The Indian policy on international trade has always been in favour of a rule-based, fair and equitable global multilateral trading system. However, after an initial reluctance, India has also joined the growing trend towards regionalism of the past decades by engaging proactively in several bilateral and regional trade agreements. India has understood that the question is not of a choice between multilateralism and regionalism but of striking an equitable balance between the two. Over the years, it has tried to illustrate that the engagement in regionalism does not necessarily have to weaken the multilateral system. As often elucidated in the objectives of some of its agreements, it considers that 'regional trade agreements can contribute towards accelerating regional and global liberalization and as building blocks within the framework of the multilateral trading system.' It has supported the positive effects of regional groupings that are consistent with the principles of multilateral trading system and also, the special needs of developing countries enunciated in the Enabling Clause. In fact, it has considered the potential impact of RTAs on the multilateral framework and stressed on addressing the issues of concern emerging on account of formation of RTAs including their impact on development.

India has specifically proposed for clear disciplines under Article XXIV, flexibilities to developing countries, enhanced transparency, addressing of important areas like rules of origin, TBT and SPS regulations and trade defence measures and to extend

[55] In fact, India's three-pronged RTA strategy prescribed includes – (i) compensate for loss in goods sector by gain in services (or even attracting FDI); (ii) within the goods sector, loss in some sectors (due to tariff reduction) is to be compensated through effective market access of other products in which India has potential advantage; (iii) identification of India's specific interest in the partner country (which may be commercial, regional development or political (Chaisse et al. 2008).

the emerging disciplines on all RTAs. The convergence between the RTAs and the multilateral trading system as per the Doha mandate has been an increasing concern. It is India's view that, as an attempt to strengthen the WTO, its engagement with the RTAs has to be expanded. Accordingly, it has recommended for implementing a permanent WTO Transparency Mechanism with inbuilt provisions for periodic review, preparation of Annual RTA Review and developing non-binding best practices guidelines on various aspects of RTAs for reference by members in negotiating future RTAs. It is thus, India's view that the WTO has to actively engage in the issue if it is to remain the fulcrum of global trading system.

The Indian practices in RTAs present a totally vivid picture with a number of agreements in different levels of completion. An examination of the RTAs reveals that one of the prominent features of the Indian RTAs is that no two agreements are similar in its nature and scope as well as in the legal issues involved. In fact, one can identify a progressive evolution or development in the Indian agreements in their disciplines and strategies. The Bangkok Agreement signed in 1975 is no way comparable to the most recently entered Comprehensive Agreement with Korea (2009). Some of the common disciplines and strategies of the agreements are as under:

It is seen that most of the agreements cover only trade in goods. Only the agreements with Singapore and Korea contain specific commitments as on date in services and investments though negotiations for expansion are due in the case of APTA, Sri Lanka and ASEAN agreements. The modalities for tariff liberalization in goods has been variable – earlier, it was through a limited positive list of items (as in APTA, GSTP, Afghanistan as well as the more recent MERCOSUR and Chile agreements) except in agreements with Sri Lanka and Singapore which contains both positive and negative lists. SAFTA contains a negative list approach. The recent agreements with ASEAN and Korea have more extensive product coverage enlisting the tariff lines with different modalities or staging categories, with due consideration for sensitive lists and exclusion of items. The Agreement with Bhutan is broadly constructed with the stipulation for 'free trade and commerce' between the parties. It is also seen that most of the agreements consider elimination of non-tariff measures as well. Certain agreements (like Afghanistan) do not contain the provision for periodic review or

expansion of commitments in the future. Some provide for further negotiation or consultation on additional or more favourable benefits entered into with non-parties. Another noticeable feature is the inclusion of trade facilitation and customs cooperation as an important area of concern in the agreements.

Most of the agreements (except Bhutan) contain the rules of origin applicable as a separate Annex. In more recent agreements (like SAFTA, Singapore, Korea etc.), one can find Product Specific Rules of Origin as well as detailed procedural requirements enclosed in the Annexes. Preferential safeguard provisions have also expanded into separate Annexes along with detailed Dispute Settlement Mechanisms. Often the scope for expanding the agreement into FTA or CECA in the future explains the rationale for such detailed provisions in spite of the limited product coverage envisaged.

The restrictions on tariff preferences are generally seen to include preferential safeguards, Balance of Payment restrictions, antidumping and countervailing duties, general exceptions, security exceptions etc. However, different agreements reveal different standards of reconciliation of these measures with the corresponding GATT/WTO rules. In earlier agreements (like APTA) these measures were only to be compatible to the WTO standards as far as practicable. In some agreements, certain concepts like 'National Treatment' and 'customs valuation' were defined as is provided for in GATT 1994. Such references for incorporating multilateral standards and concepts into the RTAs are commendable. The terms like 'as enshrined in', 'as is provided for', 'as understood in', 'be consistent with', 'in accordance with', 'be governed by', 'abide by' etc are used to denote varying levels of commitments to the GATT/WTO provisions. The more recent agreements (like ASEAN and Korea) indicates that such and such provision of GATT/WTO 'shall be incorporated, *mutatis mutandis*, into and form an integral part of this Agreement.' Thus, one can find that while some agreements pursue strict adherence to multilateral rules and standards, some others adopt the 'multilateralizing regionalism' strategy but exceeds the GATT/WTO standards in specific areas.

However, one pertinent criticism of the Indian RTAs is that they are not fully consistent with the multilateral rules. Though the trend of 'multilateralizing regionalism' is traceable to some of its recent agreements, it is apparent that there are

certain lacunae in these RTAs. More importantly, India has envisaged most of the RTAs pursuant to the Enabling Clause which is often considered as an attempt to retain the flexibilities available under it. It is often criticized that none of the Indian agreements would stand as against the stricter disciplines of Article XXIV. Even the India – Singapore CECA, which is presently the only agreement notified pursuant to Article XXIV (as well as GATS Article V), has been subject to serious criticism in the CRTA for its apparently insufficient coverage of the 'substantially all the trade' requirement. Therefore, it has to seriously doubted if the level of compliance of the Indian agreements with the true spirit of the multilateral disciplines is grossly insufficient.

At the policy level also, there have been several criticisms regarding the incompatibility between development and growth, economic viability, implementation and consolidation of the agreements and more importantly on the lack of a comprehensive and coherent trade policy on RTAs. It could be said that the formulation of a clear and concise policy strictly in accordance with the GATT/WTO disciplines is likely to guide India's future engagements in the RTAs strictly in accordance with the multilateral rules. It is therefore necessary that adequate legal and policy measures are adopted in the Indian scenario to truly develop its RTAs as an alternative window of trade liberalization and development that complements the multilateral disciplines.

## TABLE V.2

## INDIA'S REGIONAL TRADE AGREEMENTS

| Sl. No. | Name of the RTA | Type of RTA | Coverage | Status | Date of signature | Date of entry into force | WTO Legal coverage | Date of Notification to GATT/ WTO | WTO Consideration Process |
|---|---|---|---|---|---|---|---|---|---|
| 1 | APTA* | PTA | Goods | In force | 31/07/1975 | 17/06/1976 | Enabling Clause | 02/11/1976 | Report Adopted |
| 2 | GSTP* | PTA | Goods | In force | 13/04/1989 | 19/04/1989 | Enabling Clause | 25/09/1989 | No Report |
| 3 | SAPTA* | PTA | Goods | In force (Concessions to continue till SAFTA becomes full fledged FTA on 01/012015) | 11/04/1993 | 07/12/1995 | Enabling Clause | 21/04/1997 | Factual Abstract Distributed |
| 4 | India – Sri Lanka* | FTA | Goods | In force (Negotiations on for CEPA) | 28/12/1998 | 15/12/2001 | Enabling Clause | 17/06/2002 | Factual Abstract in Preparation |
| 5 | India – Afghanistan* | PTA | Goods | In force | 06/03/2003 | 13/05/2003 | Enabling Clause | 08/03/2010 | Factual Presentation in Preparation |

| | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| 6 | India – Thailand** | Early Harvest Scheme | 82 items | Negotiations for CECA on going | 01/09/2004 | 01/09/2004 | - | - | - |
| 7 | MERCOSUR – India* | PTA | Goods | In force | 25/01/2004 | 01/06/2009 | Enabling Clause | 23/02/2010 | Factual Presentation in Preparation |
| 8 | SAFTA* | FTA | Goods | In force | 06/01/2004 | 01/01/2006 | Enabling Clause | 21/04/2008 | Factual Presentation in Preparation |
| 9 | India – Singapore* | FTA & EIA | Goods & Services | In force | 29/06/2005 | 01/08/2005 | GATT Article XXIV, GATS V | 03/05/2007 | Factual Presentation Distributed |
| 10 | India – Bhutan* | FTA | Goods | In force | 28/07/2006 | 29/07/2006 | Enabling Clause | 30/06/2008 | Factual Presentation in Preparation |
| 11 | Chile – India* | PTA | Goods | In force | 08/03/2006 | 17/08/2007 | Enabling Clause | 13/01/2009 | Factual Presentation Distributed |
| 12 | Republic of Korea – India* | FTA & EIA | Goods & Services | In force | 07/08/2009 | 01/01/2010 | GATT Article XXIV (by Korea); GATS V (by both); Enabling Clause (by India) | 01/07/2010 (by Korea) & 29/09/2010 (by India) | Factual Presentation in Preparation (for goods and services) |

| | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| 13 | ASEAN – India* | FTA | Goods | TIG Agreement in force (Negotiations on for services, investment) | 13/08/2009 | 01/01/2010 | Enabling Clause | 19/08/2010 | Factual Presentation in Preparation |
| 14 | India – Nepal* | Partial Scope Agreement | Goods | In force | 27/10/2009 | 27/10/2009 | Enabling Clause | 02/08/2010 | Factual Presentation in Preparation |
| 15 | India – Japan** | CEPA | Goods & Services | Signed | 16/02/2011 | Not known | - | Not notified as on date. | - |
| 16 | India – Malaysia** | CECA | Goods & Services | Signed | 18/02/2011 | 01/07/2011 | - | Not notified as on date | - |
| 17 | BIMSTEC# | FTA | Goods | Negotiations commenced on 7/09/2004 | - | - | - | Early Announcement to WTO | - |
| 18 | India – SACU# | PTA | Goods | Negotiations commenced on 5/10/2007 | - | - | - | Early Announcement to WTO | - |
| 19 | EU – India# | BTIA | Goods, services, etc. proposed | Negotiations commenced on 28/06/2007 | - | - | - | Early Announcement to WTO | - |
| 20 | EFTA – India# | BTIA | Goods, services etc. proposed | Negotiations commenced on 06/10/2008 | - | - | - | Early Announcement to WTO | - |

| | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| 21 | India – GCC | FTA | Goods, services, etc. proposed | Framework Agreement signed in 2004 | - | - | - | - | - |
| 22 | India – Mauritius | CECPA | Goods, services etc. proposed | MoU on PTA signed | - | - | - | - | - |
| 23 | India – China | RTA | Goods, services, etc. proposed | JTF finalized draft report in October 2007 | - | - | - | - | - |
| 24 | India – New Zealand | FTA/ CECA | Goods, services, etc. proposed | Joint Study Report on 30/03/2009 | - | - | - | - | - |
| 25 | India – Indonesia | CECA | Goods, services, etc. proposed | JSG Report on 15/09/2009 | - | - | - | - | - |
| 26 | India - Australia | FTA | Goods, services, etc. proposed | JSG Report on 04/05/2010 | - | - | - | - | - |

Source: WTO RTA Database (2011), Department of Commerce (2010)

* indicates the Agreements signed and notified to the GATT/ WTO
** indicates the Agreements signed but not notified to the WTO as on date
# indicates Agreements announced to the WTO as on date

## Chapter VI

## Regional Trade Agreements: Incorporating WTO-Plus Agenda

### VI.1. Introduction

In the previous chapters attempt has been made to discuss the substantive contents, meanings and scope of Article XXIV and some of the GATT and WTO era cases that had an occasion to deal with aspects of RTAs. The previous chapter examined the Indian approach and practice in RTAs. In the present chapter an attempt is made to deal with standards that feature in many RTAs. Some of these standards go beyond what WTO standards envisaged and are therefore termed as 'WTO-Plus' provisions.

'WTO-Plus' provisions and standards are the exclusive feature of many modern RTAs. WTO-Plus refers to commitments and undertakings which go beyond the required legal standards under various Covered Agreements of the WTO. Some of these provisions demand more commitments compared to the existing ones while some other provisions shelve the available flexibilities in the WTO. Some of these features appear to downplay the flexibilities guaranteed for developing and less developed countries by the GATT/WTO, aimed at enabling the developing and the less developed countries to integrate to the global economy. It is important to examine how these WTO-Plus issues affect the multilateral trading system. It is often argued that these issues are in fact laboratories for testing new standards, disciplines and commitments prior to their application at the multilateral level. However, it is also observed that the WTO-Plus agenda in RTAs is intended to set new standards and disciplines which were either rejected or unsuccessful in the multilateral forum, thus amounting to overlapping or bypassing the multilateral consensus. The WTO-Plus issues in RTAs largely precipitate in the areas of Trade Related aspects of Intellectual Property Rights (hereinafter TRIPS), General Agreement on Trade in Services (hereinafter GATS) and on some of the Singapore issues like investment and competition policy, which are considered as unfinished business in GATT.

It should be noted that the TRIPS and GATS constitute important elements in deciding trade-flows. Interestingly, these regulations are, in many ways, region or State-specific, needing implementation mechanism at the regional and state levels.

Accordingly, it should be further noted that majority of modern RTAs incorporate provisions relating to these areas. This chapter, therefore, examines the TRIPS-Plus and GATS-Plus provisions in RTAs.

## VI.2. TRIPS Plus

The effort of the developed countries to push the Intellectual Property Rights (hereinafter, IPRs) agenda at a multilateral level was unsuccessful and came to a standstill with the failure of the Seattle Ministerial in 1999.[1] Thereafter, these countries shifted the focus of their efforts from multilateral to bilateral and regional forums like free trade agreements. The increased interest of the countries to negotiate regional trade agreements, especially in the last two decades, obviously for a variety of reasons[2] has acted as a stimulus in the effort of these developed nations to achieve stronger IPR protection. It is to be noted that the developed countries are pushing for a stronger IPR regime, while many developing countries are still struggling to implement their existing obligations under TRIPS. The IPR related chapters of the FTAs set forth obligations to provide protection for various subject matter, including expressive work (protected by copyright), trade marks, geographical indications, inventions and data. Some exceptions as in the TRIPS Agreement also appear attached with some provisions in FTAs. In a number of cases, the exceptions in the FTAs are narrower than those allowed by the TRIPS Agreement. The problem potentially created for developing countries by the adoption of these IPR provisions in fields such as public health have been widely noted (Abbot 2005). Many developing countries are yet to implement basic TRIPS standards mandated by the WTO. In these circumstances, it is difficult to understand the purpose of imposing even more rigorous and complex undertakings on developing countries. It appears that the developing countries which enter into these FTA commitments may immediately be in default of their obligations and then make them vulnerable to trade related claims by the developed countries and its industry groups.

[1] For more details of the Seattle Ministerial Conference, see the WTO website at URL: www.wto.org/english/thewto_e/minist_e/min99_e/min99_e.htm [Accessed on 6 February 2010].
[2] See discussion in Chapter II on the motivations for regionalism.

The understanding on the evolution of IPRs will enable us to comprehend the present illogical trend of TRIPS-Plus[3] propounded by the developed nations. When one broadens the scope of review, it becomes clear that TRIPS is not the definitive agreement on IPRs, but instead represents one part of a larger cycle in which developed countries engage in bilateralism, regionalism and multilateralism to advance their interests and secure concessions from other nations particularly developing nations. This perspective is substantiated by the long history of international Intellectual Property (hereinafter IP) policy making impact upon "trade interests" (Okediji 2003). Earlier IPRs (and other trade-related interests) were granted nationally and applied in a discriminatory manner in an effort to develop domestic manufacturing and export facilities. Realizing the inefficiencies of the system, the principles of MFN and National Treatment (NT) became features of early bilateral, commercial and Friendship, Commerce and Navigation (FCN) agreements, to which IPRs were included (Mercurio 2006: 217). By 20th century trading nations had created a number of trade agreements with IPR provision in which MFN and NT applied bilaterally. The complexities arose out of these agreements made the trading nations realize the need for a formal international framework. *Paris Convention for the Protection of Industrial Property*[4] (1883) (patents, trade marks and industrial designs) and the *Berne Convention for the Protection of Literary and Artistic Works*[5] (1886) (Copyright) are outcomes of efforts in this direction. The World Intellectual Property Organization (WIPO) was created subsequently to supervise and administer these and other IP treaties.

As the GATT 1947 failed to encompass all the topics traditionally covered by the FCN treaties, countries shifted their focus to bilateralism and negotiated Bilateral Investment Treaties (BITs) to protect a range of private rights including IPRs. The BITs negotiated in the 1970s and early 1980s represented a return to bilateralism in IPRs by providing more detailed provisions relating to IP (Mercurio 2006: 217).

[3] TRIPS-Plus refers to provisions which go beyond the TRIPS standards as agreed in the WTO and new disciplines, areas and subject matter which are not covered by TRIPS Agreement. One view is that there are two kinds of extended IP protection in trade agreements. The two kinds are so-called WTO-Plus or TRIPS-Plus measures that is, areas which are already covered by a WTO agreement like TRIPS and are simply strengthened, for example by a longer term of protection, and "WTOx" or "TRIPSx' measures which are new areas of coverage beyond the original scope of the WTO.

[4] See Paris Convention for the Protection of Industrial Property, 20 March 1883, 828 UNTS 107 as last revised at the Stockholm Revision Conference, 14 July 1967, 828 UNTS 303.

[5] Berne Convention for the Protection of Literary and Artistic Works (Paris Act), 9 September 1886, 1161 UNTS 30, revised 24 July 1971.

Initially, the WIPO was favoured by the developed nations, however later they started viewing WIPO as a developing country dominated institution incapable of adequately protecting there interest in IPRs. Therefore it became an unacceptable forum to the developed countries and the proliferation of BITs continued (Braithwaite and Drahos 2000). As a result of the recession and other related turbulence in 1970s and early 1980s, developing countries allowed their multilateral advantage to erode and developed countries orchestrated a shift away from multilateralism. This forum shift occurred mainly as a result of the failure of the BITs to effectively protect IPRs up to the standards of the developed nations (Mercurio 2006: 217).

The US has been the leader in this forum shift. IPRs have been an international policy priority for the US, as they have a comparative advantage for IP over other areas. It was during this forum shift that the strong protection and exploitation of IPRs was meaningfully linked with international trade. The US strengthened the link between IPRs and international trade regulation and took several steps to fortify its dominance in the area, including by naming transgressor countries, designating a 'priority watch' list in the annual *USTR National Trade Estimates Report*, applying pressure through bilateral negotiations and by filing cases and obtaining favourable decisions or concessions on the basis of unfair acts under section 301-310 of the US Trade Act, 1974 (even though the actions of foreign company/country violated no international law) (Sykes 1992). After being unsuccessful to obtain an agreement on trade in counterfeit goods in the Tokyo Round (1979) and in the face of strong resistance from the part of developing countries to include IPRs in the Uruguay Round, the US shifted away from the perceived ineffectiveness of multilateralism through WIPO by negotiating for IPRs into the North American Free Trade Agreement (NAFTA) and by linking IPRs to its Generalized System of Preferences (GSP) programme granting preferential access to US market (Mercurio 2006: 218). Thus the 1980s and early 1990s witnessed a surge of bilateralism through BITs.

Since the mid-1980s, the US and EU have used a combination of unilateral pressure and forum shifting from bilateral agreements to multilateral standard setting and then to bilateral and regional arrangements for securing trade concessions including stronger IP protection from developing countries. The resurgence of the US and EU interest in bilateral and regional free trade agreements is viewed as a response to the

emergence of a strong and assertive group of developing countries at WTO which has made it harder for the US and EU to achieve their negotiating goals in the WTO forum (Ruth 2005).

Later with the support of industrialized nations like EC, Switzerland and Japan, the US and other developed countries eventually managed to get IP on the negotiating table in the Uruguay Round and successfully negotiated a more uniform system not only providing more protection, but also an adequate remedy in the form of a binding and enforceable dispute settlement mechanism. This was a come back of the US to the multilateralism. The TRIPS Agreement has comprehensive coverage and includes several sections of IPRs like copyright, trade marks, geographical indications, industrial designs, patents, layout-designs of integrated circuits, and protection of undisclosed information etc. Similar to other covered agreements of WTO, TRIPS also provides for MFN and NT. The agreement on TRIPS sets the minimum levels of protection that each member must provide and grant to other nations. In setting the standards, the TRIPS incorporated substantive obligations of WIPO, the Paris Convention, the Berne Convention and certain provisions of the *Treaty on Intellectual Property in Respect of Integrated Circuits*[6] and the *Rome Convention.*[7] TRIPS also contains standards in areas either not addressed or sufficiently covered in WIPO agreements. TRIPS established the minimum standards to be implemented in respect of IPRs and members may apply higher levels of protection if they so desire, so long as the principles of MFN and NT are respected.

The TRIPS Agreement which became part of WTO in 1994 paved the way for immense debate and protests. While the developing countries demanded for more flexibilities and concessions, developed countries felt that many of their goals are still left unrealized. It is often observed that:

> While the criticisms of TRIPS from a development perspective are well known, developed countries also failed to achieve all their goals in the Uruguay Round and, perhaps due to constant lobbying of IP holders, increasingly argue that multilateral standards are insufficient to protect their interest..., the US and other developed nations sought to negotiate higher levels of WTO IP protection in the late 1990s. Developing countries organized to resist these efforts, which not only contributed to the collapse of the Seattle

[6] 28 ILM 447 (1989).
[7] 6 UNTS 44 (1961)

> Ministerial, but later the confirmation of the flexibilities built into the TRIPS via the Doha Declaration on TRIPS and Public Health and a prolonged Doha Round (including the failure of the Cancun Ministerial in 2003). As a result of the strong and unwavering resistance, the US has again shifted its negotiating focus and sought to use bilateralism/ regionalism to increase IPRs, by requiring FTA partners to implement TRIPS-Plus provision.... (Mercurio 2006: 219).

During 1986-1993 when the TRIPS arrangement was negotiated, it was expected that the United States would ease off negotiating intellectual property standards bilaterally. The following statement by the Director for Intellectual Property at the Office of United States Trade representation (USTR) speaks this fact:

> "What happens if we fail [to obtain TRIPS]? I think there are a number of consequences to failure. First, will be an increase in bilateralism. For those of you who think bilateralism is a bad thing, a bad thing will come about" (Simon 1989: 370).

It was expected that the signing of TRIPS will put an end to the pushing of bilateral trade agreements with intellectual property standards. However, there has been no apparent decline in US bilateral activity on intellectual property. In fact, the bilateral activity by the United States has increased (Drahos 2002: 791). This is consistent with the broader trend identified by John H .Jackson in the US trade policy in which the US has moved away from its earlier support for multilateralism and most-favoured-nation (MFN) treatment to "a more pragmatic - some might say adhoc approach of dealing with trading partners on a bilateral basis, and rewarding friends."

The forum was again shifted to bilateralism/regionalism for a greater achievement on IPRs. The idea of the US and developed world was to consolidate the gains at multilateral level and move to another forum (bilateralism/regionalism) to seek additional gains. This is precisely for the reasons that, multilateral gains are always, to some extent, small and resemble the least minimum standard that could be achieved when a large number of varied options and interests attempt to achieve consensus. This is particularly true with the case of WTO as every member, irrespective of there size or strength can veto a decision making process at any stage as consensus is required. Thus the multilateral forum became unattractive for the US in pursuing their IPR interests. When the US was unable to gain concessions through multilateral negotiations due to, among other reasons, consensus decision making, it simply shifted the parameters and side stepped multilateral impediments (the 'wont do'

countries) through bilateral/regional agreements with those 'can do' countries willing to make concessions in order to secure a potentially lucrative agreement with the most important market in the world (Zoellick 2003).

Another reason for the forum shift is that the multilateral agreements including the TRIPS contain special and differential treatment and other opt-out clauses which result in unfulfilled negotiating goals. The observation of a commentator on the forum shift by the US in this context is relevant.

> From the United States' stand point, the switch to bilateralism has at least two benefits. By changing the forum and reducing the number of negotiating parties, the United States can provide side payments that it would not be able to offer in a multilateral forum, given the diversity of interests the United States has vis-à-vis the contracting states. By switching to bilateralism, the United States can also prevent less developed countries from reopening the TRIPS negotiations with a better bargaining position (Yu 2004: 395-396).

The TRIPS-plus provisions introduced by the US in many FTAs, are designed to best protect the domestic interest of US. Most of these provisions are identical to the corresponding provisions in the US domestic law. US has strong IPR legislations which provide higher level of protection to IPRs domestically. Further, it has kept monitoring enforcement of IPRs internationally, through the special 301 Report.[8] Regionally and multilaterally, the US has always been at forefront of IPR negotiations. Bilaterally, even before the completion of the TRIPS Agreement, the US concluded its bilateral agreement with Canada[9] in which IPR featured prominently. The US had a particular concern about the liberal Canadian policies in allowing compulsory licensing in support of its domestic pharmaceutical generic industry. Again in NAFTA, the Chapter on IPR is an important component of the treaty which provides for standards close to that of the TRIPS Agreement (Roffe 2009).

It is not a hidden fact that the promotion of an IP regime that reflects a standard of protection similar to that found in the United States Law is the negotiating objective

[8] The special 301 Report is part of the Trade Act which orders the US Trade Representative to produce an Annual Report which is the first step in imposing trade sanctions on countries which systematically damage the interests of US IPR holders. India and many other US trade partners such as Canada, Mexico and many developing countries are listed in the priority watch list. See Special 301 Report at www. ustr. gov /assets/document_library /reports_publications/2005_ special_301/asset/upload_file195_7636. pdf [Accessed on 7 February 2010].

[9] Canada-US Free Trade Agreement entered into force on 1 January 1989.

of the US. This can be found in the law empowering the President to conclude trade agreements (Trade Promotion Authorities or so called 'fast track').

### VI.2.1. Trade Promotion Authority (Trade Act of 2002)

The US Trade Act of 2002[10] lays down the principal negotiating objectives of the US regarding trade related intellectual property. The Act asserts the need to further promote adequate and effective protection of IPR. In achieving the above object it reaffirms the need to ensure accelerated and full implementation of the Agreement on TRIPS reflected in section 101(d)(15) of the Uruguay Round Agreement Act (Section 2102 of Trade Act 2002), particularly with respect to meeting enforcement obligations under that agreement (Trade Act 2002: section 2102:4A(i)(1)). Further, it provides that any multilateral or bilateral trade agreement governing IPRs that is entered into by the US reflect a standard of protection similar to the one found in US Law (US Trade Act 2002: section 2102:4(A)(i)(II). The Act provides for the need for strong protection for new and emerging technologies and new methods of transmitting and distributing products embodying IP, the need to prevent or eliminate discrimination with respect to matters affecting the availability, acquisition, scope, maintenance, use and enforcement of IPR (US Trade Act 2002: Section 2102:4(A)(ii) and (iii)). The Act cautions the negotiators to ensure that standards of protection and enforcement keep pace with technological developments and in particular ensuring that the right holders have the legal and technological means to control the use of their works through the internet and others global communication media, and to prevent the unauthorized use of their works and it also emphasizes on the need for expedition and effective civil administrative and criminal enforcement mechanisms (US Trade Act 2002: section 2102 4(A)(iv) and (v)). The Act also refers to the Declaration on the TRIPS Agreement and Public Health[11] adopted by the WTO at the Fourth Ministerial Conference at Doha, Qatar on 14 November 2001 and urges to respect the Declaration.

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[10] US Trade Act 2002 is available at URL: http://www.twnside.org.sg/title2/FTAs/General/USBipartisanTradePromotionAuthorityActFromp993.pdf [Accessed on 7 February 2010]

[11] Doha Declaration on TRIPS and Public Health available as WTO Document WT/MIN(01)/DEC/2 dated 20 November 2001. The document is available at WTO website at URL: www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm [Accessed on 7 February 2010].

The above referred sources are the guidelines for US in their approach towards IPRs in RTAs. In other words, the trade policies of the US shows how keen and committed are they in pushing the TRIPS-Plus through RTAs. Moreover, the term TRIPS-Plus itself is evolving and not fixed (El-said and El-Said 2005: 78). Although, the US uses TRIPS-Plus as a general frame work in its bilateral treaties, the intensity and influence varies in case of different countries. Hence, the US bilateral agreements are acquiring an accumulative nature, consolidating along the way with each new agreement. New countries completing FTAs with the US should, therefore expect to see more conditions imposed on them (El-said and El-Said 2005: 78).

Unlike in the 1960s and 1970s when increased standards (such as investment and IP protection) were cast in terms of assisting development, namely through BITs, the current bilateralism un-ashamedly seeks to fragment developing country coalitions while at the same time taking advantage of unequal bargaining power in bilateral negotiations (Mercurio 2006: 221). It can be found that the US has employed a strategy of dividing developing country coalitions and negotiating with those who are willing to negotiate. In implementing this strategy, the US is excluding the leading G-20 members from FTA negotiations and involving other developing countries by conditioning GSP access to increased IP protection. Developing countries are falling prey to this strategy as they do not hesitate to trade off IPRs in exchange of market access. In this context, it is worth mentioning the observation of the Canadian scholar Michael Geist in the context of copyright that

> 'Developing countries such as the Dominican Republic view the inclusion of stronger copyright protection as a costless choice. For those countries the harm that may result from excessive copyright controls pales in comparison to more fundamental development concern and they are therefore willing to surrender copyright policy decision in return for tangible benefits in other trade areas' (Geist 2003).

However, it in unfortunate that these countries are not realizing the economic and social cost of the obligations they are taking in the hope of market access. Developing countries would generally be eager to make more concessions on IPR than TRIPS standards if the other party, a developed country, gives assurance that a larger market access will be granted. FTAs are indeed a way to make developing countries comply with TRIPS provisions or even having them to commit further, despite the fact that this impact of IPR on developing economies seems to most economists to be very

mitigated (Maskus 2000). The multiplication of RTAs containing IPR provisions leads developing countries be go beyond their commitment under TRIPS Agreement. The principle of minimum standards plays a vital role in this strategy. Each bilateral or multilateral agreement dealing with intellectual property contains a provision to the effect that a party to such an agreement may implement more extensive protection than is required under the agreement or that the agreement does not derogate from other agreements providing even more favorable treatment (Drahos 2002: 765). This means that each subsequent bilateral or multilateral agreement can establish a higher standard. That's what Drahos (2002) calls the "global IP ratchet": "The global ratchet for IPR consists of waves of bilaterals followed by occasional multilateral standard setting. Each wave of bilateral or multilateral treaties never derogates from existing standards and very often sets new ones" (Drahos 2002). According to Drahos, the 'ratchet' is dependent upon three factors. First is the forum shift, i.e. the standard setting agenda must be shifted from a forum where difficulty is being encountered to a more amenable forum. In IP the forum shifting (bilateralism to multilateralism and vice versa) has taken place several times compared to other aspects of international trade. For example, in 1980s industrialized countries objected to the increasing domination of WIPO by developing countries and responded by including IPRs in BITs (and later FTAs) and later the developed countries pushed and managed to set the IP tabled at Uruguay Round hence coming back to multilateralism. Since they could not further strengthen IPRs multilaterally, in the face of protest of developing countries, they again shifted the forum back to bilateralism and regionalism in order to push their agenda. Second, there must be link and coordination of bilateral and multilateral IP initiatives and strategies. For example, US negotiate BITs/FTA, requiring other parties to comply with certain unilateral IP standards. Such policies ensure and expedite compliance with TRIPS, while at the same time force certain developing countries to relinquish their rights granted by TRIPS. For example, Nicaragua agreed to forego its implementation period and immediately comply with its TRIPS obligations in exchange for preferential access to the US market and increased prospects of foreign direct investment (Rajkumar 2005: 450). Finally, to consolidate and the ratchet to take hold, resetting of minimum standards is required. It is achieved through multilateral entrenchment. Many of the US FTAs explicitly

commit the parties to the agreement to provide adequate and effective protection of IPRs in accordance with 'the highest international standards'[12] The setting of minimum standards in each agreement is important because the minimum standards clauses can ratchet up the lowest level of protection with each subsequent bilateral or multilateral agreement. While such standards are not clearly defined or mentioned in TRIPS, it has long been thought that such notations refer not to the standards existing at the time of negotiation but to any standards which subsequently emerge as a matter of international practice (Drahos 2001).

Another factor to be examined is the legal implications of these provisions (TRIPS-Plus) in the context of MFN clause in TRIPS. Article 4 of TRIPS states that any member which grants 'any advantage, favour, privilege or immunity' to the nationals of *any* other country (whether that country be a member of the WTO /TRIPS or not) must accord the same treatment to the nationals of other members of TRIPS.[13] The clause operates in a relatively unqualified way because, unlike Article XXIV of the GATT, which may serve to exempt FTAs from the operation of MFN, TRIPS does not contain a similar provision; thus, the principle of MFN applies to FTAs. For example, if the US and a developing country member negotiate an FTA, the developing country is under obligation to extend the same treatment including the IP concessions as agreed in the FTA to all other nations under the MFN clause. Thus the MFN clause in TRIPS clearly serves to 'ratchet up' international IP standards. Therefore those nations negotiating for TRIPS-Plus provisions are at the same time utilizing the MFN principle to harmonize the protection of IP rights, resulting in more far reaching implications than FTA provisions dealing with, for instance, goods (Mercurio 2006: 223)[14]. Therefore, if enough FTAs are negotiated containing TRIPS-Plus provisions, these provisions will essentially become the new minimum standard from which any future WTO trade round will proceed (Mercurio 2006: 223). Then the TRIPS Plus obligations undertaken by individual countries are not only affecting them but are having a larger impact on the international IP regime, which could be prejudicial to the interest of developing countries.

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[12] See, US FTAs with Jordan (Art 4(1)); Morocco (Art. 15 (ii)); Bahrain (Art. 4(i)(ii)); Singapore (Art. 16 (I) (II)); Australia (Art. 17 (i)(ii)); Chile (Art.17(i)(i)) etc.

[13] Emphasis added

[14] There are also divergent views that developing countries may not fully appreciate this point of difference with GATT (Ruth 2005).

### VI.2.2. MFN Clause: TRIPS and RTAs

The aim of the GATT and its intellectual property specific sub-agreement TRIPS is to facilitate free trade throughout the international economic community. Both GATT and TRIPS call for National Treatment of signatory countries' goods and even more importantly, MFN treatment for all the members. Though, GATT and TRIPS have facilitated free trade through their requirements for national treatment and MFN, there are exceptions created within each. Article XXIV is the provision in GATT providing exception to RTAs from MFN treatment. Similarly, TRIPS Article 4 contains exception for MFN treatment. The Article 4 of TRIPS provides that there is an exemption from TRIPS MFN requirements for

'any advantage, favors, privilege or immunities accorded by a member:

(a) deriving from international agreements on judicial assistance or law enforcement of a general nature and not particularly confined to the protection of intellectual property;
(b) granted in accordance with the provisions of the Berne Convention (1971) or the Rome convention authorizing that the treatment accorded be a function not of national treatment but of the treatment accorded in another country;
(c) in respect of the rights of performers, producers of phonograms and broadcasting organizations not provided under this Agreement (TRIPS Agreement);
(d) deriving from international agreements related to the protection of intellectual property which entered into force prior to the entry into force of the WTO Agreement, provided that such agreements are notified to the Council for TRIPS and do not constitute an arbitrary or unjustifiable discrimination against nationals of other member (TRIPS Article 4). This "grand father" clause in Article 4(d) allows countries to ensure that they could enjoy the benefits of TRIPS while circumventing MFN requirements if they were a party to a pre-existing agreement that dealt with intellectual property rights.

One pertinent question raised in the context of TRIPS-Plus provisions in RTAs is that whether third parties can use the multilateral MFN principle to obtain MFN status in relation to FTA obligations. This question is well-summarized by Susy Frankel as she

puts it, whether third parties have a right under multilateral MFN principle to obtain MFN status in relation to FTA obligation? (Frankel 2006). In addressing this question it is important to look at the nature and scope of TRIPS MFN principle and its application. MFN provisions are relatively new concept in international intellectual property (Frankel 2006: 380-81). MFN, however, has a different role in the area of intellectual property. The TRIPS MFN provides that

> With regard to protection of intellectual property, any advantage, favor, privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members (TRIPS Article 4).

In the case of TRIPS, the MFN principle has been drafted in a way that makes it operate in a relatively unqualified way. There is, for example, no equivalent of Article XXIV. Whenever developing countries which are WTO members enter into an international agreement whether bilateral or other, which grants TRIPS-Plus favours to another nation, it follows that the MFN principle will oblige those developing countries to extend those favors to all WTO members - subject to the qualification mentioned in Article 4.

This means that the MFN principle in TRIPS, when combined with bilateral agreements, will work in favour of the two leading exporters of intellectual property in the world, the United States and the EU. Whenever the United States negotiates an agreement with a WTO developing country member the MFN principle will see the EU gain the benefits of standards that the United States obtains. The same is true for the United States when the EU obtains gains in a bilateral agreement dealing will intellectual property. It is also true that if the EU and the United States between them negotiate enough bilateral agreements containing TRIPS-Plus standards, those standards will become, for practical purposes, the new minimum standards from which any future WTO trade round will have to proceed.

The key point is that the MFN principle in TRIPS, when combined with bilateralism on intellectual property will have the effect of spreading and setting new minimum standards of intellectual property faster than would have happened otherwise (Drahos 2002: 802).

TRIPS is a minimum legal standard treaty and Members are free to provide higher levels of protection with regard to IPRs. In the TRIPS context, "MFN requires that if a member provides a higher level of protection than that which the TRIPS Agreement mandates, a possibility that it endorses, then that member must provide that protection to all people from all members who seek protection of its intellectual property laws" (Frankel 2006: 382-83). The scope and applicability of intellectual property provision in RTAs do not have the same legal footing as that of TRIPS provisions. Generally, where the RTA provision relates to intellectual property law that is covered by the TRIPS agreement, "the national treatment principle will work so that a third party national seeking intellectual property protection in one of the FTA party States has the benefit of the FTA protection, provided that the State in question gives that level of protection to its own nationals" (Frankel 2006: 417).

This is the case where the intellectual property provision in RTA is covered by the TRIPS agreement. While, [w]here part of an FTA relates to a matter beyond the coverage of the TRIPS Agreement, there can be no TRIPS agreement national treatment or MFN obligation (Frankel 2006: 417). In other words, the National Treatment or MFN principle is not legally binding for TRIPS-Plus provisions in RTAs. Article XXIV of GATT is not mentioned in the TRIPS Agreement and GATT does not have a corresponding section in TRIPS creating an exception for Article 4 of TRIPS (MFN) for FTAs (Frankel 2006: 417) However, TRIPS is Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, which includes GATT 1994, and the two agreements are read together with all signatory members of one agreement also being members of the other agreement (Caviedes1998: 191)

### VI.2.3. TRIPS-Plus and Developing Countries

A study of UN Conference on Trade and Development (UNCTAD), on the impact of TRIPS on developing countries observed that since TRIPS expanded the licensing possibilities for foreign companies in developing countries could result in "reduced inward technology flows" at higher prices. It further pointed out that TRIPS could have certain negative impacts on developing countries, including higher prices for technologies under intellectual property right protection and restrictions on the diffusion of technologies (UNCTAD 1997). The current crop of bilateral agreements does nothing to reduce the possibility of the negative impacts of the intellectual

property protection rights and may well increase them also. It is observed by scholars that bilateral agreements impose further trade loses in the short term on developing countries. It is also argued that importers of intellectual property (all developing countries) will experience increased costs as a result of TRIPS (Maskus 2000a: 471). The following sections examine the features of some of the bilateral agreements with IPR content and the broader issues associated with them.

### VI.2.3.i. Bilateral Agreements and TRIPS Plus

The inclusion of IPRs commitments has become a common feature in regional trade agreements and in bilateral agreements mainly for three reasons.

1) The increased interest of developed countries for enhanced protection of their technologies and creations from "free riders."
2) The need to consolidate and expand market access for products and services with a high technological value in third countries.
3) The belief by developed countries that any regional and bilateral negotiations covering IPRs only make sense if they lead to levels of protection higher than those already agreed at the multilateral level (Vivas-Eugui 2003).

Bilateral agreements are generally much focused and have a limited scope. Mainly three types of bilateral agreements are relevant in the TRIPS context, viz. Bilateral Investment Agreements (BITs), Bilateral IPRs Agreements and Bilateral Trade Agreements. Though it was expected that the signing of TRIPS will reduce the bilateral pressures on IPRs by developed countries, even after a decade the bilateral activity has not diminished. Bilateral treaties are generally based on models usually prepared by developed countries that have many standardized clauses and provisions which include higher standards or unaddressed issues in IPRs.

### VI.2.3.ii. Bilateral Investment Agreements (BITs)

Bilateral investment agreements (BITs) generally do not regulate IPRs in a precise way, but they have a strong impact on how international IPRs commitments may be implemented at the national level and on the regulatory capacity of host countries over foreign investments (Vivas-Eugui 2003: 7). One important objective in many

BITs is adequate and effective protection for IPRs. BITs regulate conditions for entry, treatment, protection and exit of investment between the countries which are party to the agreement. Though IPRs are not directly dealt by the BITs, usually IPRs are defined as "investment" and protected under the provisions of such treaties. This is a common feature that could be found in most of the BITs. For example, the definition of investment in BIT between Bolivia and US (1998) states that:

> "The term 'investment' of a national or company means every kind of investment owned or controlled directly or indirectly by the national or company. This general definition includes, but is not limited to rights in companies, contracted rights, tangible property (real estate) and intangible property (rights such as leases, mortgages, liens and pledges); *intellectual property rights* (emphasis added); and rights conferred pursuant to law, such as licenses and permits."[15]

In some BITs, IPRs are defined in a broad way. We can see such approach in those between Canada and Venezuela (1998) and Canada and Costa Rica (1999) in which IPRs are defined as including:

> "Copyright and related rights, trade mark rights, patent rights, rights on layout designs of semi-conductor integrated circuits, trade secret rights, plant breeder's rights, rights in geographical indications and industrial design rights."

Some of the important provisions appearing in various BITs that provide protection for IPRs like fair and equitable treatment; protection against indirect expropriation; performance requirements prohibition, and the investor-state dispute settlement mechanism raise concerns for the developing world.

The fair and equitable treatment standard, depending on how it is interpreted, could have implications on the expansion and consolidation of intellectual property protection. There are two possible interpretations of what is to be considered fair and equitable treatment in the BITs context: the plain meaning approach and the international minimum standard (Vivas-Eugui 2003) The "plain meaning" approach basically indicates that where an investor has an assurance of treatment under this standard, a straight forward assessment needs to be made as to whether a particular treatment meted out to that investor is both "fair and equitable" (UNCTAD 1999).

[15] The text of the Treaty between the Government of United States of America and the Government of the Republic of Bolivia concerning the Encouragement and Reciprocal Protection of Investment available at URL: http://www.sice.oas.org/bits/bolu1_e.asp [Accessed on 6 February 2010].

The "international minimum standard" approach suggests that the concept of fair and equitable is synonymous with the concept of international minimum standards applied in international law (Vivas-Eugui 2003). Minimum international standard is ascertained from practices in TRIPS, WIPO treaties and may even possibly extend to potential chapters on IPRs in various RTAs or trade agreements. This would mean a transfer of standards of treatment in international IPRs agreement into BITs commitments. In many of the recent BITs reference is made to the "highest-international standard' or "international law" and not the minimum international standard (Vivas-Eugui 2003).

*Protection against expropriation* regulations aims to protect foreign investors against outright seizure. Many recent BITs have provisions on "indirect expropriation" and measures tantamount to expropriations. It is observed that these provisions against indirect expropriation might deeply limit governmental regulatory powers in areas of public interest when broadly interpreted.

*Performance requirements* are conditions set by a host country to pre-establishment as an investor with a view to promote effective technology transfer under or through the use of national investment laws. Performance requirement is a vital tool in the hands of developing nations for effective technology transfer. In some of the last generation BITs, the prohibition on performance on technology transfer have been widely included (Vivas-Eugui 2003). Prohibition on performance requirements will definitely weaken the effective use of this policy mechanism to promote technology transfer as a pre-condition to obtain investor status in developing countries.

Investor-state dispute settlement provisions incorporated in recent BITs is one of the most powerful legal tools in the hands of investors. This provision of investor-state dispute settlement allows a foreign investor to sue a host state for an alleged violation of certain treaty provisions.

### VI.2.3.iii. Bilateral IPRs Agreements

Bilateral IPRs Agreements are usually a consequence of broader trade offs between two countries. Bilateral IPRs agreements between developed and developing countries usually emerge in the background of science and technology co-operation agreements

or sometimes with economic or aid assistance. These agreements generally tend to focus on specific amendments and enforcement measures depending on the particular interest of the developed country who is party to the agreement. The interest varies from country to country as when the US prioritizes the expansion of protection on copyrights in the digital environment or plant varieties protection to UPOV levels, the EU emphasizes on higher levels of protection for GIs (Geographical Indication) plus the signing and ratification of the UPOV. After 1994, Bilateral Agreements on IPRs tend to be mostly TRIPS-Plus or at least include some TRIPS-Plus provisions.

For instance, Nicaragua and US signed Bilateral Intellectual Property rights Treaty in 1998. The treaty had to be implemented in 1999 ahead of the expiry of Nicargua's TRIPS deadline which was in 2000. The Treaty contains various TRIPS-Plus features including an obligation to join UPOV, a detection of the exceptions for the patentability of life, and a mandatory use of the classification system for trademarks of the Nice Agreement on the International Classification of Goods and services for the Purpose of Registration of Marks (Vivas-Eugui 2003).

Also, Ecuador and the US signed an IPRs treaty in 1993 which mandates full protection for copyrights, trademarks, patents (including pipeline protection for pharmaceutical products), satellite signals, computer software, integrated circuits layout designs and trade secrets (USTR 1999). The treaty requires the establishment of criminal and broader enforcement systems. The above examples clearly illustrate how these treaties push and promote TRIPS-Plus provisions.

It is not only the Bilateral IPR Agreements which create and promote TRIPS-Plus standards; but also the bilateral trade agreements entered between countries, especially with developed countries, which contain such TRIPS-Plus standards. Bilateral trade agreements are viewed as a tool by many developing countries to create "privileged trade relations" with big developed countries. Many of these agreements have wide coverage of trade issues and usually have IPR chapters with TRIPS-Plus standards. Most of the Bilateral Trade Agreements between US and developing countries have IPR provisions which are TRIPS-Plus.

### VI.2.3.iv. TRIPS-Plus and Broader Issues in Trade

The TRIPS Agreement has almost become a universal set of minimum IPRs standards at the international level. Many developing countries are even struggling to implement the TRIPS commitments undertaken in the WTO. Many RTAs and bilateral trade agreements are used for shaping several developing countries' legislation at will. The TRIPS Agreement has, in reality, created a suitable environment for pushing deeper IPRs standards in many parallel negotiations and bilateral agreements (Vivas-Eugui 2003). It is opined that TRIPs Agreement was accepted by developing countries in the Uruguay Round without assessing the impacts on development through a clear benefit cost analysis. The concessions gained under the WTO Agreements on Agriculture and on Textiles and Clothing have not produced much desirable results for developing countries. On the other side, the TRIPS commitments accepted by the developing countries turned out to be a major breakthrough for the developed countries. This gives rise to doubts about whether some "trade off" in the Uruguay Round was given sufficient consideration. In a similar manner, many RTAs and bilateral negotiations have not carried out assessment exercises and new "unmeasured" commitments have been accepted by many developing countries saving questions about the future impact of these agreements (Vivas-Eugui 2003). Developing countries, before entering into more commitments in IPRs should compare transfer payments from technology and copyright licensing to the developed countries with the value of exports they gain in return from the developed countries under the agreements. They will only then be able to determine the actual "trade negotiating value" of the potential commitments on IPRs they might adopt.

Besides harmonizing the IPR standards, the TRIPS-Plus provisions in trade agreements cause for the perpetual expansion of IPR commitments. RTAs and bilateral trade agreements are generating a continuous review of commitments on IPRs even before the TRIPS Agreement is fully implemented by many developing countries. In some of the RTAs and bilateral trade agreements, the type of commitments included are sometimes TRIPS-Plus or even US legislation-Plus which is considered to be having the highest standard of IPR protection (Vivas-Eugui 2003).

The last decade had witnessed a forum shift in the trade negotiations. Repeated failures of multilateral trade talks and increased enthusiasm in forming regional and

bilateral trade treaties shows the changed interest of countries. Owing to the proliferation of RTAs and bilateral trade agreements, developed countries and particularly the US, are losing interest in negotiating issues in the TRIPS Council. The US has already demonstrated its lack of interest in negotiating issues different from the mandated negotiation in the TRIPS Council. A similar attitude is to be expected in future from the US and other developed world until an "acceptable" harvest of RTAs and bilateral trade agreements containing TRIPS-Plus IPR commitments allows them to pursue negotiations of higher standards in the TRIPS Council (Vivas-Eugui 2003).

The IPR commitments undertaken in RTAs and bilateral trade agreements does not confine to the countries party to the agreements. As discussed earlier, the MFN clause in TRIPS allows for the spreading of these commitments multilaterally. Thus the benefits arising out of RTAs and bilateral trade agreements can be obtained, even before multilateral standards are raised again. The limited scope of the MFN exemption under Article 4(d) of TRIPS applies only to agreements reached prior to TRIPS, allowing automatic MFN status for regional or bilateral IPRs commitments undertaken subsequently. By virtue of the MFN clause in TRIPS, the IPR obligation undertaken in various RTAs and bilateral trade agreements formed after the TRIPS will be automatically multilateralized according to the MFN clause contained in Article 4 of the TRIPS.

Internationally, regionally or bilaterally, it is difficult to recover the policy spaces once they have been committed. The TRIPS and health debate in the WTO has proven that what ever being the reasons, it is very difficult to change commitments that limit spaces for undertaking public policies once they have been agreed to. With RTAs and bilateral trade agreements, it is even more difficult to modify or change the commitments due to the differences in the bargaining power and the lack of political bodies following the implementation of those treaties (Vivas-Eugui 2003). The undemocratic nature and non-transparent processes in regional and bilateral negotiations adds to the lack of proper care and caution while undertaking IPR commitments.

US bilateralism forms one part of a broader US strategy to raise global IP standards. US bilateralism on IP was initially largely a response to the US failure to obtain an agreement on trade in counterfeit goods at the end of the Tokyo Round (1979) and the

resistance of developing countries in the first half of the 1980s to include IP as negotiating item in a new GATT Round. During the 1980s, the US reformed its 1976 Trade Act to include what became known as the 'special 301' provisions. This provision requires the USTR to identify countries that it considered were denying adequate and effective protection for intellectual property. These countries were kept in 'watch list.' The provision further empowered the USTR to impose necessary trade sanctions as required against these countries.

The US also linked the administration of its Generalized System of Preferences (GSP) programme, which gave developing country access to the US market, to the adequate protection of IPRs. The GSP was so critical for many developing countries as it enabled them access to the large US market. In this respect many developing countries were forced to yield to the US pressure for higher protection for IPRs. US also linked its Bilateral Investment Treaty (BITs) programme to the goal of adequate and effective protection for intellectual property.

In this manner, the US used its enormous market as a powerful source of bargaining and credible threat to break the resistance raised by hard-line developing countries like India, Brazil, Argentina, Cuba, Egypt, Nicaragua, Nigeria, Peru, Tanzania and Yugoslavia in the TRIPS negotiations at the WTO (Ruth 2005). Indeed, this bilateral pressure by the US was one of the major reasons why developing countries agreed for TRIPS in WTO. By signing TRIPS, it was expected that the US and other developed countries will abstain from putting pressure on developing countries to sign bilateral agreements. However, rather than abating, the US bilateral activity continued after the signing of TRIPS with the negotiation of a large number of FTAs and BITs in which US sought to achieve most of the new issues which it could not get in WTO and other multilateral forums (Ruth 2005: 3).

US bilateralism has recently received a further boost following recent developments at the WTO which have made it harder for it to achieve its negotiating goals on IP and others issues. These events include the 2001 landmark WTO Declaration on TRIPS and Public Health and the emergence of strong group of developing country governments at the WTO in the form of G-20. (Ruth 2005: 3). Repeated failures of multilateral talks in the WTO are also one reason for the renewed interest of US in

pushing the regional and bilateral agreements. This is evident in a letter from Robert Zoellick to David Walker, Comptroller of the United States which states that,

> 'at the most basic level, the competitive liberalization strategy simply means that America expands and strengthens its options. If free trade progress becomes stalled globally - where any one of 148 economies in the WTO has Veto power - then we can move ahead regionally and bilaterally. If one hemispheric talks are progressing stage-by-stage, we can point to more ambitious possibilities through FTAs with individual countries and sub regions. Having a strong bilateral or sub regional option helps spur progress in the larger negotiations. The recent disappointment in Cancun provides a case in point. A number of 'won't do' countries that frustrated the 'can do' spirit of Doha are now rethinking the consequences as the US vigorously advances FTAs around the world' (Ruth 2005: 5).

The emergence of the G-20 which gained face in the run up to the Cancun Ministerial Conference has posed a threat to the US negotiating goals particularly in the area of agriculture. Under the leadership of countries like India, Brazil, China, and South-Africa, the G-20 was seen by many commentators as a new power within the WTO that would help developing countries gain more positive outcomes in the WTO on critical development issues such as agriculture

The US appears to have responded to the developments in WTO which are not in favour of them, by increasing its use of bilateral FTAs with developing countries. The aim of the strategy appears to gain market access for its exports with less trade offs than would be possible at the WTO, ratchet up IP standards outside the WTO and to break the power of developing countries within the WTO (Ruth 2005: 6).

The US has also been using a combination of unilateral and bilateral trade agreements to pressure developing countries to distance themselves from G-20. The announcement of countries like Costa Rica, Columbia and Peru that they are no longer members of G-20 group shortly after the Cancun Ministerial is viewed as a result of the pressure from the US. Though the Costa Rican Trade Minister said that their decision to leave the G -21 had nothing to do with US pressure, or the visit of the US Trade Representative, Robert Zoellick a week prior to the announcement, it could not be taken at its face value. This is to be read with the words of warning by Senator Charles Grassley, the Chairman of the Finance Committee that the Congress will not approve FTAs with G-21 members in wake of the Cancun Ministerial. He further warned that Costa Rica and Guatemala should be excluded from the US-CAFTA

negotiations unless they back out of their support for the G-21. Grassley also said that Brazil and all others Latin American members of the G-21 should be excluded from the FTTA negotiation (Inside US Trade 2003).

Many a times, poor countries tend to sign up free trade agreements with developed countries for political reasons.[16] In their desperate attempt for greater access to vast US markets, they fully do not realize what they are signing away. The former French President Chirac characterized the US strategy of bilateral pressure for higher IP standards as 'tantamount to blackmail.' In a statement read out to international AIDS Conference in Bangkok on 13 July 2004 he wrote: 'Making certain countries drop these measures (i.e. to produce life saving generics) in the framework of bilateral trade negotiations would be tantamount to blackmail, since what is the point of starting treatment without any guarantee of having quality and affordable drugs in the long term.'

However, some developing countries have attempted to resist US attempts to introduce TRIPS-Plus standards and it has proved difficult for US to fulfill its agenda in the wake of this resistance.[17] The developing countries need to come together in resisting the attempt of the developed world, including US, to promote higher IP standards. The US has adopted a divide-and-conquer policy to counter the resistance of developing countries. There has also been linking of the GSP for developing countries with IP standards and the raising of eligibility conditionality on IP for developing countries to qualify for US GSP and other US trade preferences such as the Caribbean Basin Initiative or Andean Trade Preferences Act. The current standard requires countries to provide adequate and effective IPR protection as defined by the US. The powerful industrial groups in US are hard lobbying to raise the IP standards in developing countries through trade negotiations. The unsuccessful attempt of Senators Hatch (R-VT) and Leahy (D-VT), with the backing from the US Motion Picture Association and Copyright Industry, proposing explicit ratcheting up and linking of IP standard to specific provisions prescribed in Special 301 report, which are typically TRIPS-Plus, is one example.

[16] See Chapter II for more discussions on motivations for RTAs.
[17] See, for example the FTAA negotiations are currently at a standstill partly in response to developing country resistance to the US agenda.

### VI.2.4. EU Approach to WTO-Plus Standards

Like the US, the EU also uses bilateral trade agreements to obtain WTO-Plus provisions on trade issues. In a paper published by the NGO GRAIN, it is alleged that the EU is aggressively pursuing developing countries to accept the 'stricter IP rules on seeds' that are possible (GRAIN 2003). It is identified that the EU Free Trade Agreements with Algeria, Tunisia, South Africa, Morocco, Lebanon and Bangladesh contains provisions of TRIPS-Plus. These provisions are also likely to appear in the other trade agreements following. Thus, it is estimated that the EU has forced TRIPS-Plus commitments regarding IP on life forms in more than 90 developing country agreements, including the ACP grouping. The language or the commitments included in different FTAs are not always the same. Some countries are required to join *International Convention for the Protection of New Varieties of Plants*[18] (Paris 1961, the UPOV Convention) and/or the *Budapest Treaty on the International Recognition of Deposit of Microorganisms for the Purpose of Patent Procedure*[19] (Budapest 1977, the Budapest Treaty), while in some other cases, countries have to implement effective *sui generis* system and in some other agreements the parties are required to recognize the need to provide adequate and effective protection of IPRs to the level of "the highest international standards" which sometimes amount to patent protection of plant varieties and bio-technological inventions (GRAIN 2003). As TRIPS has no such provision about implementing or joining either UPOV or Budapest treaties and it neither requires patent protection of plant varieties nor have a reference to "bio technological inventions", the above referred agreements and provisions qualify as TRIPS-Plus.

The present Director-General of WTO, Pascal Lamy was quoted saying while being the Trade Commissioner of EU that "we also use bilateral FTAs to move things beyond WTO standards. By definition, a bilateral trade agreement is 'WTO-Plus.' Whether it is about investment, intellectual property rights, tariff structure, or trade instruments, in each bilateral FTA we have the WTO-Plus provisions" (Jakarta Post dated 9 September 2004). For justification, the EC contends that the rationale for bilateral agreements is not always solely or primarily for trade advantage, but is also

[18] Available at URL: http://www.upov.int/en/publications/conventions/1961/pdf/act1961.pdf
[19] 1861 UNTS 861.

for geo-political reasons as in the case of the European Partnership Agreements with ACP countries. Similar to the case of US, the emergence of the G-20 at Cancun is said to be one of the major reasons that prompted the EC to re-think its bilateral strategy. The statement of Lamy shortly after the Cancun testifies this argument where he said, 'we will have to a good, hard think amongst ourselves (sic). Should we maintain multilateralism as our priority, which was the basic tenet of EU commercial policy?' (Buck 2004). However, Lamy subsequently reconfirmed the EC's commitment to the WTO negotiations. At the same time, the implicit threat remains that the EC will revert to bilateral if the WTO negotiations flounder; as does the possibility for it to use free trade negotiations to raise IP standards. Though EC is not expressly using current bilateral negotiations with developing countries to ratchet up IP protection on medicines, it may well try to do it on the other IP issues such as geographical indications and also on services and investment. The negotiating mandates of many of its previous trade agreements contain commitments to provide 'adequate and effective provision' to the 'highest international standards'[20] although EC officials have stated that the Commission no longer uses 'highest international standards' in current negotiations. However, the EC had taken a different approach with EU accession countries. These countries are required to apply stringent EU standards on data protection and marketing exclusivity, which have a major impact on generic producers (Ruth 2005: 10-11).

### VI.2.4.a. EC Trade Barriers Regulation (TBR)

The EC is applying Trade Barriers Regulation (TBR)[21], a commercial policy instrument for effective compliance of various commitments undertaken by countries. The TBR is a legal instrument that gives right to community enterprises and industries to lodge a complaint with Commission, which obliges the Commission to investigate and evaluate whether there is evidence of violation of international trade rules resulting in adverse effects. Though international trade rules are taken to be primarily those established by the WTO Agreement, the rules and procedures agreed in other international treaties to which EC is a party may also be considered as international

[20] See the EU-Palestine (1997), EU-Mexico, EU-Tunisia (1998), EU-South Africa (1999) agreements in this regard.
[21] TBR, 1994, EC No. 3286/94, December 1994.

trade rules. The procedure under TBR will lead to either a mutually agreed solution to the problem or recourse to the relevant dispute settlement procedure.[22]

Unlike the US 301 (Trade Act 2002), which empowers the US government to investigate countries that threaten commercial and economic interest generally, the EC regulation can only be used if a specific right of action can be established relating to a breach of international trade rules. Moreover, the TBR allows to refer cases to the relevant dispute settlement mechanism unlike US 301 which permits for unilateral trade sanctions. In a TBR proceeding, either the dispute may be referred to WTO dispute settlement procedure or a bilateral mechanism, if available. But this does not stop EC from applying unilateral political and diplomatic pressure on countries to implement and enforce trade commitments.

The EC has initiated examination procedures under TBR in response to complaints from the European Federation of Pharmaceutical Industries and Association (FPIA) about the discriminatory drug pricing and intellectual property issues in Korea in 1999 and Turkey in 2003. The intellectual property issues in both the Turkish and Korean cases included industry complaints about inadequate data protection, and in the Korean case about patent extensions (Ruth 2005: 12).

For more effective enforcement of intellectual property rights in third countries, the EC has made it a negotiating strategy that it requires its trading partners to have an effective protection of IP under their domestic law, *at least at the level set in TRIPS Agreement* (emphasis added). EC recommends and encourages the right holders of the possibility of using the TBR mechanism in case of evidence of violation of TRIPS or of 'the highest standards' agreed in bilateral agreements between the EC and third countries and also recommends making use of the WTO dispute settlement mechanism or the dispute settlement tools included in the bilateral agreements. EC also recommends making use of Innovation Relay Centres dealing with transfer of technology to be used to collect information about enforcement problems in third countries. However, it is pertinent to note that the strategy contains no mention of the

[22] See for details see URL: http://europa.eu.int/comm/trade/issues/respect rules/tbr/adgrego6a.htm [Accessed on 7 February 2010].

Doha Declaration or the need for flexible enforcement on issues pertaining to Public Health.

Efforts by the European Union to insert strong provisions on pharmaceutical patents in a series of free trade agreements it is negotiating could imperil access to medicines in developing countries. As part of trade talks being conducted with India, Colombia, Peru and regional grouping in South-east Asia, EU officials have proposed that drug-makers should benefit from a robust intellectual property regime (Cronin 2009).

Data exclusivity is one area where new standards are proposed. By the proposed standards, national regulatory authorities in the countries concerned would be prevented for lengthy periods from using data provided by a company that holds a drug patent in order to authorize a generic version of that medicine. For Columbia and Peru such 'date exclusivity' would apply for upto 11 years, according to the recommendations from European Commission. German Holguin, Director of Mision Salud, a Colombian Organization observes that this provision "would have devastating effects on access to medicines and health in general in our region" (Cronin 2009). If the proposal is enforced as part of a free trade agreement, he predicted that the supply of affordable drugs in the Andean countries would be severally reduced. As generics are on average four times cheaper than branded drugs and some times up to 35 times cheaper, he warned that any measure which restricts the availability of cheaper generic drugs will have 'horrible consequences' in a region with widespread poverty. Holguin is of the view that the European Commission is seeking higher standards on IP than the US wished to include in the free trade agreements it sought with Latin American countries in the recent years (Cronin 2009).

It is often argued that EC is not using current bilateral negotiation with developing countries to ratchet up IP protection on medicines post Doha. But an analysis of the EC's new proposals on bilateral agreements indicates that they go beyond the Agreement on TRIPS including in IPRs on Pharmaceuticals. Xavier Seuba from Pompeu Fabra University in Barcelona, who wrote an analysis on the EC's approach on IPRs in bilateral trade agreements, noted that TRIPS grants national governments particular leeway to decide on how IP rules should apply to medicines. By contrast, the Commission's proposals advocate "a rigid and extremely precise framework for the measures and actions states must adopt and implement regarding intellectual

property" (Cronin 2009). He also raised concerns about how seizures of medicines by custom authorities could become more frequent as a result of EU strategy to incorporate IP chapters in the Free Trade Agreements it concludes with countries. The seizure of generic medicines occurred recently[23] justifies the concern raised by Seuba.

It is also observed that the draft free trade agreement presently negotiated between EU with Columbia and Peru contains provision which enable pharmaceutical firms to hinder the transport of generic medicines. In this respect, it has been criticized that EU is seeking powers additional to TRIPS, which largely restrict the use of seizure for counterfeit goods but which is not for generic medicines. The European proposal to the Andean Community enables the right holder to block the importation, exportation, re-exportation, entry or exist of goods suspected of infringing any intellectual property rights in the customs territory. "This represents a dramatic broadening of the required measures and grants a tremendous power to the title holders, who will be able to block rival goods alleging a supposed infringement of IP right" (Cronin 2009).

Following the footsteps of the US and EU, EFTA also joined the drive in promoting TRIPS-Plus in their bilateral and regional agreements. The Free Trade Agreements concluded between the four members states of the EFTA – Switzerland, Norway, Iceland and Liechtenstein - and a number of developing countries contain provisions on the protection of IPRs which go far beyond the obligations already imposed under the framework of WTO. EFTA member countries have close ties with the EU and basically follow a very similar trade policy vis-à-vis countries outside Western Europe. A number of FTAs concluded or presently being negotiated between the EFTA states and the developing countries[24] contains TRIPS-Plus provisions. There agreements contain almost similar kinds of TRIPS-Plus provisions as the EU Agreements.

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[23] In January 2009, the custom authorities in the Port of Rotterdam blocked a consignment of Losartan, a medicine for the treatment of high Blood Pressure that was being shipped from India to Brazil. Although Losartan is a legal generic drug, the seizure took place after an unnamed company claimed to hold the patent for it in the Netherlands.

[24] EFTA states have concluded Free Trade Agreements with 12 Eastern and South-East European countries. The list of countries includes Chile, Egypt, Jordan, Lebanon, Mexico, Morocco, Palestinian Authority, South Africa, Tunisia etc. All Free Trade Agreements concluded by EFTA are available at URL: www.secretarial.efta.int/free-trade/free-trade-agreements.aspx [Accessed 6 February 2010].

### VI.2.5. TRIPS-Plus: Impact for National Legislations

Bilateral free trade agreements can have a profound effect on the national intellectual property legislation of a country. To comply with many of the commitments undertaken in FTAs, the countries might have to modify or amend their national IP legislations. This is especially required when countries undertake TRIPS-Plus provision through FTAs. Provisions which ensure legal enforceability of IP rights feature predominantly in bilateral agreements which contain IP provision that go beyond the TRIPS Agreement.

The broad agenda on the part of the United States and the European Union with respect to IP protection may stretch capacity of countries to implement new legislation (Mara 2009). It is viewed that the TRIPS-Plus provision in FTAs has substantial impact on national laws of countries in terms of how IP rights are legislated and implemented domestically. They may also affect countries' relationships to other international agreements in particular the way that multilateral agreements are transported into the national laws (Mara 2009).

Generally, the TRIPS-Plus provisions in FTAs almost always carry strong legal protection. The legal enforceability of these measures is ensured not only with sufficiently precise language which confers specific rights but also with a body which allows for dispute settlement. It is analyzed that 93 percent of TRIPS-Plus measures in EU agreements and 100 percent in US agreements are enforceable (Mara 2009). One notable feature of bilateral agreements with the United States is that countries are under obligation "to adjust internal IP regimes to new IP standards prior to the entry into force of the agreement."

The general view on TRIPS is that the Agreement sets minimum standards only, which can then become the basis for further IP protection. But this view is challenged by pointing out that there are some provisions which offer the idea of mandatory limitations to IP protection. In this regard it is observed that, such provisions are not exceptions and limitations in the classical sense, where certain topics are excluded from protection, but instead are a more general cap. In support of this view, it is argued that Article 1.1 of TRIPS is the key evidence that the above limits already exist in multilateral agreements. It specifies that stronger protection measures than

TRIPS may be undertaken but only "provided that does not contravene the provisions of this agreement." There are binding limits in TRIPS on the amount of IP protection a nation can have and this Article makes such limitation binding. Hence it is argued that the Article 1.1 of TRIPS itself limit parties from going beyond TRIPS in specific areas (Mara 2009).

### VI.2.6. Implications for Multilateralism

Developing countries are being led into a highly complex multilateral/bilateral web of intellectual property standards that are progressively eroding not just their ability to set domestic standards but also their ability to interpret their application through domestic administrative and judicial mechanism (Drahos 2002: 83). Many commentators[25] have expressed concern that the TRIPS-Plus measures in FTAs will undermine implementation of the WTO Doha Declaration and the August 30th Decision by restricting or eliminating vital TRIPS flexibilities such as compulsory licensing and parallel importation. The provisions examined above have revealed the way in which these TRIPS-Plus measures limits the available flexibilities in TRIPS and bring in new IP obligations. This, in turn will erode the credibility of WTO as a key multilateral forum on trade. Many times, these provisions also violate the US's own trade negotiation mandate. The newly granted IPRs pose a threat to the public health and welfare by removing the flexibilities granted in TRIPS and mandating a more restrictive system for health care. US is often criticized for using bilateralism to undermine the substantive and strategic gains, protections and flexibilities for developing countries by weakening or even overriding TRIPS and imposing new obligations under IPRs.

However, the US has responded to these criticisms by claiming that they had included side letters in various FTAs which contains waivers for public health purposes. For instance, the US-CAFTA-DR side letter states that the obligations set forth in the FTA 'do not affect the ability of either party to take necessary measures to protect public health by promoting access to medicines for all, in particular concerning such cases as HIV/AIDS, tuberculosis, malaria and other epidemics, as well as circumstances of extreme urgency or national emergency' and that the FTA 'does not prevent this

[25] See, MSF (2004); Oxfam (2004); Oxfam (2004a); Stiglitz (2004); Ruth (2005); World Bank (2005); Porteus (2008); Correa (2009); Cronin (2009); Vivas-Eugui (2003) etc.

effective utilization of the TRIPS/health solution.' However, it is observed that even with the side letters the effect of the FTAs with TRIPS-Plus provisions will be at best to muddy the ability of countries to use the TRIPS flexibilities confirmed by the Doha Declaration and the WTO August 30th Decision on access to medicines, and at worst undermine their implementation. In response to the criticism, the USTR had made it clear that the side letter will have interpretative value and that 'the United States has no intention of using dispute settlement to challenge any country's actions that are in accordance will that solution.' Uncertainty persists on the legal status and effect of such statements as side letters are not part of the actual text (Mercurio 2006: 234). Legal experts point out that the side letters are likely to carry little legal weight as they are not in the main text of the agreement, and in the case of dispute they are unlikely to override the binding provisions in the main text. The effectiveness of the letter of understanding itself depends on the interpretation of what was agreed in the WTO. It is also observed that a conflict between the text and the side letter would also, raise complicated questions related to international treaty law (Ruth 2005).

Further, the side letters introduce the term 'necessary' to protect public health, a term not used in the Doha Declaration and which in international trade can be used in a very limiting way. In other words, a measure may be interpreted necessary only if there is no other way to achieve the public health objective, even if the alternatives are not politically or financially feasible. The World Bank Global Economic Prospects, 2005, on side letters observed that 'Notwithstanding the potential flexibilities provided by these side letters, they raise several questions. How widely will the parties to these agreements define the 'protection of public health' or what definitions would an arbitration panel use? Uncertainty in this respect may become itself a barrier to making use of the flexibilities and may open the door for restrictive interpretations by vested interest. Also several of the U.S. FTAs do not contain comparable side letters, raising questions about conflicts between intellectual property obligations and public health objectives in at least some of the affected countries (World Bank 2005).

### VI.3. Growing Trend of GATS-Plus in RTAs

'Services' is yet another area where both developing and developed countries cherish their own interests and priorities. This enthusiasm could be found in way of many GATS-Plus in various RTAs concluded especially between developed and developing

countries. A different approach is required in treating services in developed-developing country RTAs, incorporating transfer of technology and social obligations. RTAs should not be allowed to undermine developmental objectives such as public health, environment, energy, culture etc. Since 1980, trade in services has grown faster than trade in goods despite services being subject to complex non-tariff barriers (WTO 2003). Nowadays, countries are endeavouring to incorporate services into regional integration process. ASEAN moved along with the Asian Framework Agreement on Services (hereinafter referred to on AFAS) under which the member countries negotiated GATS-Plus commitments on a positive list basis (UNDP 2005: 670). Now ASEAN is in the process of negotiating services agreement with India after signing the agreement in trade in goods. Countries are also negotiating Mutual Recognition Agreements (hereinafter MRAs) for a variety of professions within this framework. Developed countries also have placed liberalization of services with high importance in their RTAs. It is interesting to note that countries had adopted both positive list and negative list approach while negotiating with different countries.[26] Developed countries target areas of their traditional interest in services like telecommunications and financial services in their RTAs with developing countries. However, the main goal of developing countries in their RTAs with developed countries is to obtain transfer of technology commitments, access to networks, and access for natural person and also aims at obtaining better market access. In their efforts to get into the wave of RTAs, developing countries may find themselves under pressure to open up key service sectors central to human development like health, environment, energy, audio-visual and cultural services to foreign participation in various RTA negotiations. Such liberalization can further the development goals if properly channeled and vice versa if not properly checked. Hence it is important to ensure that RTAs do not infringe the sovereign rights of the trading partners to implement regulatory mechanism to protect public interest. All these points to the fact that developing countries have to be cautious while entering into RTAs liberalizing services which go beyond the commitments under GATS. While doing so, it has to take proper preparation and ensure necessary legislative safeguards.

[26] For example, the Singapore-Jordan FTA has GATS-Plus positive list while Singapore-US FTA has a negative list format.

It is an accepted fact in the international trade circle that, the number of preferential trade agreements has increased at a great and steady pace since the establishment of the WTO in 1995. Most of these RTAs are notified under GATT Article XXIV which deals with the trade in goods. However, RTAs encompassing services are more novel. Since the trade rules on services are a more recent phenomenon,[27] it is understandable that less number of RTAs have been notified under GATS Article V compared to that of RTAs notified under GATT Article XXIV. However, it is important to note that, notifications of service agreements have grown at a faster pace than others. In other words though the number of RTAs under GATS Article V is less when compared to that under GATT, the pace of notification or the pace of proliferation of service RTAs is higher when compared to the others.[28] Since 2000, key traditional *demandeurs* in the services negotiations, such as the United States, the EC and Japan have, for the first time, engaged in (services) RTAs beyond their most immediate neighbours (i.e. Mexico and Canada for the US, other European countries for EC). Other key players - including many developing countries - have followed suit, for example, India, China, Australia, New Zealand, Chile, Mexico, Hong Kong, Switzerland, Norway, Thailand, Malaysia, Korea, Singapore etc. As a result, so far many of the most important advocates of liberalization in the multilateral services negotiations are involved in services RTAs. Governments that are parties to these agreements account for more than 80% world services trade (Roy et al. 2006).

Though the above named countries are vigorously pursuing services RTAs, however it is interesting to note that services trade relations among larger players like the US, China, India, Japan or the EU tend to be still governed by the WTO commitments as there is no services RTAs between these countries so far.[29] The recent wave of services RTAs has often brought together developed and developing countries. Agreements among and between developing countries are also common. The developed countries have shown greater interest in including services trade in the RTA negotiations. In general, trade agreements involving at least one developed country tend to include services components[30] while the majority of trade agreements

[27] The Canada –US Free Trade Agreement in 1989 and the GATS in 1995 were the key precursors.
[28] More than three fourth of the services RTA, have been notified since the start of the WTO services negotiations in 2000.
[29] India-EU is presently negotiating an FTA which includes trade in services.
[30] Exceptions are there like trade agreements between the EU and African and Middle Eastern Countries.

between developing countries include no services commitments although that trend seems to be changing now (Roy et al. 2006: 8). It is also observed that countries like US, Singapore and Chile who are parties to more than five services RTAs have played a particularly important role in spreading of services RTAs.

### VI.3.1. Differing Approaches of Various Services RTA

Countries have adopted various approaches to the trade rules of services RTAs. There is no unique approach to the trade rules of services RTAs. Same countries have taken different approaches to different partners in the case of services RTAs suiting their interests. A key element that distinguishes many services RTAs is the approach to liberalization by various countries. Traditionally, distinction on approach have been drawn on the basis of whether the RTAs followed a GATS-type or a NAFTA-type approach. The main difference between the two is that the NAFTA is based on a negative list scheduling modality. In other words, every thing is liberalized, unless otherwise indicated through lists of reservation. Reservations are for existing non-conforming measures (Annex 1) and for future measures (Annex 2). These agreements provide a high degree of transparency since, the actual level of openness is spelled out, along with the indication of the legal/regulatory framework in place. In contrast to this, GATS adopts a positive list modality where by the liberalization commitments only apply to the specifically listed sectors, which themselves are subject to limitations or other terms and conditions attached to it. There is no specific understanding on whether these limitations are for existing non-conforming measures or for future measures. Further, there is no clear indication on the relevant laws/regulations since only "measures" are bound. Comparing the two approaches, it is observed that negative list approach is more effective and liberalizing as it typically include a ratchet mechanism whereby any future liberalization of Annex-1 type reservations is automatically locked in.[31]

The approaches differ in other aspects also. In NAFTA-type, different modes of supply are dealt within different chapters, like disciplines for modes 1, 2 and 4 are included in a chapter on cross border trade in services, while disciplines relating to mode 3 are included in a separate chapter on investment for services and non-services

[31] For more details see, OECD (2002a), Stephenson (2002).

activities. Generally, provisions on temporary movement of natural persons are also found in separate chapter. It is not the inclusion of separate chapter that makes the difference, but the nature of obligations contained in this chapter also differs. NAFTA's cross-border services and investment chapter both contain national treatment obligation but does not contain a market access obligation as found in Article XVI of the GATS for certain non-discriminatory quantitative restrictions. Though NAFTA's cross-border services chapter contains provisions on non-discriminatory quantitative restrictions it only requires best endeavour attempt. Similarly, investment chapter, which covers commercial presence in services also does not contain provisions or disciplines requiring non-discriminatory quantitative restrictions (OECD 2002; Roy 2003).

Apart from liberalization provisions, NAFTA-type agreements go beyond GATS in several aspects. By including extensive investment provisions, such as on expropriation, minimum standard of treatment, and investors-state dispute settlement procedures, these agreements go well beyond the GATS obligation. In this respect, these provisions are absolutely GATS-Plus. It is not necessary that RTAs should limit to either of these approaches. While various RTAs still follow either the NAFTA or GATS structure, it is interesting to note that a number of RTAs have evolved into a combination of the two approaches.

The latest attempt of the countries is to achieve greater coherence between services and investment disciplines so as to avoid discrepancies and discrimination in the treatment of investment in goods and services or in the treatment of trade in services under different modes of supply. Thus a combination of approaches is adopted in an effort to ensure that services trade under all modes of supply are subject to the same disciplines and that mode 3 is covered by generic investment disciplines (Roy 2003). Thus it can be found that a number of services RTAs have adopted variants of a combined approach.

Air transport services is one sector where we could find notable difference in terms of liberalization modalities between GATS-type and NAFTA-type or combined models. While services chapters on RTAs typically carve-out key air transport services (at times along similar lines on GATS and sometimes providing for even less coverage), the investment chapters of relevant RTAs, where national treatment applies, do not

exclude any particular service sector and therefore apply to all air transport services as to any other sector, of course subject to any specific reservations listed in relevant annexes (Roy et al. 2006: 10).

### VI.3.2. RTA Commitments exceeding GATS Schedules and Offers

A comprehensive overview of the liberalization commitments of the recent wave of RTAs demonstrates that the commitments undertaken by countries under various RTAs exceeds the existing GATS schedules and offers made by them. It will be difficult to compare and assess all the service RTAs with the GATS, so here a selective approach is made in assessing the RTAs for this purpose. Given the relative complexity of services agreements (different modes of supply, types of barriers and liberalization modalities), it is rather difficult to get a clear picture or an exact comparison of the state of commitments and the overall extent of improvements. For a proper assessment we need to assess the sector coverage provided by RTAs. Such an assessment captives the breadth of commitments across all services sectors as to how many sectors are included and how many are left out. However, while improvements in the sectoral breadth of commitments represents one important way by which RTAs can go beyond GATS, another key aspect relates to the depth of commitments i.e. the actual level of access bound for the sectors committed. In other words, it is equally important to examine as to how many sectors are liberalized and to what extent these sectors are liberalized. To get an overview of the depth of RTA commitments, the possible way is to, identity the sectors and the extent of improved commitments undertaken. This will enable us to provide an aggregate picture of the extent of new commitments undertaken by countries (expansion of sectoral coverage) and the improved level of bindings for already committed sectors (depth of commitments). A sector by sector analysis will provide a more clear understanding of the impact of RTAs in various service sectors.

In the assessing exercise, it is ideal to look at the liberalization progressing under mode 1 (cross border trade) and mode 3 (commercial presence) as these two being two areas where countries have shown much interest so far. Mode 2 (consumption abroad) commitments are typically liberal and hence comparing the RTA commitments under this mode does not make much sense, while mode 4 (movement of natural persons) liberalization is complex and commitments under this mode by

various countries are being influenced by a number of policy issues and different parameters. Further, more than 80 per cent of the world services trade is estimated to occur under mode 1 and mode 3 (WTO 2005).

The RTA commitments of various countries should not only be compared with the existing GATS commitments, which were negotiated almost 15 years ago but also should look at the services offers submitted by countries in the Doha negotiations so far. This approach will enable us to look at whether RTA commitments only go beyond existing GATS commitments, which are expected, or even so beyond GATS offers made so far, and if so, to what extent.

In this respect, the study undertaken by the Economic Research and Statistics Division of WTO (Roy et al. 2006) is highly relevant and useful. The study is based on more than 150 sub-sectors, wherein it is examined whether for each particular sub-sector and mode the RTA commitments improved upon the GATS offer, either by binding a new service sub-sector (i.e. the sector which was not included in the GATS schedule nor the offer was "unbound" for this relevant mode of supply) or had improved upon the GATS binding for that sub sectors (e.g. removing a limitation and therefore providing for binding at a higher level of liberalization). The study indicate, for each member, the proportion of total services sub-sectors improved (through either new bindings or better ones) in comparison with the GATS offer. It also applies the same exercise to assess the value-added by latest GATS offers over GATS commitments currently in force, and thus enable us to have a point of comparison in assessing the extent to which these RTAs make advances. Though the study provides an over all understanding of the value addition by RTAs, it would not be helpful in individual assessment of any RTA or any country.

The result of the study undertaken by the Economic Research and Statistics Division of WTO is illustrated as a chart diagram. It provides a clearer understanding and assessment of the impact of various RTAs. The Chart Diagram shows the proportion of sub-sectors with new and improved commitments under RTAs. The first chart diagram annexed to the chapter is prepared on the results of study undertaken under mode 3 (that is, Chart VI.1 (1/2 and 2/2)). Chart VI.2 (1/2 and 2/2) annexed to the chapter provides the comparison in mode 1. The analysis is as under:

The WTO study is based on 28 or 29 PTAs. Chart 1 presents the results for each country review for mode 3 while Chart 2 does the same for mode 1. By looking at the proportion of new and improved commitments for each country, the charts illustrate the value added of each country's PTA commitments over their latest GATS offer.

So as to give a point of comparison, the charts illustrate (through the bars labeled "GATS"), the value-added of each country's latest GATS offer over their existing GATS schedules. The bottom part of the bars shows the proportion of sub-sectors in the GATS schedule that is not improved upon by the offer. The lighter part above represents the proportion of sub-sectors already bound in the GATS schedule that has been improved upon by the GATS offer. The striped part further above shows the proportion of sub-sectors where new commitments are proposed in the GATS offer. The upper part of the bars represents the proportion of sub-sectors that remain uncommitted in both GATS schedules and GATS offers.

Along similar lines, the bars labeled "PTA" provide an overview of how much PTA commitments add to GATS offers. The bottom part of the bars shows the sub-sectors committed in GATS schedules/offers that have not been improved through PTAs. The lighter part above represents the sub-sectors in the GATS schedule/offer that are further improved upon by the PTA (ie. the PTA provides a more liberal binding than in the GATS offer). The striped part further above shows the sub-sectors where the PTA provides for new bindings for the relevant mode, ie., a level of liberalization is bound where there were no commitments what so ever in the GATS schedules/offers. The upper part of the bars represents the proportion of sub sectors that remain uncommitted in both GATS schedules/offers and PTAs. In other words, the "value-added" of the PTAs over the GATS offer is captured in the lighter and striped parts of the bars. The bars labeled "GATS" represent the 'value added' of the GATS offer over the current GATS commitments in the same manner.

The result demonstrated in the chart shows that overall RTA commitments tend to go significantly beyond GATS offers in terms of improved and new bindings. It can also be seen that the proportion of new/improved commitments in RTAs are generally

much higher/greater than in GATS existing commitments as well as GATS offers. The diagram also reveals that the ratio of comparison vary from country to country though the general trend is upwards.

Though much diversity was found, the overview suggests that many RTAs go well beyond GATS offers in terms of sectoral coverage (i.e. commitments in new sub sectors), as well as on levels of commitments, as suggested by the proportion of sub-sectors where commitments in GATS schedules/offers were improved. It can be found that many members have a low level of sectoral coverage in existing GATS commitments and modest quality of offers in the Doha Round, but have demonstrated an increased interest in liberalizing through RTA route. Except for some countries[32] the general trend of significant commitments beyond GATS offers was seen in both mode-1 and mode-3. It is also observed that the negative list approach to agreements have yielded greater proportions of new/improved liberalization bindings compared to that of the positive list approach. It is US which was instrumental in spreading the negative list approach as US has consistently used this approach and these RTAs have exhibited strong results. This does not mean that the positive list agreements have always led to lesser commitments than negative list ones.[33]. But in support of the negative list approach, it is often argued that countries that have concluded agreements of both types have under taken greater commitments in the negative list ones.

The negative list approach in RTAs is often criticized also. Martin Khor (2005) has observed that, the FTA chapter on services make use of the 'negative list approach' in which full liberalization in all sectors is assumed unless they are included in a list of exceptions. This is unlike the WTO services agreements 'positive list approach", in which only the sectors and type of liberalization listed are committed by the country concerned. Pointing this out, he has argued that thus RTAs over turn the architecture of the WTO's services agreement and reduce the flexibilities for developing countries to choose whether or not to liberalize particular sector and at what level and pace. In

[32] India and China had shown more interest in mode 3 but not that much in mode-1

[33] For example, China's commitments in its agreements with Hong Kong and Macao, based on a positive list, provides for many improvements that appear to provide for concrete new commercial opportunities, in particular in professional services, audiovisual, construction, distribution and in maritime, air, road and auxiliary transport services. See also Antkiewicz and Whalley (2005) for more details.

this context, it is to be noted that the developing countries had fought for these flexible structures during the Uruguay Round and were still defending it strongly at the WTO in the face of pressures, but some countries were ceding the hard-won policy space in the RTAs (Khor 2005). The service liberalization under RTAs has also met criticism. Many scholars have raised concerns over the liberalization approach in RTAs. It is observed that the liberalization exercise undertaken in RTAs are without taking into consideration various rules and principles in international trade.

### VI.3.3. GATS-Plus: Sector-wise Analysis

So far, we have looked at the general trend of liberalization under RTA standards and how far the RTAs tend go beyond the WTO commitments. A closer look at various sectors will enable us to get a clearer understanding of the content of the new improved commitments in RTAs. It would be difficult to analyze all the sectors or random selection of the sectors also would not help. Hence, for the purpose, we would select a few samples of sectors like financial services, distribution, audiovisual, telecommunications, education and professional services. The reason for selection of these sectors is that these sectors have already attracted many GATS commitments/offers like financial and telecom, while some other sectors have proved more difficult in multilateral negotiations like education and audio-visual. The following section attempts for a comprehensive evaluation of commitments under taken by various countries in their respective RTAs. A comparison of the above commitments with the existing GATS schedule/offer will enable us to know how far these RTA commitments go beyond the GATS schedule/offer. Thereafter an evaluation of liberalization of these sectors under various RTAs is undertaken to estimate the depth of these commitments. In this exercise the analysis of less than 32 RTAs is carried out. This section has extensively drawn from the Staff Working Paper published by WTO, Economic Research and Statistics Division 2006-07 (Roy et al. 2006).

#### VI.3.3.a. Financial Services

Due to the strategic importance for economic development and its political sensitivity, financial services have always been considered special and controversial in trade negotiations. WTO members have shown much interest and have made more

commitments in this sector compared to other sectors in services trade.[34] The sectoral coverage by various countries are however different in this sector. It can be noted that all developed countries had made commitments in all sub-sectors in financial service while developing countries had tended to take commitments on insurance and core banking services[35] rather than in capital-market related services[36] (Roy 2003: 31). It can also be noticed that stronger commitments were in general made under mode 3 (establishment) than under mode 1 (cross border trade). Compared to this RTAs have witnessed more liberal approach in financial sectors by countries. The picture has not changed significantly with the submission of offers in Doha Round.

Considering the sensitivities surrounding the financial services, countries had been cautious in treating the sector. Different modalities were adopted in various RTAs. Some RTAs have totally excluded financial service in their agreements.[37] Earlier the entire sector used to be excluded from the agreement while later RTAs witnessed the exclusion of the sector from the initial schedules of market access commitments, with the promise to include it in future rounds of negotiations.[38]

In some RTAs, services are included as an additional chapter or annex which clarifies or elaborates upon provisions governing trade in financial services.[39] Another modality adopted by countries is to develop a separate, self contained, chapter on financial services that governs all aspects of trade in financial services.[40] RTAs also differ in their liberalization approach adopted. Some adopt a positive list approach while some other adopts a negative list approach[41] In all its RTAs, the US has used a combination of these approaches, with variation depending on the mode of supply.

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[34] Tourism is the only other sector where more commitments are made by WTO members than the financial services.

[35] Deposit taking, lending, payment and money transmission services, financial leasing and guarantees and commitments are the core banking services.

[36] Trading in securities, under-writing and asset management.

[37] Chile-El Salvador, Chile-Costa Rica, Chile-Korea etc

[38] For example, the Thailand –Australia FTA though does not contain provisions on financial sector but have a reference for subsequent addition in review.

[39] Japan-Singapore, Australia-Singapore, EFTA-Singapore, Japan-Malaysia, Singapore-India etc are trade agreements which have separate or additional chapters on services.

[40] US has adopted this approach in all their RTAs. EFTA-Mexico; EC-Mexico; EC-Chile; Panama-El Salvador; Japan-Mexico; Korea-Singapore etc. also have adopted similar approach in respective agreements

[41] Positive list approach and negative list approach has been explained above. Japan-Singapore, EC-Chile, EC-Mexico, EFTA-Mexico, EFTA-Singapore, China-Hong Kong, China-Macao, Japan-Malaysia, Korea-Singapore and India-Singapore are examples where positive list approach is adopted. Panama-El Salvador, Australia-Singapore etc are examples in which negative list approach is adopted.

Some RTAs contain a provision on market access for financial services modeled on GATS Article XVI, but which only apply to mode 3, and whose liberalization is subject to the traditional negative list approach (establishment is allowed in all financial services activities unless a reservation is made). Cross border trade, is subject to a different approach, similar to the one adopted in the WTO Understanding on Commitments in Financial Services – i.e., the listing of non-conforming measures for a specified (positive) list of financial services sub-sectors.

### VI.3.3.a.i. Beyond GATS

Generally RTAs have provided for significant improvements beyond GATS commitments, sometimes leading to real market liberalization. The commitments in various RTAs have also well exceeded the offers made in the context of the Doha Round in many cases. In some cases, the liberalization commitments have matched the proposals in the plurilateral request, made pursuant to the Hong Kong Ministerial Declaration.[42]

It can be viewed that, agreements following a negative list or a hybrid approach have tended to produce more significant results compared to GATS type approach which have produced limited results both in terms of new bindings as well as in terms of further liberalization. Another feature is that countries have favored commercial presence as a mode of supply over cross-border trade. In cross-border trade in services the US has been so instrumental in bringing countries to the level of liberalization embedded in the WTO Understanding on Commitments in Financial Services. Hence as a rule the countries which had entered into agreements with the US have accepted commitments on the cross-border supply of marine, aviation, transport (MAT) insurance; reinsurance; services auxiliary to insurance; provision on transfer of financial information; financial data processing and advisory and other auxiliary

[42] The plurilateral request on financial services was sponsored by Australia, Canada, Chinese Taipei, Ecuador, EC, Hong Kong China, Japan, Korea, Norway and the US. The market access objective of mode 1 are the following: undertake commitments for MAT insurance (marine, aviation and transport insurance); reinsurance; insurance intermediation; insurance auxiliary services; financial advisory services and financial information and data processing services; and provide for additional liberalization, especially where the consuming agent is sophisticated, for example an institutional consumer of securities services. The objectives for Mode 3 include undertaking commitments for all financial services sectors, encompassing rights to establish new and acquire existing companies in the form of wholly-owned subsidiaries, joint ventures and branches and removing limitations such as monopolies, numerical quotas or economic needs tests and mandatory cession (Roy et al. 2006: 33, 34).

financial services relating to banking. Many of these agreements require countries to further take commitments on areas like insurance intermediation (broking and agency) and on the cross border provision of portfolio management services by asset management firms to mutual fund located in any of these countries. This template of commitments on mode 1 matches the plurilateral request mode at the WTO by the US (Roy et al. 2006: 34). Many of the US trading partners have undertaken for further liberalization in these sectors.[43]

Foreign equity limitations have been generally barred in most of the services agreements though with exceptions.[44] The restrictions on the form of legal entity through which foreign financial institutions can access local market is also reasonably dealt within various agreements. The US has made significant progress in this area by prompting important commitments to allow branching in Chile (life and non-life insurance); Australia (non-life insurance), El Salvador (all insurance services), Honduras (all insurance services), Columbia (insurance and banking), Costa Rica (insurance), Dominican Republic (direct insurance and re-insurance), Guatemala (insurance and banking), Morocco (life and non-life insurance) and Nicaragua (insurance) (Roy et al. 2006: 35).

When we look at whether these agreements have led to substantial improvements and thereby to real liberalization, a general answer might be difficult. However, it can be observed that the US agreements have led to substantial commitments and have resulted in real liberalization. This can be substantiated from the fact that many of the US agreements, both on cross-border and establishment have undertaken pre-commitments, with specific time frames for the phasing out of many restrictions in place.[45]

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[43] For example Bahrain and Chile will allow the cross-border supply of MAT insurance (including brokerage of those services) one year after the entry into force of the agreement; Morocco will allow cross-border supply of MAT insurance (including brokerage of those services) two years after the entry into force of the agreement. Further, Morocco has also undertaken to eliminate mandatory cession requirements in not more than 8 years. Similarly, countries like Dominican Republic, El Salvador, Guatemala and Nicaragua which have undertaken commitments on the cross-border supply of portfolio management services will be required to introduce regulatory frameworks on collective investments schemes, which are currently not regulated in their countries.

[44] India, Malaysia, Morocco and Thailand have not barred the foreign equity limitation in their agreements.

[45] For example, in the case of Costa Rica, the PTA signed with US contains commitments to fully liberalize the insurance sector in two stages by 2011.

### VI.3.3.b. Distribution Services

As a key infrastructure service, distribution is one of the service sectors where WTO members have made limited commitments. The offers submitted as part of the Doha Round do not contain many commitments in the sector. In contrast to this, RTAs have brought about a number of advances over GATS schedules/offers. It is interesting to note that many developing countries had undertaken number of commitments in RTAs while many of them have none or limited undertakings under GATS schedules and offers. Bahrain, Chile, Columbia, Costa Rica, Honduras, Morocco, and Nicaragua, which had no GATS commitments in this sectors nor had made offers except for one - all undertook RTA commitments across all aspects of the distribution on services including retailing, whole sale trade, franchising, commission agents' services etc.[46] The WTO members who have substantial export interest in the distribution sector was very well favoured by these commitments as they got exemption from existing strong barriers in this sector such as limitations to foreign equity participation, economic needs tests and broad and numerous product exclusions. It is also notable that many developing countries who had commitments under GATS in this sector had improved their bindings significantly.[47]

China has also made a number of improvements over GATS under mode 3. Some agreements provide for certain product exclusions to be phased out more quickly than under multilateral commitments. Another important commitment made by China is the waiver of the restrictions, listed in GATS that prevent foreign wholly-owned operation of multi-product chain stores with more than 30 outlets.

Thailand permitted up to 100 per cent foreign equity participation for whole sale and retail trade of products manufactured by Australian companies in Thailand in its trade agreement with Australia, while it has GATS distribution commitments only in

[46] These commitments provide either for full openness as in the case of Guatemala, Chile and Nicaragua or provides for few circumscribed limitations like restriction on aircrafts for Columbia; monopolies for such products as sugar for the Dominican Republic; restrictions on oil and derivatives for Costa Rica. Bahrain also took commitments across the board, with local presence requirements for whole sale trade and retailing with respect to cross-border trade.

[47] Oman in its PTA with US permitted foreign nationals to own up to 100% of equity in any established retail enterprise valued at greater than $ 5 million wherein Oman's prevailing multilateral commitments limits foreign ownership of any enterprise to 49%. Further, the PTA also provides for future liberalization by specifying that, full foreign ownership will be permitted for enterprises of more than $ 1 million from 2011.

commission agent's services along with a 49 per cent foreign equity limitation applying to all sectors. Singapore has also come up with new commitments on retailing which are generally liberal except some restrictions on pharmacies and certain medical products. However some countries have made smaller advances in trade in services in their selected RTAs.[48]

It is also important to mention at this point that many of the important target countries like India and Malaysia with its larger markets have not made significant commitments in this sector neither in GATS schedule/offers nor in their RTAs. Another country Panama, who has kept restrictions in retailing, has maintained the same restrictions in its trade agreement with El Salvador. The US had already taken full commitments in distribution sector in the GATS. However, EC, Norway and Switzerland have not made significant commitments beyond their GATS schedules/offers in their various RTAs.

### VI.3.3.c. Audio Visual Services

Audio visual services have been very sensitive and controversial in the WTO negotiations. Due to the divergent views held by various members, attempt for liberalization of this sector has always met with strong resistance. While countries like US has tremendous interest in liberalizing this sector, certain other WTO members, Canada and European Communities, in particular, have taken the position that audio visual services, because of the cultural aspects of the sector, should not be subject to liberalization rules and thus have abstained from under taking commitments or making offers. Countering this, countries including United States have taken the view that trade rules are compatible with cultural objectives and trade in audio visual services promotes cultural diversity.[49] In this circumstance, audio visual services have not so far attracted significant commitments nor offers in WTO. In contrast to this various RTAs have provided much more significant advances in the sector.

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[48] Australia withdrew restrictions on the sale of pharmaceutical goods in its PTA with US (but not in its PTA with Singapore); Korea removed restrictions under mode 1 for pharmaceutical and medical goods in its PTA with Chile (but not in its PTA with Singapore); New Zealand and Mexico offered new commitments on franchising; Peru bound full openness under mode 1 (which was unbound in GATS) and undertook new commitments on commission agents services, except for aircrafts; Japan reduced the number of product exclusions compared to GATS (for example, rice under mode 3).

[49] See for example, TN/S/W/49: "Joint statement on the Negotiations on Trade in services," Communication from Hong Kong, China; Japan; Mexico; The separate customs territory of Taiwan, Penghu, Kinmen and Matsu; and the United States dated 30 June 2005.

An overview in general reveals the fact that RTAs involving US, who has substantial interests in liberalization of this sector, has gone much ahead in liberalization of audio visual services compared to other RTAs. Countries likely Australia, Bahrain, Chile, Colombia, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Morocco, Nicaragua, Oman, Peru and Singapore have undertaken commitments in the various areas of audio visual services. Many of the commitments come in movie related, TV and radio related and sound recording, although often with many limitations. It is interesting to note that most of these countries have no commitments in audio visual services in the WTO. This shows that the liberalization of audio visual services have been successful more in the RTAs than in WTO. It can be found that countries have shown different approach to various sub-sectors coming under audio visual services. For example, while commitments taken up by countries in movie-related services and sound recoding tend to have fewer restrictions.[50] Commitments on services relating to television and radio contain number of restrictions. Major restrictions in this area come as content quotas and foreign equity limitations. This restriction mostly appears in the case of free-to-air television. Comparatively, liberal access is often granted to areas of Satellite TV, foreign programming for cable TV and interactive audio/video services as these are new services where local capacity is sometimes lacking. Apart from this, countries have under taken commitments for future liberalization in this sector.[51] In general, the US has gained significant advances in the audiovisual service liberalization in its various RTAs. The commitments under taken by the US' RTA partners, though with restrictions has provided significant value addition for the US when compared to that in WTO. In some aspects the commitments secured by the US in their agreements have generally exceeded the objectives sought by the group of WTO *demandeurs* on audio visual services in their plurilateral request.

Commitments undertaken by other members in their RTAs with countries other than US have also made notable improvements over those undertaken or offered in the

[50] Commitments on sound recordings are typically without limitations. Only Morocco, Colombia, Peru, Dominican Republic and Costa Rica have maintained market access restrictions in relation to movie-related services (apart from discriminatory subsidies, which are typically permitted in US-type agreements). In any event, none of the RTAs allow the imposition of restrictions on the number of cinema theaters or their level of foreign equity participation.

[51] Colombia explicitly provides for future liberalization by guaranteeing that existing restrictions on certain concessions for subscription television will cease after 31 October 2011.

GATS. China, in its RTA with Hong Kong China and Macao has offered improvements in all sub-sectors of audio visual services. It has raised the foreign equity limit from 49 per cent in its GATS commitment to 100 per cent in its RTA, for movie projection and sound recording. China has permitted foreign equity participation up to 70 per cent in movie distribution and it has also permitted distribution of certain movies while it has limited commitments for distribution of audiovisual products in GATS, which excludes movies. China has also undertaken commitments on services relating to TV transmission and production, though with restrictions, while it has no such commitments in GATS. There are also other countries who have taken GATS-Plus commitment in their various RTAs, though in a limited manner.[52]

It is also to be noted that many countries have not made advances in this sector in their RTAs. Countries like Japan, India, Malaysia, New Zealand and Thailand who had made some commitments in WTO in this sector have not improved in their commitments anymore in RTAs. However European Communities and EFTA members who have not made any commitments in this sector in WTO have even excluded this sector in the services chapters in their RTAs.

### VI.3.3.d. Education Services

Education services have always remained tough in GATS negotiations and have attracted public debate. The Education sector has been divided into five sub-sectors viz primary education, secondary education, higher education, adult education and other educational services. Due to the high sensitivity of the sector, education service is one of the sectors which has attracted fewest commitments in GATS.[53] The offers submitted by various countries for the Doha Round also have not attracted many commitments in sector. Similar to other sectors discussed above, we could see that it is US which has made a significant impact on the liberalization of education sector outside GATS. This is evident from the fact that the many US RTAs contains GATS-Plus commitments in education sector. Many countries who had made no

[52] Panama, Korea and Mexico have GATS-Plus commitments in their agreements. Mexico goes beyond its GATS schedule/ offer by not maintaining any of the restrictions for movie-related services that it had listed at the WTO.

[53] Only 47 WTO members have taken commitment in at least one of the five sub-sectors in education services.

commitments or offer or who had made limited commitments in GATS have gone a long way in liberalizing education sector in their agreements with the US. The depth of commitments made by countries varies. Some have taken commitments across all five education sub-sectors without limitations.[54] Some countries have taken commitments across all education sub-sectors but with some reservations and restrictions related to public education. Such Annex II-type reservation typically covers public education services to the extent that these are social services maintained or established for a public purpose/interest.[55] Another set of countries have undertaken commitments, but have maintained several restrictions.[56]

There are also US agreements which have relatively limited commitments in education services. For instance Chile only took commitments under mode 3 and maintained the right to impose any measures relating to natural persons involved. Singapore has under taken new commitments in the primary, secondary and higher education and improved the sectoral coverage in other educational services but maintained reservation, by keeping a clause which allows the right to impose any measures in relation to the provisions in primary and secondary education. Mexico took new commitment by allowing 49 per cent of foreign equity in adult education. Australia also took some new commitment in adult education and improved its GATS bindings in "other education services." From the side of US, they had not undertaken significant commitments which go beyond their GATS schedule/offers. The commitments undertaken by US in primary and secondary education are limited by the provision related to public education.[57]

Various other RTAs not involving US, also have taken commitments beyond GATS, though not comparable to the agreements discussed above. For example, Thailand which has allowed 49 per cent foreign equity participation in higher education services in GATS has improved it to 60 per cent in its RTAs. Similarly, Panama

[54] El Salvador, Guatemala and Oman have taken commitments across all sub sectors. Service chapters of US-type agreements generally include an exclusion for "service provided in the exercise of governmental authority."

[55] Countries like Bahrain, Columbia, Dominican Republic, Morocco, Nicaragua and Peru have taken commitments across all education sub-sectors but have subjected them to a reservation allowing to maintain existing restrictions or to undertake new restrictions in relation to public education.

[56] For instance Costa Rica and Honduras have committed all sub-sectors, but adopted nationality requirements for faculty and administrative staff.

[57] The formulation in most PTAs involving the US is to exclude "public education" to the extent that they are social services established or maintained for a public purpose.

improved its GATS schedule offer in its RTAs by taking commitments on private education for all sub-sectors though with a reservation preserving the teaching of civic history and national history to Panamians. Japan has expanded the sector coverage for primary education under mode 3 in its RTAs, while Korea has improved its GATS schedule/offer in its RTAs in education bindings for both modes of supply. Malaysia has made a minor improvement in its RTA on some criteria to its economic needs test for higher education. However, it is to be noted that many leading countries like India, China, EC, EFTA member states and New Zealand have hardly made any GATS-Plus commitments in their RTAs.

**VI.3.3.e. Telecommunication Services**

Unlike other sectors so far examined, telecommunications services have received substantial attention and obtained far reaching liberalization commitments within WTO. With the extended negotiations completed in 1997, a good number of WTO members have committed to open their markets to international competition and has so far undertaken a number of commitments in this sector. This background of telecommunication sector has been quite influential in attracting more commitments in various RTAs. Many countries have made a number of commitments in their respective RTAs, covering all telecommunication services including both basic and value added services. It can be noted that the commitments made in these RTAs are with fewer limitations than those listed at the WTO. Many of these commitments came as part of the previous autonomous liberalization introduced in this sector by countries, while in other cases countries made phase-in commitments to open up their markets partially or completely, thus using the RTA commitments as a lock-in mechanism for reforms that were already underway.

Generally, in most of the RTAs, the cross-border supply of basic telecommunication services has been bound with no limitations, though there are few exceptions. In basic telecommunication services supplied under mode 3, countries like China, EFTA countries, El Salvador, Guatemala, Japan, Mexico, New Zealand, Oman and Thailand have made commitments similar to that they made in GATS. Countries like India, Australia, Korea, Malaysia and US have made commitments in RTAs at par with the offers they have made in Doha Round. Countries like Chile, Columbia, Dominican Republic, EC, Morocco, Peru and Singapore have made commitments in RTAs

beyond their GATS schedule of offers. However, Bahrain, Costa Rica, Honduras, Nicaragua and Panama have undertaken commitments in their respective RTAs in basic telecommunication services without making or offering any commitment at the WTO. In sum, liberalization of telecommunication sector at bilateral, regional and multilateral level has so far made significant progress compared to other sectors.

Apart from liberalization commitments, we could also see improvements or value addition in various regulatory disciplines in the sector. For example, many of the RTAs especially the US RTAs have adopted an approach of combining elements of NAFTA, the GATS Annex on Telecommunications and the WTO reference paper, to form a comprehensive set of regulatory disciplines in this sector which are GATS-Plus in areas such as co-location of interconnection equipment, resale and number of portability and leased circuits services.

**VI.3.3.f. Professional Services**

Liberalization of trade in professional services is always sensitive for countries because of the political pressure often the governments have to face in their home countries. The liberalization of trade in professional services will be effective and relevant when liberalized under mode 1, 3 and 4. In other words, the trade in professional services will be truly liberal when the transfer of professionals from the home country is allowed. Though many professional services are considered together, the stake and impact differ from profession to profession and this diversity makes it difficult to make an objective assessment of the impact of liberalization. Countries have also treated different professions distinctly. Generally, countries have tended to maintain greater restrictions on legal, medical and dental services while more liberal approach is adopted for architecture, engineering and accountancy services. This had been the approach of many developing countries who had either no or only a few GATS commitments. While entering into RTAs countries have often took new commitments across all the professions with few exceptions except for legal services, medical and dental services which are often more restricted. In legal services, the practice of host country law or representation before a court remain reserved to nationals in may RTAs, while commitments on medical and dental services are often accompanied with a reservation allowing future restrictions on health to the extent that these are social services maintained or established for a public purpose/interest.

Accounting, architectural and engineering services are liberalized with no or few limitations, although there are exceptions. Some countries have adopted a reciprocity approach, in which commitments are allowed for states which reciprocate the same treatment.[58]

As in other sectors, trade agreements with US have attracted more commitments in trade in professional services. However, other RTAs have also gone beyond existing GATS commitments in this sector, though not upto the RTAs involving US. Developing countries have generally undertaken commitments in various professional services while retaining more restrictions on legal, medical and dental services.[59] Developed countries have made fewer improvements overall as they often start from a higher level of bindings in the GATS. Another group of countries like Thailand, Malaysia, Japan, EFTA and the US have provided no or limited GATS-Plus commitments.

### VI.3.4. GATS Disciplines and RTAs

Generally the GATS and the regional trade agreements contain similar disciplines with respect to services trade. Commonly, we could find three shared and overriding objectives in both GATS and RTAs, namely the promotion of transparency, stability and liberalization of services trade. The GATS also contains some unfinished rules namely on subsidies, emergency safeguard measures, and government procurement, as well as certain disciplines with respect to domestic regulation. The following sections probe the question of how well RTAs have been able to meet their objectives compared to the GATS. An attempt is also be made to identity how far RTAs go beyond GATS in addressing the objectives.

In many aspects the disciplines in GATS is an unfinished business and the GATS text itself admits and provides for future negotiations and the need for the development of

[58] Central American countries have subjected their PTA commitments with the US on professional services to a reciprocity provision, likely to limit the access granted only to those US States that provide for similar access.

[59] For example, Oman improved upon its GATS binding for all professional services except legal services where foreign equity is still limited to 70 per cent. India improved upon its GATS schedule/offer in various sub-sectors although it left legal services uncommitted. Chile improved on its offers by taking full commitments in architecture and engineering as well as in other professions, but only Chilean nationals are allowed to practice as lawyers. Panama took new and improved commitments under mode 3 across all professions but left mode 1 uncommitted. China released various limitations under mode 3, including for legal, medical and dental services.

disciplines governing the trade in services. The last decade and a half witnessed strong growth in the number of regional trade agreements. These agreements are not that exclusively covering trade in goods but also featuring disciplines on trade and investment in services. The complexity is growing with the proliferation of RTAs, in particular of bi- or trilateral free trade agreements among non-neighbouring countries.[60] The various RTAs, which includes chapters or protocols on trade in services renders the relationship between regional and multilateral trade rules even more complicated (Krajewski 2006: 175). On the other side, the rule making and discipline designing exercises in RTAs have parallel efforts at framing services disciplines in the WTO under the aegis of the GATS. The regional and multilateral efforts at services rule making have tended to be closely intertwined processes. The experiences gained in developing the provisions and disciplines for trade in services have provided significant negotiating capacity and expertise for countries which could be progressively deployed in multilateral negotiations and rule making process (Sauve 2003: 24).

The following statement of Singapore's Minister for Trade and Industry George Yeo in 2002 while announcing his interest in a Free Trade Agreement with Japan testifies the enthusiasm shown by countries in negotiating trade agreements in services since a decade

> As Singapore and Japan are already relatively open economies with regard to trade in goods, the focus of the FTA will likely be on investments and further integration in the services sectors. That is why we hope to go beyond a traditional FTA to a "new-age" FTA focusing on liberalization and cooperation in the high-growth services sectors of the future such as the transport, financial and information and communication technology sectors. Such a forward looking FTA will enhance and strengthen the competitiveness and capabilities of both our countries (Findlay et al. 2005: 294).

The proliferation of regional trade agreements has provided governments with ample policy space to experiment various approaches to rule making and market opening in the area of trade in services. Since the GATS itself remains incomplete with negotiations pending in a number of key areas, the regional route has afforded governments ability to pursue policy approaches in rule making and liberalization. However, such regional experimentation has generated a number of useful policy

[60] For a comprehensive account of this development, see Crawford and Orentino (2005).

liaisons in comparative negotiating and rule making dynamics in many areas like domestic regulation, government procurement, subsidies, emergency safeguard measures etc. (Sauve 2003: 24). The following section attempts to analyse the various provisions in selected RTAs in the above areas which go beyond the GATS disciplines. The attempt is to cull out these GATS-Plus disciplines in various RTAs and to examine the impact of this on multilateral trading system.

Five provisions of GATS mandate further negotiations concerning trade in services. Article XIX GATS (Progressive Liberalization – Part IV of GATS) calls for successive rounds of negotiations directed at the reduction or elimination of measures with adverse effects on trade as a means for providing effective market access. The others four provisions are disciplines in which the Members could not arrive on a consensus in Uruguay Round. These provisions are part of the built in agenda otherwise referred to as the 'unfinished business' of GATS (Stephenson 2000: 509). They are Article VI:4 GATS providing for negotiation on disciplines on domestic regulation; Article X:1 GATS which deals with emergency safeguard measures; Article XIII:2 which deals with government procurement and Article XV:1 on subsidies which have become part of the built-in agenda of GATS. This section looks into how various RTAs have gone beyond GATS while introducing disciplines in the above areas.

Article VI of GATS, Domestic Regulation provides that '...each member shall ensure that all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner' (Article VI:1 of GATS). In achieving this objective, Article VI:4 GATS provides that:

> With a view to ensuring that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services, the Council for Trade in Services shall, through appropriate bodies it may establish, develop any necessary disciplines (Article VI: 4 of GATS).

Article VI:4 GATS further holds that these disciplines shall aim to ensure that such regulations are *inter alia* (a) based on objective and transparent criteria such as competence and the ability to supply the service; (b) not more burdensome than necessary to ensure the quality of the service; (c) in the case of licensing procedures, not in themselves a restriction on the supply of service (Article VI:4 of GATS).

Similarly, the negotiations in other three areas, namely, government procurement, subsidies and emergency safeguard measures have not produced any substantive outcome and are still at an early stage despite many years of negotiations.[61]

According to Article XIII GATS:

> Articles II, XVI and XVII shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of services purchased for governmental purposes....'

Further Article XIII:2 provides:

> There shall be multilateral negotiations on government procurement in services under this Agreement....

Hence, it can be found that except listing exception, the GATS text does not contain substantial provisions governing the discipline of government procurement and it provides for further negotiations and framing of disciplines.

Regarding discipline on subsides, except for the provisions to request for consultations with a member in the event of, any member considering the subsidy of the other member as adversely affecting trade, no substantial provision could be found in GATS (Article XV:2 of GATS).

Further Article XV:1 provides that:

> Members shall enter into negotiations with a view to developing the necessary multilateral disciplines to avoid such trade distortive effects. The negotiations shall also address the appropriateness of countervailing procedures.

In doing so, it requires to recognize the role of subsidies in the development needs of developing countries and its importance in various development programmes. Hence, the GATS text hardly offers substantial disciplines on subsidies.

Article X:1 of GATS calls for multilateral negotiations on the question of emergency safeguard measures based on the principle of non-discrimination. Elements discussed in the negotiation on emergency safeguard measures included the justification of

[61] For more details, see Working Party on GATS Rules (2006), Annual Report of the Working Party on GATS Rules to the Council of Trade in Services, WTO Document S/WPGR/15 dated 22 September 2005.

safeguards, applicable measures, duration, compensation and surveillance. Some members even questioned the desirability and feasibility of rules on safeguards in the context of trade in services (Krajewski 2006: 181). The discussions which offered in these lines have not produced desired results.

Various GATS bodies were mandated with negotiations and improving disciplines on the above areas. There negotiations have not yet been concluded and include a number of contentious issues (Djordjevic 2002; Krajewski 2003). A number of contentious issues and unresolved questions have made negotiation difficult and have not produced any substantive outcome and are still at an early stage despite many years of negotiations.[62]

Given the early stages of the debates on GATS rules in the WTO, it would be relevant to see how various RTAs approach and address these issues in general and what the concepts they utilize while addressing these issues. The following section identifies various provisions governing the disciplines in selected RTAs. The effort has been to examine whether RTAs contain disciplines on the above discussed areas and if so how far it is beyond the GATS disciplines. It would be difficult to survey all the RTAs which contain services trade provisions. Hence examination done on few selected RTAs by various studies will be relied upon. Though various RTAs contain number of disciplines going beyond the GATS text, the examination here will be limited to disciplines on Domestic regulation, Government Procurement, Subsidies and Emergency safeguard measures.

### VI.3.4.i. Domestic Regulation Disciplines in RTAs

The GATS contains a set of provision governing disciplines on domestic regulation. Broadly, they represent administrative law type standards of transparency, objectivity, reviewability and necessity. The RTAs contain counterpart provisions that could be regarded as supplementary. The impact of these provisions varies in different RTAs. The GATS requires members to ensure that measures of general application of trade in services be administered in a reasonably objective and impartial manner. The GATS also requires members to maintain procedures for the prompt review of remedy

[62] For the most recent summary of the negotiations, see working party on GATS Rules, Annual Report of the Working Party on GATS Rules to the Councils for Trade in services available at www.wto.org.

of administrative action-decisions affecting trade in services (Buckeley 2008: 171). Various RTAs also include provisions imposing disciplines like domestic regulation dealt by GATS. Some of them, while follow the standard set by GATS, some other RTAs go beyond the standards already set by GATS. An analysis of this, on selected RTAs would enable us to know how far the RTAs tend to go beyond GATS in rule making.

**a. NAFTA**

North American Free Trade Agreement (NAFTA) provides the most detailed regime for domestic regulation. NAFTA does not contain specific domestic regulation provision for trade in services. However, the Chapter 9 of NAFTA is on standards related measures which apply to measures directly or indirectly affecting trade in goods or services trade (NAFTA Article 901 (1)). NAFTA Article 904, provides for the basic rights and obligations concerning such standards related measures. NAFTA Article 904 (4) provides that:

> No party may prepare, adopt, maintain or apply any standards-related measures with a view to or with the effect of creating an unnecessary obstacle to trade between the parties. An unnecessary obstacle to trade shall not be deemed to be created where:
>
> (a) The demonstrable purpose of the measure is to achieve a legitimate objective; and
> (b) The measure does not operate to exclude goods of another party that meet that legitimate objective.

It can be found that Article 904 (4) of NAFTA is comparable to Article VI:4 of GATS. However, the standard of the necessity test applied in the two provisions differ. While, GATS Article VI:4 only refers to the quality of service, the NAFTA Article 904 (4) goes beyond the GATS provision and refers to (any) legitimate objective. NAFTA text contains the principle of mutual recognition in its disciplines on domestic regulation. A stronger and clear application of mutual recognition principle which also extends to services can be found in NAFTA Article 906 (4). This provision requires the members to treat foreign regulations as equivalent to domestic ones if the foreign regulations adequately fulfill the domestic policy objectives.

Another comparable obligation can be found in NAFTA Article 905, which requires the use of relevant international standards as a basis for standards related measures. NAFTA Article 905 and Article 906 (4) supplement this basic rule of NAFTA Article 904 (4) and show the relevance of the use of international standards, and recognition of equivalence in the context of domestic recognition, which has also been recognized by the negotiations in WTO (Krajewski 2006: 187).

Chapter Twelve of NAFTA deals with the trade in services. The Article 1210 of NAFTA contained in this chapter is relevant in this context. The paragraph 1 of Article 1210 reads:

> With a view to ensuring that any measure adopted or maintained by a party relating to the licensing or certification of nationals of another party does not constitute an unnecessary barrier to trade, each party shall endeavour to ensure that any such measure.
>
> a) Is based on objective and transparent criteria, such as competence and the ability to provide a service;
> b) Is not more burdensome than necessary to ensure the quality of a service; and
> c) Does not constitute a disguised restriction on the cross-border provision of a service.

This provision more or less resembles Article VI:4 of GATS on the standard setting. But, unlike the GATS provision which covers qualification requirements and procedures, technical standards and licensing requirements, the scope of NAFTA Article 1210 (1) is limited to licensing and certification of natural persons. It is also to be noted that this discipline of NAFTA is loosely constructed which only requires a best effort from the parties ('each party shall endeavor') unlike the corresponding GATS discipline. Thus the legal obligation under NAFTA discipline is more limited compared to that of GATS.

It is not always that NAFTA disciplines are loosely constructed. In its Telecommunication chapter, Article 1304 (1) requires each party to ensure that its standard related measures relating to the attachment of equipments to the public telecommunication transport networks are adopted or maintained only to the extent necessary to achieve five specific policy objectives. This provision thus establishes a specific necessity test with a closed list of legitimate objectives. Unlike NAFTA

Article 1210 (1), above mentioned Article 1304 (1) of NAFTA contains a strict legal obligation ('each party shall ensure') (Krajewski 2006: 187). Similarly, the investment chapter of NAFTA also contains a provision which requires for fair and equitable treatment for investments (Article 1105 (1) NAFTA) which is comparable to the obligation set in GATS.

**b. MERCOSUR and CAFTA-DR**

The Montevideo Protocol on Trade in Services and the CAFTA-DR agreement contains disciplines governing domestic regulation for trade services, which are almost in line and tune with that of GATS Article VI:4. In examining this provision we can find that the Article X:4 (National Regulation) of the Montevideo Protocol holds:

> In order to ensure that measures relating to technical norms requirements and procedures for qualification certificates and requirements in terms of licensing do not constitute unnecessary impediments to trade in services, Member States shall see to it that these requirements and procedures, among other things
>
> i) are based on objective and transparent criteria, such as the competence and capacity for providing the service;
>
> ii) are not unnecessarily onerous for assuring quality of service and
>
> iii) in the case of procedures in regard to licenses, do not constitute in themselves restrictions on the provision of services.

In CAFTA-DR, the Article 11 (8)(2) concerning Domestic Regulation reads as follows:

> With a view to ensuring that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services, each party shall endeavour to ensure, as appropriate for individual sectors, that any such measures that it adopts or maintains are:
>
> **a)** based on objective and transparent criteria, such as competitive and the ability to supply this service;
>
> **b)** not more burdensome than necessary to ensure the quality of the service; and

**c)** in the case of licensing procedures, not in themselves a restriction on the supply of the service.

Both the above provisions of Montevideo Protocol and CAFTA-DR respectively, contains almost similar wording as GATS Article VI:4. The only difference is that these provisions are directly applicable and require no further negotiation as GATS does. It could be observed that the Article 11 (8)(2) of CAFTA-DR and Article X:4 of Montevideo protocol do not constitute a binding obligation. While the former contains a best endeavour approach the latter contain a bit more stronger provision which requires that the 'Member State shall see to it.' It is interesting to note that the paragraph 3 of CAFTA-DR Article 11 (8) contains an amendment provision, which says amendment shall bring the results of the GATS negotiation into effect under the CAFTA-DR Agreement (Krajewski 2006: 189).

**c. Andean Community and ASEAN**

Both the General Framework of the Andean Community and the ASEAN Frame work Agreement on Services (AFAS) do not contain special provisions on domestic regulation. However, the Article 13 of the Andean Community General Framework requires the recognition of licenses, certifications, professional degrees and accreditations granted by another member in accordance with criteria established by a decision of the Andean Community Commission. Further, it is interesting to note that the Andean Community General Framework and the AFAS both contains reference to the GATS in general. Andean Community General Framework Article 26 states:

> In order to ensure the consistency and clarity of the General Framework established by the decision, the ideas, definitions and interpretative elements contained in the General Agreement on Trade in Services (GATS) shall be applied to said General Framework, whenever pertinent.

Article XIV:1 of AFAS provides:

> The terms and definitions and other provisions of the GATS shall be referred to and applied to matters arising under this framework agreement for which no specific provision has been made under it.

It is observed that Article XIV:1 of AFAS is broad enough to incorporate GATS Article VI:4 provisions into AFAS (Stephenson 2000: 287,309). The same view is relevant in the case of Article 26 of the Andean community General Framework.

**d. Caricom**

The Revised Treaty of Chaguaramas does not contain any specific provision similar to GATS Article VI:4. Article 36 of the Treaty generally prohibits the introduction of new restrictions on the provision of services and Article 37 calls for the establishment of a programme to abolish existing discriminatory restrictions on the provision of services. Apart from this, Article 67 of the Revised Treaty of Chaguaramas contains a legislative mandate for the Caricom Council for Trade and Economic Development to develop a standardization programme aimed at trade facilitation, enhanced efficiency in the production and delivery of services, improved quality, and consumer and environmental protection. The programme shall, *inter alia*, include harmonization of standards and technical regulations, transparency in their development, and recognition of conformity assessment procedures through mutual recognition agreements. It could be argued that the above provision contains similar objectives as GATS disciplines on domestic regulation.

Generally, we could find that there is no uniform trend in the domestic regulation disciplines in the various RTAs examined. While some do not have any provisions governing domestic regulation (Andean Community General Framework, AFAS and the revised Treaty of Chaguaramas), some have narrow provisions when compared to that of GATS Article VI:4. However, CAFTA-DR and the Montevideo Protocol, contain a provision with a standard similar to the standard of GATS Article VI:4. It could be argued that these agreements go beyond the scope of GATS, as they contain directly applicable disciplines (Krajewski 2006: 191).

**VI.3.4.ii. Government Procurement**

**a. Andean Community, Caricom and ASEAN**

The General Framework of the Andean Community does not contain detailed provisions on government procurement. It contains a general provision in its Article 4 which provides:

> (...) the procurement of services by government agencies or public institutions of Member Countries shall be subject to the principle of national treatment among member countries, pursuant to a decision to be adopted no later than

> January 1st 2002. In the event that the Decision in question fails to be adopted by that date the member countries shall grant national treatment immediately (....)

It can be observed that by virtue of above provision, national treatment applies to procurement among the Andean Community Members.

The Revised Treaty of Chaguaramas does not contain specific rule on government procurement. However, the Article 239 (b) of the Treaty requires the Caricom members to undertake to elaborate a protocol relating *inter alia* to government procurement.

AFAS does not contain any provision related to government procurement. Even though, one could argue that the Article XIV:1 AFAS, which incorporates terms, definition and other provisions of GATS into AFAS, includes the relevant provision of government procurement in GATS.

**b. MERCOSUR**

The Montevideo Protocol on trade in services contains provision on government procurement. The provision contained in the Montevideo Protocol is almost identical to the respective provisions in GATS. It is Article XV of the Montevideo Protocol which deals with Public Contracting. It provides:

> 1) Articles III, IV and V[63] shall not be applicable to the laws, rules and regulations that govern government contracting of services directed at official functions, nor to commercial resale or to its utilization in the provision of services for commercial sale.
>
> 2) Maintaining the terms established in paragraph 1 and recognizing that such laws, rules, and regulations may have distorting effect on trade in services, the member states agree to establish common guidelines that in terms of government purchases in general shall be established in the MERCOSUR.

In December 2004, members of MERCOSUR agreed on a Protocol on Public Contracts.[64] This protocol covers both goods and services. The Protocol contains a

[63] Article III of the Montevideo protocol provides for most favoured nation treatment, Article IV provides for market access and Article V provides for national treatment (Explanation added).
[64] Decision 27/04 of the Council of the Common Market, 9 December 2004. More data on the decision is available from

full-fledged regime concerning public procurement. The Protocol contains detailed rules on contract awarding and challenging procedures and other non-discrimination provisions.

**c. NAFTA and CAFTA-DR**

NAFTA and CAFTA-DR contains comprehensive legal regime on government procurement covering both goods and services. NAFTA provisions on government procurement are contained in Chapter 10 and that of CAFTA-DR is included in Chapter 9. Both agreements provide for general non discrimination treatment and include detailed regulation on tendering and bid challenging procedures. Both agreements provide for exception of certain sectors and sub-sectors. CAFTA-DR government procurement rules applicable in services trade are without extensive sectoral exclusions.

Generally, we cannot find a common trend in government procurement provisions in various RTAs. While some RTAs like NAFTA, CAFTA-DR, and MERCOSUR contain provisions and have comprehensive legal frameworks for government procurement, others do not have the same. They contain non-discrimination obligation and detailed tendering and tender challenging procedures. However, we could not say they contain all liberalization provisions, example market access. It can also be seen that RTAs adopt different approaches in addressing the issue of government procurement. While some adopt negative list approach (NAFTA and CAFTA-DR), some others adopt positive list approach (MERCOSUR). Many other RTAs do not address government procurement comprehensively, but some of them refer to government procurement as potential future policy objective (The revised treaty of Chaguaramas). However, there is no common approach by RTAs to Government Procurement relating to trade in services. Some of them go beyond GATS disciplines, while many of them do not address government procurement disciplines in their RTAs.

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www.mre.gov.py/dependencias/tratados/mercosur/registro%20mercosur/mercosurprincipal.htm [Accessed on 6 February 2010].

### VI.3.4.iii. Subsidies

#### a. Caricom and Andean Community

Among the RTAs examined here, the Revised Treaty of Chaguaramas contains the most comprehensive provision on subsidies. The Treaty contains 21 substantial provisions (Articles 96-115) on subsidies in its Chapter five on trade policy. These provisions are applicable for both trade in goods and services. Article 96 of the Treaty defines a subsidy as 'a financial contribution by a Government or any public body' such as direct transfer of funds, government revenue that is not collected, and government services other than general infrastructure. Article 97 which deals with the types of subsidies categorizes subsidies into three groups, viz. prohibited subsidies, subsidies which cause injury to a domestic industry, or which results in nullification or impairment of benefits or seriously prejudice interests of a Member State, and subsidies which cause serious adverse effects to a domestic industry of any member state which would be difficult to repair. Article 98 entitles members to take actions against subsidized products and Article 99 prohibits the granting or maintenance of export subsidies and local content subsidies. The Treaty also contains provision for investigation, consultations and the withdrawal of subsidies.

Apart from these provisions, the Article 69 of the Revised Treaty of Chaguaramas requires Caricom Members to 'harmonize national incentives to investments in the industrial, agricultural and services sectors.' This provision provides some flexibility also.[65]

The Andean Community General Framework also contains provision addressing subsidies in services trade. The Article 18 of the Andean Community General Framework contains a general obligation to apply subsidies to services in a comparatively neutral way and mandates for the adoption of further rules on this subject. It provides:

> Member Countries shall ensure that such promotional measures as they may apply to service activities do not distort competition within the sub-regional

[65] The Council for Finance and Planning is entrusted with formulating respective proposals, which shall accord 'support for industries considered to be of strategic interest to the Community' and may, *inter alia*, provide for non-discrimination in the granting of incentives among Community nationals.

market and shall adopt Community rule regarding incentives for the trade in services.

In 1999, the Andean Commission enacted special rules to identify and correct the distortive effect of subsidies.[66] The decision has created detailed rules governing subsidies which are applicable for both trade in goods and services. The rules contain declared provisions on the definition of a subsidy in general, of actionable and of specific subsidies. It also provides for the calculation of the benefit element of a subsidy. Apart from this, the rule also provides for the determination of a damage caused by a subsidy and possible remedies including preliminary measures.

**b. MERCOSUR**

The Montevideo Protocol Article XVI, which refers to subsidies, contains a similar provision to the respective GATS provision, Article XV. It provides:

> **1)** The Member States recognize that in certain circumstances subsidies may have distorting effects on trade in services. The member states agree that common guidelines shall be applied that in the matter of subsidies in general shall be established in MERCOSUR.
>
> **2)** The mechanism stated in paragraph 2 of Article XV of GATS shall be applied.

The paragraph 2 of Article XVI refers to GATS Article XV:2 which provides that a member that considers itself to be adversely affected by a subsidy may request consultations from the subsidizing members and further it provides that such requests shall be considered sympathetically.

**c. NAFTA, CAFTA-DR and ASEAN**

NAFTA, CAFTA-DR and AFAS do not contain special rules regarding subsidies in services trade.

Hence, it could be found that there is no uniform approach in RTAs regarding subsidies discipline in services trade. While Caricom and Andean Community have detailed provisions addressing subsidies, the Montevideo Protocol follows and refers

[66] Decision 457 of the Commission of the Andean Community 4 May 1999, *Gaceta Oficial del Acuerdo de Cartagena*, Ano XV Numero 436, 7 May 1999 at 20 (Krajewski 2006: 195).

to the GATS provisions on subsidies. However, NAFTA, CAFTA-DR and ASEAN do not contain specific provision on subsidies in services.

### VI.3.4.iv. Emergency Safeguard Measures

Safeguard measures are commonly found in RTAs. Most of them are related to trade in goods and on balance of payment issues (Article 2104 NAFTA; Articles 20 and 21 of the General Framework of the Andean Community; Article 43 of the Revised Treaty of Chaguaramas). However, we could find a comprehensive treatment of safeguard measures in services in the Revised Treaty of Chaguaramas. It is contained in Chapter Three of the Treaty which covers establishment, services, capital and movement of persons. Article 47 contained in Chapter Three of the Treaty provides for the emergency safeguard measures in services. Paragraph 1 of Article 47 states:

> Where the exercise of rights granted under this chapter creates serious difficulties in any sector of the economy of a member state or occasions economic hardships in a region of the Community, a member state adversely affected thereby may, subject to the provision of this Article, apply such restrictions on the exercise of the rights as it considers appropriate in order to resolve the difficulties or alleviate the hardships.

Article 47 also places necessary regulation in the application of these safeguard measures. It requires that the restrictions applied by a Member state pursuant to paragraph 1 shall be confined to those necessary to resolve the difficulties in the affected sectors and to alleviate economic hardships in a particular region (Article 47 (5)). Further it requires the minimization of damage to the commercial or economic interest of other Member States (Article 47 (6)). Article 47 (7) provides that the restrictions shall not be discriminatory and shall be progressively relaxed as relevant conditions improve and shall be maintained only to the extent the conditions mentioned in paragraph 1 continue to justify their application. The notification of the measures taken under this provision is required under Article 47 (2). It also requires to submit a programme to the Council for Trade and Economic Development or the Council for Finance and Planning through which it intends to resolve its difficulties or hardships (Article 47(3)). The competent organs are mandated to asses the programme and determine whether the measures should continue and if so how long and to what extent.

**a. ASEAN**

AFAS does not contain any specific provision addressing the issue of emergency safeguards. However, we could find a provision for emergency safeguards in the 1998 Framework Agreement on the ASEAN Investment Area (AIA).[67] Article 14 of the AIA which deals with the emergency safeguard measures reads as follows:

> **1)** If as a result of the implementation of the liberalization programme under this Agreement, a Member state suffers or is threatened with any serious injury and threat, the Member State may take emergency safeguard measures to the extend and for such period as may be necessary to prevent or to remedy such injury. The measures taken shall be provisional and without discrimination.
>
> **2)** Where emergency safeguard measures are taken pursuant to this Article, notice of such measure shall be given to the AIA Council within 14 days from the date of such measures are taken.
>
> **3)** The AIA Council shall determine the definition of serious injury and threat of serious injury and the procedures of instituting emergency safeguards measures pursuant to the Article.

Even though not equivalent to the Article 47 provisions of the Revised Treaty of Chaguaramas, the Article 14 of the AIA Framework agreement is comparable with the former. Both require to be applied in a non-discriminatory manner and the application should be limited to the extent and for the time necessary to control the damage or injury. Both contain provisions for notification and the modalities of application are subject to institutional controls.

**b. NAFTA, CAFTA-DR, MERCOSUR and Andean Community**

It can be found that NAFTA, CAFTA-DR, MERCOSUR and Andean Community agreements do not have provisions on safeguards governing the trade in services. Some of these agreements contain safeguard provision for trade in goods.[68] Similar to other disciplines examined, we could not find a common approach by countries on

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[67] The text is available at www.aseansec.org/6466.htm [Accessed on 7 February 2010].

[68] Article 801 (1) NAFTA allows the suspension of the further reductions or the increase of duties if imports 'constitute a substantial cause of serious injury, or threat thereof to a domestic industry producing a like or directly competitive good.' A similar provision can be found in Article 8 (1) of CAFTA-DR regarding the import of goods. Generally the application of these safeguard measures are limited to a 10 year transition period.

emergency safeguard disciplines on trade in services in their RTAs. Still there are RTAs which contain comprehensive provisions regarding emergency safeguard disciplines in the trade in services. Hence it would be wrong to suggest that emergency safe guard measures as a discipline have not gone beyond GATS in trade in services.

### VI.4. Other WTO Plus Issues in RTAs

Various RTAs feature a number of other WTO-Plus issues which go beyond the WTO disciplines. Important among them are issues sometimes referred to as 'Singapore Issues' like investment, competition policy, government procurement etc. Among this, we have already examined the provisions governing government procurement and subsidies in the previous section. This section deals with how RTAs address the issues like investment and competition policy compared to the WTO.

#### VI.4.1. Investment

Investment is one area where RTAs are playing a crucial role in creating commitments and disciplines beyond the WTO standards and flexibilities. While bilateral investment agreements have operated for many years now, the recent RTAs have taken over the agenda of rule making in investments.

It is generally acknowledged that the Uruguay round of GATT talks went further than any previous rounds in placing investment issues on the multilateral trade agenda. Concurrently, the pace of developments with respect to the negotiations of rules on investment at the sub-multilateral level also accelerated during the early 1990s (OECD 2003: 62). This rapid growing importance of investments in the international policy framework reflects the increasing recognition of the role of investments in international economic development and integration. Since the 1980s, foreign investment has come to be perceived as an important 'new' mode of global economic linkage. Statistics indicate that flows of foreign direct investment have out stripped both global trade and GDP growth rates since the 1980s (OECD 2003).

This growing importance of investment is not well addressed in multilateral negotiations while RTAs have shown the flexibility to accommodate the concerns of

the countries. There is no comprehensive multilateral agreement on investment. The WTO TRIMS agreement has some purchase, broaching entry rights and performance requirements but its sphere of influence is limited to investment measures that affect trade in goods. Though the OECD codes have provided models for liberalization, the major initiative for a binding compact Multilateral Agreement on Investment, failed to achieve a consensus. Further, in order to facilitate sailing for other issues, the European Union has taken the 'Singapore Issues' (including investment) off the WTO agenda (Arup 2008: 174).

Generally, it can be found that RTAs attempt to establish ambitious investment rules, with a broad definition of investment. Most countries that have entered into agreements containing high-standard rules on investment had either already been liberalizing their investment regimes unilaterally or had experimented with investment rules in prior agreements.[69] At the same time, countries who were traditionally highly restrictive and have only recently begun to liberalize their investment regimes have preferred for less encompassing agreements covering limited rights of establishment and movement of capital.

At the regional and bilateral level, investment issues have been addressed through RTAs, Bilateral Investment Treaties (BITs) and a range of plurilateral arrangements specifically aimed at dealing with investment issues. It is important to keep in perspective that RTAs only represent one of several institutional settings at the sub-multilateral level in which investment rule making has taken place. However, it can be noted that, the RTA investment chapters are making a path for liberal international investment law (Arup 2008: 174). Rules on investment on different aspects can be found in various RTAs. This includes: (i) agreements that focus on the right of establishment and the movement of capital; (ii) agreements that build upon treatment and protection principles typically found in BITS; (iii) agreements that distinguish between the rights accorded to local and third party investors and (iv) agreements that include provisions on the status of regional enterprises. Most of the recent RTAs which contain investment chapters constitute examples of efforts to go beyond existing provisions on investment at the WTO, either in terms of substance or

[69] A number of agreements recently negotiated by the NAFTA signatories contains provisions almost identical to NAFTA's chapter 11 which deals with investments.

objectives. RTAs containing rules on investment usually go beyond the WTO where they contain provisions on the right of establishment, an obligation that does not exist in any WTO agreement (OECD 2003: 65).

The content going beyond the WTO provisions starts right from the definition of investment. Many RTAs provide for a wide definition of investment. The scope is broad, covering intangible as well as tangible property; contractual and administrative as well as property rights; portfolio as well as direct investments. Such a treatment of definition provides for a variety of protection and rights for investors. For example, Australia – United States Free Trade Agreement (AUSFTA) specifies that investment means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit or the assumption of risk. Generously the forms include: an enterprise; share and stock or other forms of equity participation in an enterprise; bonds, debentures, other debt instruments, and loans; futures, options and other derivatives, turn-key, construction, management, production, concession, revenue sharing and other similar contracts; intellectual property rights; licenses, authorizations and permits; and other tangible or intangible property and related property rights (Arup 2008: 176). It is also noted that a wide scope of the definition will have an impact in several ways (Piccitto 1998: 731).

The RTA chapters on investment provide for rights of entry or establishment. The rights of entry or establishment are ensured through the national treatment obligation. The national treatment requires that whenever the national government permits private investment, then it should give no less favorable treatment to foreign investors than it does to local investors. However, we should note that this does not amount to market access *per se* (as there is for cross-border services) and if the government maintains a public monopoly or applies even-handed controls on private investment (such as cross-media controls or licensing requirements for educational institutions), it will not be contradicting the national treatment obligation. To accommodate these kind of sensitivities, RTA provisions in investments often contain some flexibilities.[70]

[70] For instance, AUSFTA contains a declaration that, for greater certainty, nothing in the chapter imposes an obligation on a party to privatize

Early efforts at introducing rules on investment at the regional level emphasized the issues of establishment and free movement of capital. One of the most comprehensive examples of this approach can be found in the *Treaty Establishing the European Communities* (1957) (revised by the Treaty of Amsterdam which entered into force on 1 May 1999). Freedom of establishment and free movement of capital are two primary concerns addressed in the EC Treaty. Article 52 of the original treaty prohibits restrictions on the freedom of establishment of nationals of a member state in the territory of another member state and on the setting up of agencies, branches or subsidiaries by national of any member state established in the territory of any member state.[71] The freedom of establishment here includes the right to take up and pursue activities as self-employed persons and to set up and manage undertakings under conditions applicable for the nationals of the country where it is established. This right of establishment is applicable to companies or firms having their registered office, central administration or principal place of business within the community by virtue of Article 58 (Article 48 of Treaty of Amsterdam) (OECD 2003).

With respect to movement of capital, Article 73 (b) of the EC Treaty (Article 56 of the Treaty of Amsterdam), added by the 1992 Treaty on European Union, provides for the prohibition as of 1 January 1994, of restrictions on movements of capital and payments between the member states and between the member states and third countries. Under this, capital movements include direct investments, defined as investments of all kinds which serve to establish or to maintain lasting and direct links between the person providing the capital and the undertaking to which the capital is made available in order to carry on an economic activity. However this provision is subject to some exceptions and a safeguard clause applicable in case of difficulties (OECD 2003).

Agreements involving countries that have traditionally restricted capital movements also have tended to emphasize establishment and capital movements in their agreements though with a limited ambit (OECD 2003: 60). The Treaty Establishing the Caribbean Community (CARICOM) (1973), as amended by a Protocol adopted in

[71] The reference in the original text to the progressive abolition of restrictions on the right of establishment in the course of the transitional period was deleted and replaced by the concept of prohibition in amendments made by the Treaty of Amsterdam, Article 43. Official Journal of the European Communities, No. C 340, 10 November 1997: 61.

July 1997 prohibits the introduction by member states of any new restriction relating to the right of establishment of nationals of other member states (Article 356). Member States are also required to remove restrictions on the right of establishment of nationals, of other member states, including restrictions on the setting up of agencies, branches or subsidiaries by nationals of a member state in the territory of another member state by virtue of Article 35C. Similarly, the Treaty Establishing the African Economic Community (1991) and the Treaty Establishing the Common Market for Eastern and Southern Africa (COMESA, 1993) contain provisions for the removal of obstacles to the free movement of capital and right for establishment. The Revised Treaty of the Economic Community of West African States (ECOWAS, 1993) also contains objectives aiming for the removal of obstacles to the free movement of persons, goods, services and capital and obstacles to the right of residence and establishment (Article 3 (2)). The Treaty Establishing the Economic and Monetary Union of West Africa (1996) is yet another treaty which proscribes restrictions on movement of capital.

While most governments are looking to attract foreign capital and encourage foreign participation, they might still wish to limit foreign participation; they might still wish to limit foreign holdings in key sectors. There are a variety of reasons, economic, political, cultural and social for retaining these controls. It is also the duty of the government to ensure that it has competence over foreign entity, given the fact that foreign investors have several escape routes. Various requirements and regulatory safeguards like local incorporation and capitalization requirements or other requirements attached to various investments aim at meeting this objective of the governments (Arup 2008: 176).

Along with the national treatment requirement, many RTAs outrightly proscribes certain performance requirements (Picciotto 1998). A typical example is NAFTA. The provisions of the NAFTA regarding performance requirements are applicable to both investments of investors of a party and investments of investors of a non-party. Article 1106 (1) of NAFTA proscribes the imposition or enforcement of mandatory requirements and the enforcement of any undertakings or commitments: 1) to export a given level or percentage of goods or services; 2) to achieve a given level or percentage of domestic content; 3) to purchase, use or accord a preference to goods

produced or services provided in the territory of a party or to purchase goods or services from persons in its territory; 4) to relate the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with investment; 5) to restrict sale of goods or services produced or provided by an investment in a party's territory by relating such sales to the volume or value of exports or foreign exchange earnings of the investment; 6) to transfer technology, a production process or other proprietary knowledge; and 7) to act as the exclusive supplier of the goods produced or services provided by an investment to a specific region or world market. With the exception for the first and the last two requirements listed, these requirements are also prohibited if applied as condition for the receipt of an advantage (Article 1106 (3)).

NAFTA chapter on investments contains dispute settlement provisions. It provides for international arbitration of disputes between a party and an investor of another party. Under NAFTA, the investor has the choice to proceed arbitration under the International Centre for Settlement of Investment Disputes (ICSID) Convention, the Additional Facility Rules of ICSID or the United Nations Commission of International Trade Law (UNCITRAL) Arbitration Rules.

One aspect in respect of dispute settlement in investments is whether the investors shall be provided with the option to go on with their own motion to an international tribunal. Direct investor-state arbitration has become readily available with the World Bank (ICSID) initiatives in 1960s. Most US FTAs have until recently provided this avenue. But interestingly the FTA with Australia did not do so. The reasons are not clear why this provision was omitted. One interpretation is that the United States, burnt by challenges under the NAFTA provisions, could not contemplate the project of Australian investors bringing it to book before an international tribunal (Dodge 2006). Australia's FTAs with Singapore and Thailand authorize investor-state arbitration. Australia may also suggest similar options for FTAs with China. China's recent FTA with Pakistan contains such provision. A number of more recent RTAs

(and proposed RTAs), especially involving NAFTA signatories, have been broadly modeled after the NAFTA with respect to investment rules.[72]

Other RTAs have sought to incorporate BIT-like provisions on investment but have refrained from including strict enforcement standards and higher levels of protection and liberalization as found in agreements like NAFTA. In the APEC Non-Binding Investment Principles (1994), we could find a number of norms of a legally non-binding nature relating to the admission, treatment and protection of foreign investment. This contains general principles for treating investment, which states that Member economies will ensure transparency with respect to laws, regulations and policies affecting foreign investment; extend MFN treatment to investors from any economy with respect to the establishment, expansion and operation of these investments; and accord national treatment to foreign investors in relation to the establishment, expansion, operation and protection of foreign investment, with exception as provided for in domestic laws, regulations and policies. It is also specifically mentioned that Member economies will not relax health, safety and environmental regulations as an incentive to encourage foreign investment; minimize the use of performance requirements that distort or limit the expansion of trade and investment; and permit the technology entry and sojourn of key personnel for the purpose of engaging in activities connected with foreign investment, subject to relevant laws and regulations (OECD 2003: 68).

A number of regional and plurilateral agreements exist which do not directly incorporate the full range of investment protection and dispute settlement provisions typically found in other agreements but envisage the conclusion of such bilateral treaties between the parties. Although not part of the RTAs themselves, these 'side-BITs' are explicitly recognized as contributing to the wider process of liberalization between the parties. Some agreements contain investment provisions whose aim is more developmental in nature. The Protocol on Promotion and Protection of Investment from States not parties to MERCOSUR is having a developmental perspective rather then economic efficiency as its primary objectives (OECD 2003).

[72] For example, the Canada-Chile Free Trade Agreement (1997); the proposed draft of Free Trade Areas of the Americas; Vanduz Convention; the revised Convention establishing the European Free Trade Association (2001), Japan-Singapore Economic Partnership Agreement.

Several regional agreements allow for co-operation among firms of member states by establishing a special legal regime for the formation of a regional form of business enterprise. The Uniform Code on Andean Multinational Enterprises established by Decision 292 of the Commission of the Cartagena Agreement provides for the formation of Andean Multinational Enterprises. For the formation of such an enterprise, it requires that capital contributions by national investors of two or more member countries must make up more than 60 per cent of the capital of the enterprise. For such an enterprise, the Decision requires the member countries to grant national treatment with respect to government procurement, export incentives and taxation, the right to participate in economic sectors reserved for national companies, the right to open branches in any member country and the right for free transfer of funds related to investments. Similarly, the Bank Agreement on the ASEAN Industrial Cooperation Scheme (AICO Scheme) was concluded by members of ASEAN in 1996 to promote joint manufacturing industrial activities between ASEAN-based companies.

It is often argued that strong investment rights attract more investment. There are contrasting views to the argument too.[73] In general, the strongest investor protections entail non discrimination among all investors, provisions against expropriation, dispute settlement with eligibility for investor state suits and independent arbitration. The legal power granted to investors to sue governments under terms of the bilateral or regional agreements is arguably the strongest new protection in the trade agreements (World Bank 2005: 107). It is also observed that despite the proliferation of new protections to foreign investment, the positive economic consequences have yet to be demonstrated. However, protections by themselves contribute little additional inflows, evidence is mounting that RTAs – that is, the combination of appropriate trade rules, liberalized market access, and investor protections - can have positive effects on inflows of foreign investment, provided that the investment climate is supportive and the size of the newly created market is attractive (World Bank 2005: 108).

[73] Hallward-Dreimeier's (2003) study analyzing the bilateral flows of OECD members to 31 developing countries over two decades, she found that, controlling for a time trend and other factors, BITs had virtually no independent effect in increasing FDIs to signatory country from a house country. UNCTAD (1998) study testifies that the number of BITs signed by the host was uncorrelated with the amount of FDI received.

### VI.4.2. Competition Policy in RTAs

Competition policy is an integral part of modern trade, whether national, bilateral, regional or international. Competition law is a key element of virtually all advanced legal systems. Competition policy or law is not limited to national systems; it has national, bilateral, regional and international dimensions. Competition law aims to create a market in which producers and traders compete freely on the quality of products and services they offer and the prices they charge rather than through any advantage (dominance) or monopoly in the market, either existing or acquired. In a broad sense, competition policy is designed to address, 'industry structures and practices that give excessive market power to sellers - power to raise prices above, or reduce quantities below, the levels that would prevail in competitive markets' (Tarullo 2000: 483). The competition laws generally target and discourage anti-competitive practices in business enterprises such as price-fixing and market-segmentation cartels and abuse of dominant positions such as monopolies. Competition laws aim at restricting or prohibiting such anti-competitive practices. To ensure this, competition law provides for sanctions for violation of competition law which range form administrative, behavioural or structural orders to criminal penalties against officers acting on behalf of those operators.

State Enterprises comes under National competition laws of some countries while not regulated by competition laws in some other countries.[74] Further, it is to be noted that, competition laws, generally do not apply to inter-governmental activities or anti-competitive practices. Examples are various international commodity agreements made up of producing and consuming countries aimed at regulating prices and supplies through production quotas[75] or those established only by producing countries such as Organization of Petroleum Exporting Countries (OPEC).[76] It is also often

[74] For example, the Mexican Law provides that state enterprises are subject to the prohibition against monopolies and monopolistic activities unless the enterprise is engaged in strategic activities protected by the constitution. The State enterprises in US generally enjoy sovereign immunity against the US anti-trust laws.

[75] For example, the International Coffee Agreements, particularly the earlier ones, allowed for the suspension of quotas if prices were high and their re-introduction if prices became too low. See www.dev.ico.org/history.asp#ica2.

[76] Two judicial actions were brought against OPEC based on US anti-trust law. In both-cases, however, the courts dismissed the cases on grounds of the 'act of state' doctrine and service of process. More detailed discussion on this can be found in Desta (2003a), Rezzouk (2004) observing that the behaviour of governments are outside the conventional range of competition law. Tarullo (2000) also notes that 'competition law generally applies only to private conduct'

suggested that such practices could be captured by rules of the WTO system, due to the direct governmental act involved unless the act is justified under any of its exceptions (Desta 2003).

Competition policy has not so far developed as a mature discipline in multilateral trade negotiations. It is not untrue if some one says that the competition policy as a discipline still remains embryonic in the WTO. However, competition policy is not a new issue in the context of the WTO. Nonetheless, it has not yet been systematically developed. Historically, the 1947 Havana Charter and the International Trade Organization contained provisions for multilateral regulation and review of restrictive business practices. Specifically, the Chapter V of the Charter, entitled "Restrictive Business Practices", contained a number of articles "to prevent on the part of private or commercial public enterprises, business practices affecting international trade which restrain competition, limit access to markets or foster monopolistic control." However, it is important to note that, the Chapter V of the Charter was not included in the original GATT (1947). Instead of Chapter V, a diluted Decision on Arrangements for Consultations on Restrictive Business Practices was adopted in 1960. The Decision recognized "that the activities of international cartels and trusts may hamper the expansion of world trade and...thereby frustrate the benefits of tariff reductions and of the removal of quantitative restrictions or otherwise interfere with the objectives of the General Agreement" and also "that international co-operation is needed to deal effectively with harmful restrictive practices in international trade." Without providing for any dispute settlement or effective regulation mechanism, the Decision recommended for either bilateral or multilateral consultations in the event of harmful restrictive practices in international trade. Beyond the 1960 Decision, competition-related provisions have been incorporated in the GATT and the subsequent WTO agreements in a piecemeal manner (Nottage 2003: 72). We could find a number of competition related provisions in various instruments of WTO, but there is no comprehensive approach towards competition policy at multilateral level so far.

Article XVII of GATT 1994 (State Trading Enterprises) recognizes that state trading enterprises and other enterprises that benefit from exclusive or special privileges may be operated in a manner creating serious obstacles to trade and notes the importance

of negotiations on a reciprocal and mutually advantageous basis, to reduce such obstacles.

Another WTO instrument – GATS – in its Article VIII (Monopolies and Exclusive Service Suppliers) sets out an obligation for WTO Members to ensure that such monopolies and exclusive service suppliers do not act in a manner which is inconsistent with their obligation under Article II (Most-Favoured-Nation Treatment) and specific scheduled commitments. Further, Article IX of GATS (Business practices) recognizes that anti-competitive business practices of service suppliers "may restrain competition and thereby trade in services."

The TRIPS Agreement Article 8.2 (principles) allows a Member to take appropriate measures in order to prevent the abuse of IPRs by right-holders or practices which unreasonably restrain trade or adversely affect the transfer of technology, provided that they are consistent with the other provisions of the TRIPS Agreement. Article 40.2 (Control of Anti-Competitive Practices in Contractual Licenses) authorizes Members to specify in their legislation licensing practices or conditions that may, in particular cases, constitute an abuse of IPRs having an adverse effect on competition in the relevant market. In addition, Article 31 (Other Use Without Authorization of the Right Holder) recognizes anti-competitive practices as one of the grounds for compulsory licensing.

Under the TRIMS agreement, Article 9 mandates the Council for Trade in Goods to consider whether the agreement should be complemented with provisions on investment and competition policy.

We could also find some elements of competition policy in the Agreement on Technical Barriers to Trade, the Agreement on the Application of Sanitary and Phytosanitary Measures, the Agreement on Safeguards, the Agreement on Pre-shipment Inspection, the Agreement on Government Procurement and the Agreement on Trade in Civil Aircraft.

Another provision relevant for consideration is GATT Article VI (Anti-dumping and Countervailing Duties) and the accompanying agreement on the application of Article VI (Anti-Dumping Agreement) which allows for anti-dumping duties in cases where

dumping has been determined to occur. Furthermore, the concept of non-violation nullification and impairment, based on Article XXIII of GATT 1994 may provide a basis to challenge denials of market access that fundamentally undermine bargained concessions. It has been argued that it is not precluded that restrictive business practices could be a factor in such situations (OECD 2003: 74). It is also observed that the general rules of the WTO relating to non-discrimination and transparency, the consultation and co-operation arrangements under each of the main WTO Agreements and the WTO dispute settlement mechanism also are relevant in the context of competition policy (OECD 2003: 78).

As mentioned above, the WTO system contains bits and pieces of competition provisions in its various agreements. However, intense effort has been taking place on the topic particularly since the 1996 Singapore Ministerial Conference with the object of introducing a generic competition agreement that would apply to every sector in the same way as the WTO Agreements on Subsidies and Countervailing Measures or on anti-dumping measures. Apart from the WTO Agreements, the competition policy instruments in existence today at the international level are limited to the soft-law provisions of the 1976 OECD Guidelines for Multinational Enterprises (revised in 2000) and the 1980 United Nations Set of Principles and Rules on Restrictive Business practices (UNCTAD 2000) and various bilateral arrangements incorporating, *inter alia*, both traditional and positive comity principles (OECD 2003: 74).

RTAs have played a vital role in the promotion of competition policy and law at bilateral, regional and multilateral levels. With the proliferation of RTAs aimed at closer economic integration through the dismantling of barriers against the free movement of goods and services, and in many cases also of capital and persons, the need for competition law at the regional level has become ever more apparent and regional competition law and policies are increasingly common place (Desta and Barnes 2006: 242). Regional competition law is viewed as instrument minimizing trade distortions and building confidence and amicable international relations at regional level, which will protect the fruits of trade liberalization from being

undetermined by private barriers.[77] The recent growth in the number of countries with competition laws in many parts of the developing world is directly linked to the unprecedented growth in the number of regional trade agreements with competition provisions over the past decade or so.[78] We could see widespread use of competition related provisions in RTAs. They appear in trade agreements having memberships varying between and across, both developed and developing countries. This suggests a broad consensus on the value and appropriateness of having competition related provisions in trading agreements (OECD 2003: 72).

The following section examines competition related provisions in some RTAs. The RTAs are selected with a view to get an understanding of the trend in developed-developed country RTAs, developed-developing country RTAs and developing-developing country RTAs. The brief survey attempts to bring out the general approach of countries towards competition provisions and the level of co-ordination of these policies.

### VI.4.2.i. Competition Related Provisions in RTAs

Almost every modern RTA devotes a chapter or so to competition provisions (OECD 2005). Although significant divergence exists in the form and substantive content of the competition law obligations created by different RTAs (Holmes 2005: 107), the approach in RTAs could be broadly classified into three categories. The first, in which RTAs contain competition provisions that seek only cooperation on competition issues between signatory countries. The second category is more ambitious in which RTA competition provisions require enactment of national competition laws, and in some cases the harmonization of the substantive provisions of those laws. The final and most advanced category of RTAs not only imposes common substantive obligations directly on the private operators in member countries but also create a supranational authority with power to enforce the law throughout the Community. A brief sketch of competition provisions in some selected RTAs is provided in the following section:

[77] Most of the RTA competition provisions mentions as its primary objective the protection of the achievements of the RTA from being undetermined by private anti-competition behavior.
[78] For more details see Silva (2004).

**a. EC Competition Law**

EC has a very advanced and almost uniform system of regional competition law with a powerful competition Directorate-General that has the competence to enforce its rules directly on private enterprises through out the Community (Jenny and Horna 2005). Articles 81 and 82 of the Treaty Establishing the European Community (EC Treaty) contains the substantive rules on anti-competitive agreements and abuse of dominant market position respectively. Article 81(1) prohibits 'all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between member states and which have as their object or effect the prevention, restriction or distortion of competition within the common market.' This general principle is supplemented by a list of specific practices such as price fixing, supply restriction, and market sharing agreements which 'shall be automatically void.' Article 81 (3) provides a list of conditions under which exemption can be granted to the above provision.

Article 82 of the EC Treaty provides that '[a]ny abuse by one or more undertaking of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States.' There are also exemptions provided for this general principle.

Article 86 of the EC Treaty refers to the public undertakings and undertakings to which member states grant special and exclusive rights. It specifies that the rules of competition law contained in the Treaty is applicable to such undertakings too. Paragraph 2 of Article 86 provides:

> Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particulars to the rules on competition, in so far as the application of such rules does not obstruct the performance in law or in fact, of the particular task assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interest of the Community.

It is also important to note that EC Competition law may be enforced by the competition authorities and national courts of the Member States as well as the European courts at the initiation of any interested party, private as well as public.[79]

Similar and specific provisions regarding prohibited conduct in Articles 81 and 82 of EC Treaty can be found in most of the EC oriented RTAs. The similarity and specificity can take the form of explicit reference to the EC Treaty or merely the inclusion of similar language (Cernat 2005: 24).

**b. US – Australia FTA**

The competition provisions in US-Australia FTA require the maintenance of measures prohibiting anti-competitive conduct and a competition authority to enforce such provisions.[80] The US-Australia FTA contains provisions for cooperation and coordination in competition policies. The Agreement also recognizes and refers to previous cooperation agreements on anti-trust matters and undertakes the commitment to further cooperate on the enforcement of their national competition laws and to facilitate such cooperation through a joint working group (Articles 14(2)(3) and 14 (2)(4)). Apart from this, the US-Australia FTA contains provisions specifically addressing monopolies and state enterprises. Though the Agreement does not prohibit designating monopolies, it requires that any designated monopoly must comply with the terms of the FTA; must act solely with commercial considerations in the sale of any goods or services; provide non-discriminatory treatment to covered investments under the FTA and not use its monopoly position to engage in anti-competitive practices in a non-monopolized market within its territory (Article 14(3)). The Agreement further requires that state enterprises must refrain from creating obstacles to trade and investment and must also provide non-discriminatory treatment in the sale of goods or services (Article 14 (4)).

In addressing consumer protection matters, the agreement requires the parties to cooperate, coordinate and recognize existing agreements addressing such matters

[79] See, for example, Article 6 of the Council Regulation (EC) No. 1/2003 of 16 December 2002 on the Implementation of the Rules on Competition laid down in Articles 81 and 82 of the Treaty (2003), OJL 1/1.

[80] Article 14 (2)(1) of the US-Australia Free Trade Agreement , available at www.ustr.gov/trade_agreements/Bilateral/Australia_FTA/section_index.html [Accessed on 7 February 2010].

(Article 14 (6)). The agreement also requires the recognition and enforcement of monetary judgments issued by respective competition and securities authorities of the parties (Article 14 (7)). It is pertinent to note that the Agreement does not allow the parties to invoke dispute resolution provisions for any matter arising under the obligation to maintain competition laws, the ability to designate monopolies, consumer protection provisions or the obligation to cooperate or consult (Article 14 (11)).

**c. Other US Agreements**

Generally, bilateral trade agreements with the US tend to contain provisions that require the signatory governments to enact competition laws, if none exist, or to amend existing competition laws to prohibit anti-competitive conduct.[81] It also generally requires each party to adopt or maintain competition laws or measures that proscribe anti-competitive business conduct (Desta and Barnes 2006: 256). US bilateral trade agreements often require the formation of competition authorities with the power to enforce competition laws[82] and tend to focus on cooperation and coordination between the signatory states in furthering the development of competition law and policy as well as requiring cooperation and coordination between competition authorities with respect to enforcement of competition laws.[83]

US trade agreements do not prohibit the designation of privately-owned monopolies but they are required to act according to the terms agreed in the agreement. It further requires that the Monopolies must act solely with commercial considerations; provide non-discriminatory treatments to investments covered by the trade agreement and must not use their monopoly position to engage in anti-competitive trade.[84] US agreements sometimes also require that state enterprises act in conformity with the

[81] The US-Singapore Free Trade Agreement required Singapore to enact competition laws by September 2005.
[82] Article 12 (2)(2) US-Singapore FTA; Article 14 (2)(2) US-Australia FTA and Article 16 (1)(2) US-Chile FTA
[83] Articles 12 (4) and 12 (6) of US-Singapore FTA and Article 16 (2) of US-Chile FTA and Article 14 (6) of the US-Australia FTA which also requires coordination on views of consumers protection laws.
[84] Article 12 (3)(1)(c) of US-Singapore FTA; Article 14 (3)(1) of US-Australia FTA; Article 16(3) of US-Chile FTA.

terms of the trade agreement, even when exercising regulatory, administrative or other governmental authority.[85]

It is a general feature of the US trade agreements that they do not allow the dispute resolution provision to be invoked for certain provisions related to competition. For example, as we have seen in the case of the US-Australia Agreement, the US-Chile Agreement states that parties may not invoke the dispute settlement provisions for violations of the agreement provisions to maintain competition laws and competition authorities, the agreement to cooperate or the agreement to consult. We could see similar provisions in the US-Singapore agreement also.

**d. Other EC Agreements**

In its trade agreements with developing countries, the EC generally follows the standard practice of including competition provisions. Generally these provisions specify the conduct that is prohibited, namely concerted practices and abuse of dominant market position. The EC-South Africa Trade and Development Co-operation Agreement (TDCA), the Euro-Mediterranean Association Agreement between EC and Algeria (EC-Algeria) and the EC-Mexico Free Trade Agreement contain provisions on competition policy. Article 35 of the TDCA and Article 41 of the EC-Algeria Agreement identify concerted practices and abuse of dominant market position as being prohibited conduct.

The EC-Mexico Agreement limits itself by simply stating that the parties undertake to eliminate anti-competitive activities by applying the appropriate legislation (Article 1, EC-Mexico FTA). It also requires to give particular attention 'to agreements between companies, decisions to form an association between companies and concerted practices between companies' and to prevent the abuse of market position (Article 1, EC-Mexico FTA). In another EC agreement, EC–Algeria, Algeria undertakes commitments to ensure that state enterprises with special or exclusive rights do not distort trade between the parties (Articles 42 and 43 of EC-Algeria Agreement).

It could be commonly noted that the enforcement of the competition commitments in all the above referred agreements is left to the respective competition authorities of

[85] Article 16 (4) of US-Chile FTA.

the EC and the partner countries. The agreements also provide for administrative cooperation and coordination, provisions that are not normally comprehensive in EC RTAs (Holmes 2005: 72). Cooperation provisions are more detailed in the EC-Mexico and the EC-Algeria Agreements, especially with respect to exchange of information and notification of enforcement activities and coordination thereon, consultations when a party's important interests are affected as well as technical assistance in terms of exchange of experts, seminars, joint studies and training (Articles 3-6 and 9 of EC-Mexico FTA; and Annex 5, Articles 6-7 of EC-Algeria Agreement)

**e. The Caribbean Community (Caricom)**

During the inception of the Chaguaramas Treaty establishing Caricom[86] in 1973 itself, it contained a set of principles governing restrictive business practices. Article 30 of the Annex to the Chaguaramas Treaty declared a category of private sector practices incompatible with the terms of the treaty. Article 30(4) required the members to introduce 'as soon as practicable' uniform legislation for the control of restrictive business practices.

These provisions were later amended and replaced by a new and more detailed Protocol[87] in 2000 (hereinafter Protocol VIII). Protocol VIII provides that the Community will 'establish appropriate norms and institutional arrangements to prohibit and penalize anti-competitive business conduct' and 'establish and maintain information systems to enable enterprises and consumers to be kept informed about the operation of markets within the CSME' (Caricom Single Market Economy) (Article 30(6)). Protocol VIII provides for the establishment of a regional competition commission with necessary powers for the enforcement of the rules, including powers to secure the attendance of any person before it to give evidence, order termination of anti-competitive conduct and impose fines and/or order payment of compensation to affected Parties (Article 30(f)). The Protocol VIII also requires the Member States to

[86] Treaty establishing the Caribbean Community (Caricom) signed on 4 July 1973, in force from 1 August 1973. Text available at 12 ILM 1033 (1973).

[87] Protocol amending the Treaty Establishing the Caribbean Community, Protocol VIII: Competition Policy, Consumer Protection, Dumping, Subsidies which was signed on 14 March 2000. Details and text are available at www.caricom.org/jsp/secretariat/legal_instruments/protocol/viii.jsp2menu=secretariat [Accessed on 7 February 2010].

take all necessary legislative measures to ensure compliance with the rules of competition, impose penalties for anti-competitive business conduct and establish national competition authorities (Article 30(6)).

The Protocol definition of anti-competitive business conducts includes:

> a) Agreements between enterprises, decisions by associations of enterprises and concerted practices by enterprises which have as their object or effect the prevention, restriction or distortion of competition within the Community; or
>
> b) Action by which an enterprise abuse its dominant position within the Community; or
>
> c) Any other like conduct by enterprises whose object or effect is to frustrate the benefits expected from the establishment of the CSME (Article 30(i)(1)).

The Protocol further includes specific practices such as price fixing, supply restriction and the unauthorized denial of access to networks or essential infrastructure. It can be observed that Caricom's competition provisions provide for common RTA wide competition rules with a supranational enforcement mechanism. It also requires the Member States to enact appropriate competition legislation and to establish competition authorities for the enforcement of the legislation. (Desta and Barns 2006: 250).

**f. Andean Community**

The Competition policy provision presently applicable in the Andean Community is promulgated by Decision 608 on competition issued by the Commission of the Andean Community and of the Andean Council of Foreign Ministers on 25 March 2005.[88] The Decision aims to promote market efficiency and consumer welfare by addressing anti-competitive conduct that produces trade distorting effects within the Community. It is interesting to note that the Decision also aims to capture conduct having an effect within the community, whether that conduct originates within or outside the Community. The Decision is applicable to any 'economic agent' which includes any public or private, natural or legal person (Article 1).

[88] Rules for the Protection and Promotion of Free Competition in the Andean Community, Decisions 608, signed 29 March 2005, available in Spanish at URL: www.sice.oas.org/trade/JUNAL/junaind.asp [Accessed on 7 February 2010].

The Treaty of Andean Community requires the Commission of the Andean Community to adopt measures to prevent practices that distort competition within the Community. It is to be noted that it does not explicitly requires member states to enact harmonized competition legislation. The Decision 608 suggests that the competition laws must be based on principles of non-discrimination, transparency and due process. The Decision 608 prohibits concerted practices which includes price fixing, restriction of supply or demand and bid rigging as well as abuse of dominant market position (Articles 7 and 8). The General Secretariat has the power to investigate any incidence of prohibited conduct on its own or on request of any authority, government or interested parties (Article 10). It also contains the procedure for investigation. Thus, the Andean Community has established a supranational authority with the power to enforce the common competition law throughout the region.

**g. The Southern Common Market (MERCOSUR)**

The Treaty of Asuncion[89] initially contained that 'State parties shall co-ordinate their respective domestic policies with a view to drafting common rules for trade competition' (Article 4). Later in 1996, the MERCOSUR Parties agreed to the MERCOSUR Protocol for the Defence of Competition which provides for RTA-wide competition rules. Under the Protocol, the prohibited conducts include concerted acts or agreements that 'distort competition or access to the market or which constitute an abuse of a dominant position' (Article 4 of the MERCOSUR Protocol for the Defence of Competition). It also includes acts such as price fixing, reduction of output and input, predatory practices and market manipulation (Article 6). The member states are required to enact common rules that prohibit anti-competitive conduct (Article 7). For investigation and enforcement, the protocol establishes an inter-governmental Committee for the Defence of Competition (Article 9). Thus the protocol provides for supra-national authority for the enforcement of the competition rules.

It can be generally found that the competition policy has become a common feature in bilateral and regional trade agreements. This is out of a growing consensus that private business, if left unregulated, can distort and defeat the object and purpose of trade liberalization. Though the competition provisions are common in modern trade

[89] Treaty of Asuncion signed on 26 March 1991 and came into force on 29 November 1991.

agreements, we could not find a consistent practice in their scope or application. It can vary from mere statements of aspiration to harmonized national laws and supranational institutions with broad powers. While similarities can be drawn among RTAs in a number of competition issues, and its treatment, significant differences also exist within RTAs and in its scope and terms of competition provisions. Unlike in other disciplines, in the matter of competition policy, it can be noted that the development level of the trading partners does not necessarily translate to different forms of competition provisions. It is also important to note that, despite the increasing and consistent presence of competition provisions in many RTAs, there are often important exceptions from competition regimes. The link between anti-dumping and competition policy continues to be considered in the negotiation of new RTAs and is an area where regional approaches may differ considerably from what is currently contemplated multilaterally under the disciplines of the WTO. Finally, when examining both the treatment of monopolies and enterprises with special and exclusive rights, as well as mechanisms for consultation, co-operation and enforcement in competition issues, it is found that RTAs tend to go beyond existing provisions in the WTO (Nottage 2003).

### VI.5. Conclusion

The present surge of RTAs and the scope and nature of these agreements are to be viewed as part of a large cycle. The above analyses have demonstrated that WTO-Plus issues are prominent features of many modern RTAs. Though every agreement is not built on the same framework, a close look at these agreements reveal the uniform trend especially in the developed country RTAs which always tend to go beyond the multilateral standards. This trend is visible in the case of more depth in the liberalization commitments as well as more breadth in including and addressing new issues. Though ambitious liberalization and bringing in new areas under liberalizing regime is a welcome trend from the trade point of view, its impact on the present multilateral trading system is debated. Going by the history, the new standards and disciplines developed through these new generation RTAs are likely to be tabled in the next round of multilateral negotiations as existing standards and practices. However, such an acceptance might go well against the interest of developing countries. Setting of trade standards, norms and disciplines outside the multilateral

forum may well overlook the development needs of developing and less developed countries. It may also result in the weakening of existing flexibilities for developing countries in the present multilateral trading system.

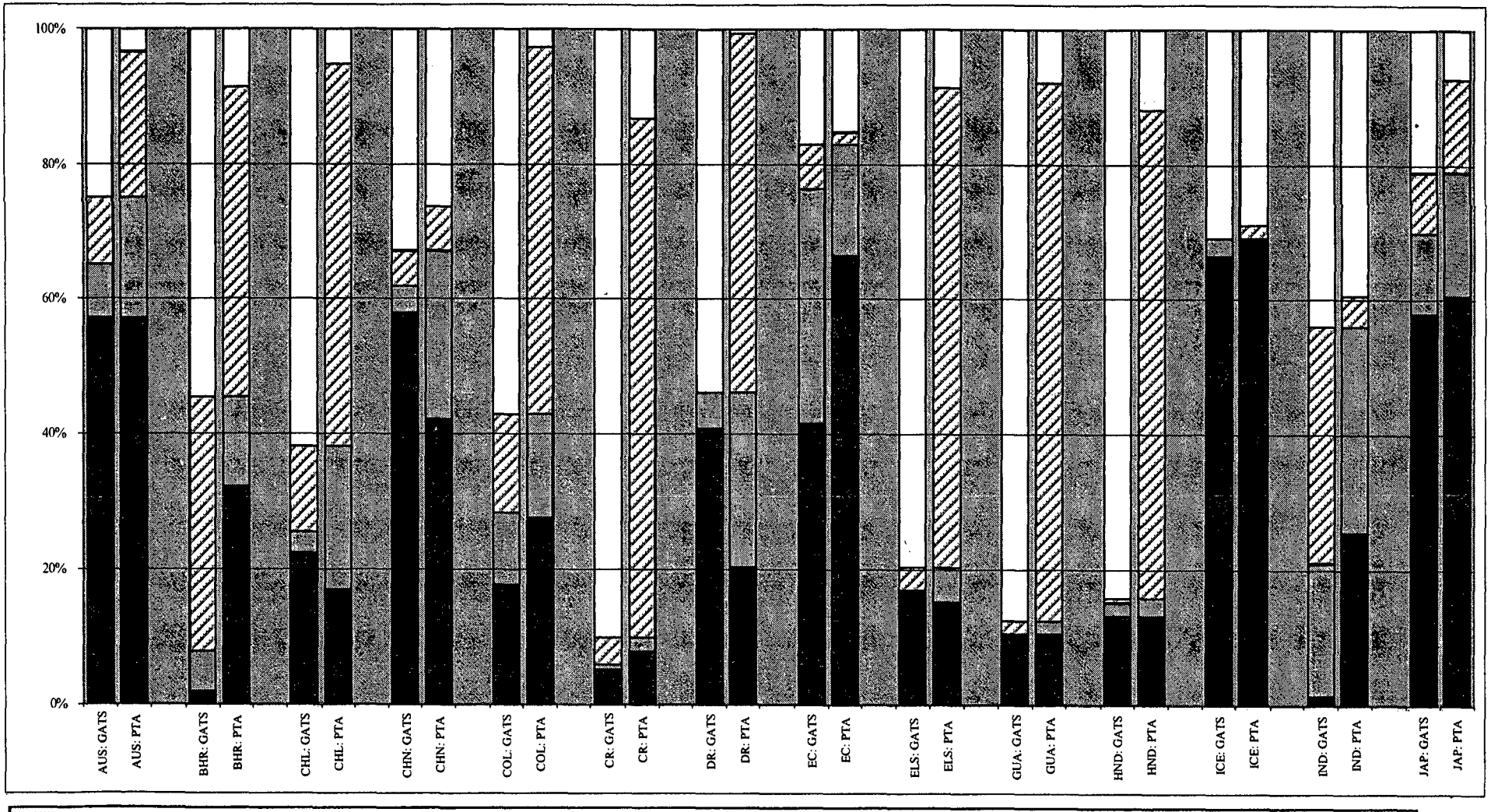
The important areas like IPRs have always remained controversial in international trade negotiations. It is one area where a sharp divide exists between the developed and the developing worlds. International IP policy making has witnessed a never ending cycle of multilateral standard setting which leads to increased standards through bilateralism/regionalism followed by consolidation at the multilateral level. Bilateral and Regional Trade Agreements are being increasingly used especially by the developed countries, to further a range of intellectual property policy objectives of these countries. Developing countries are often falling prey to this strategy in search of new lucrative markets for their products. Various TRIPS-Plus provisions appearing in modern RTAs are not only introducing higher standards in IP but also reducing the flexibilities available under TRIPS. The MFN clause in TRIPS devoid of a regional exception clause, in effect, multilateralizes those commitments undertaken by countries in their RTAs. Higher IP standards coupled with reduced flexibilities directly affect the public health choices of developing countries. The need is to protect the existing flexibilities available under the TRIPS and to resist the introduction of any TRIPS-Plus standards. Multilaterally, strong coalitions with strength in numbers would be the best option to reverse the TRIPS-Plus trend and to protect the flexibilities written into TRIPS. Moreover, the developing countries must advocate for and insist upon some kind of development friendly provisions including the Doha Declaration in the various RTAs that they are negotiating. Efforts should be made to negotiate more RTAs among developing countries which contain principles and recognition of strong pro-development rights. At the same time, the success of the multilateral talks (Doha Round) also has a significant bearing on the future of bilateralism and regionalism.

In respect of services, since the services trade is still in a maturing process, the many disciplines are yet to emerge. However, the recent wave of regionalism has not let out services trade. The above analyses of RTAs demonstrates that the commitments undertaken by various countries in their respective RTAs exceeds the existing GATS schedules and offers made by these countries. It could be found that many countries

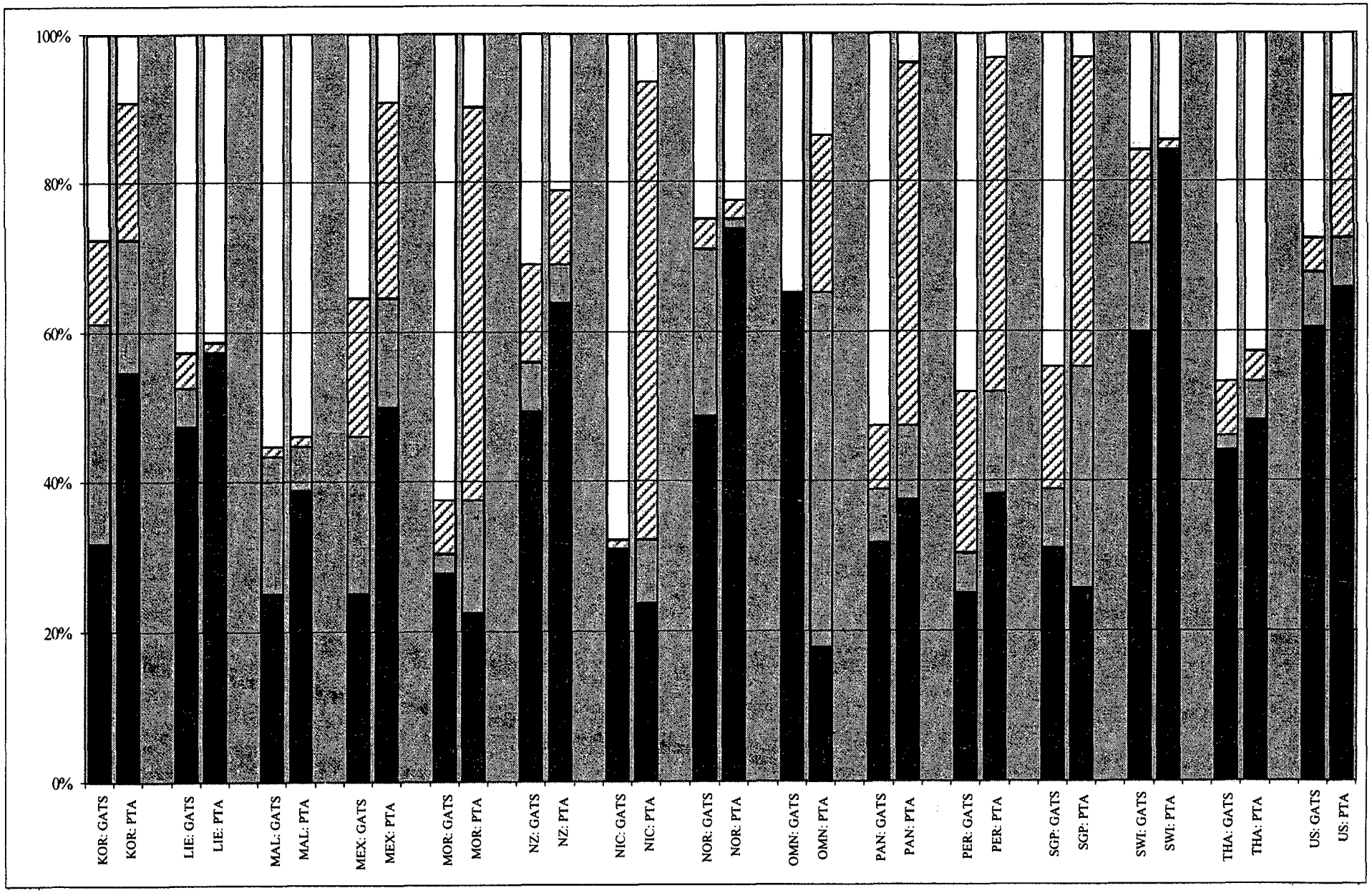
which have a low level of sectoral coverage in existing GATS commitments and modest quality of offers in the Doha Round have demonstrated ambitious liberalization in their various RTAs. Apart from liberalization commitments, the services RTAs have also been instrumental in developing disciplines on services trade beyond GATS. It is therefore obvious and well acknowledged that the disciplines in GATS is an unfinished business and the development of these disciplines are on its way. The recent RTAs with services disciplines have demonstrated various approaches to rule making and market opening in the area of trade in services. The GATS itself remains incomplete with negotiations pending in a number of key areas like Domestic Regulation, Government Procurement, Subsidies, Investment, Competition Policy and Emergency Safeguards. However, the impact of liberalization and rule making in the regional route is still awaited. However, it is often debated that whether these regional rule making process adequately address the developmental needs of developing countries, since the present surge of regionalism is led by the developed countries. Many of the regional rule making is often criticized of imposing higher standards and norms than the multilateral ones as to suit the demands of developed countries. Though the RTAs provide avenues for new markets and trade growth, the developing countries need to be cautious in their liberalizing approach while going beyond the multilateral norms and standards.

## CHART VI.1 (1/2): Proportion of Sub-Sectors with New and Improved Commitments under Mode 3, per WTO Member

**(when comparing the GATS offer to the GATS schedule ("GATS") and the PTA commitments to the GATS offer ("PTA"))**



## CHART VI.1 (2/2)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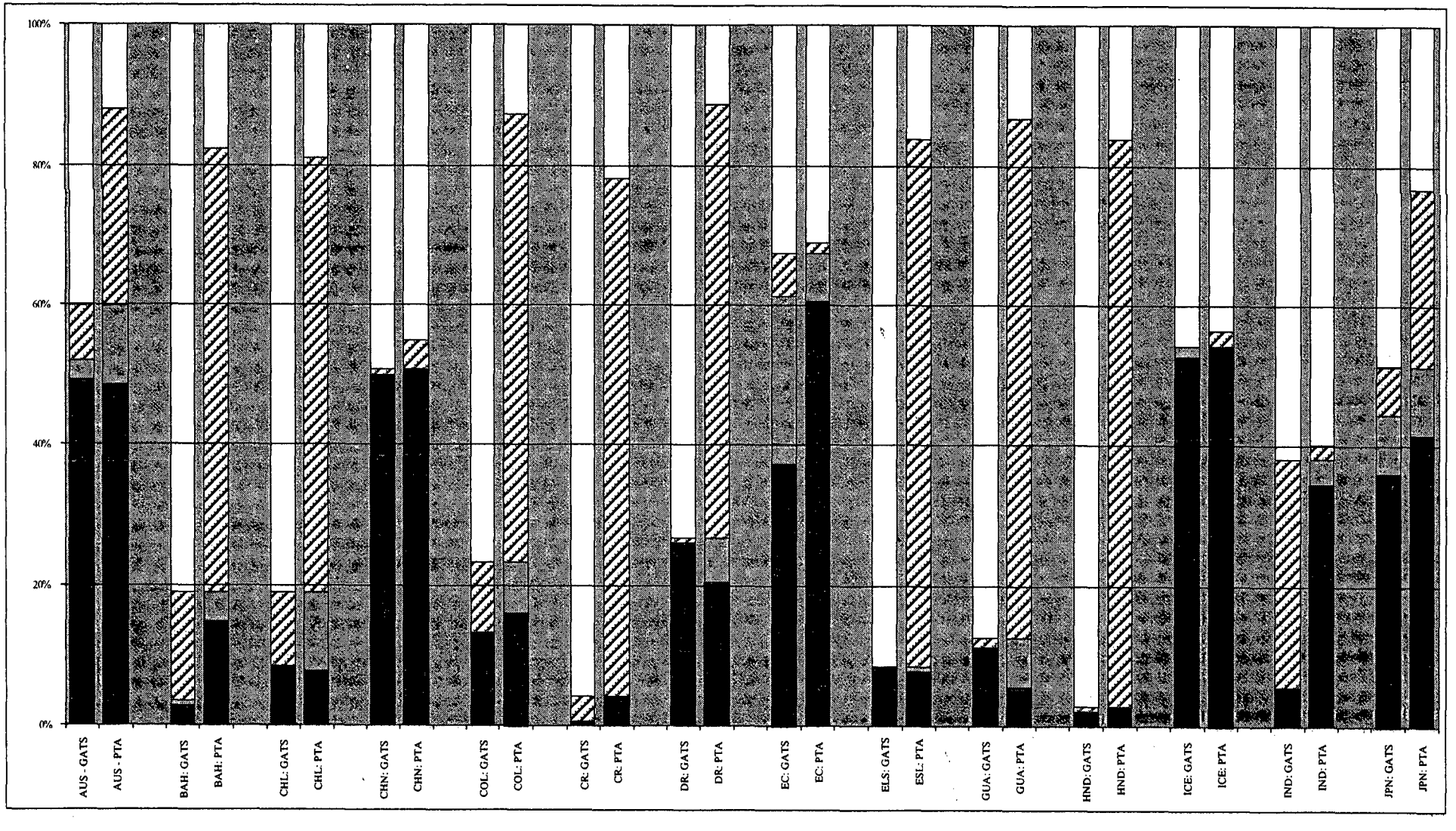
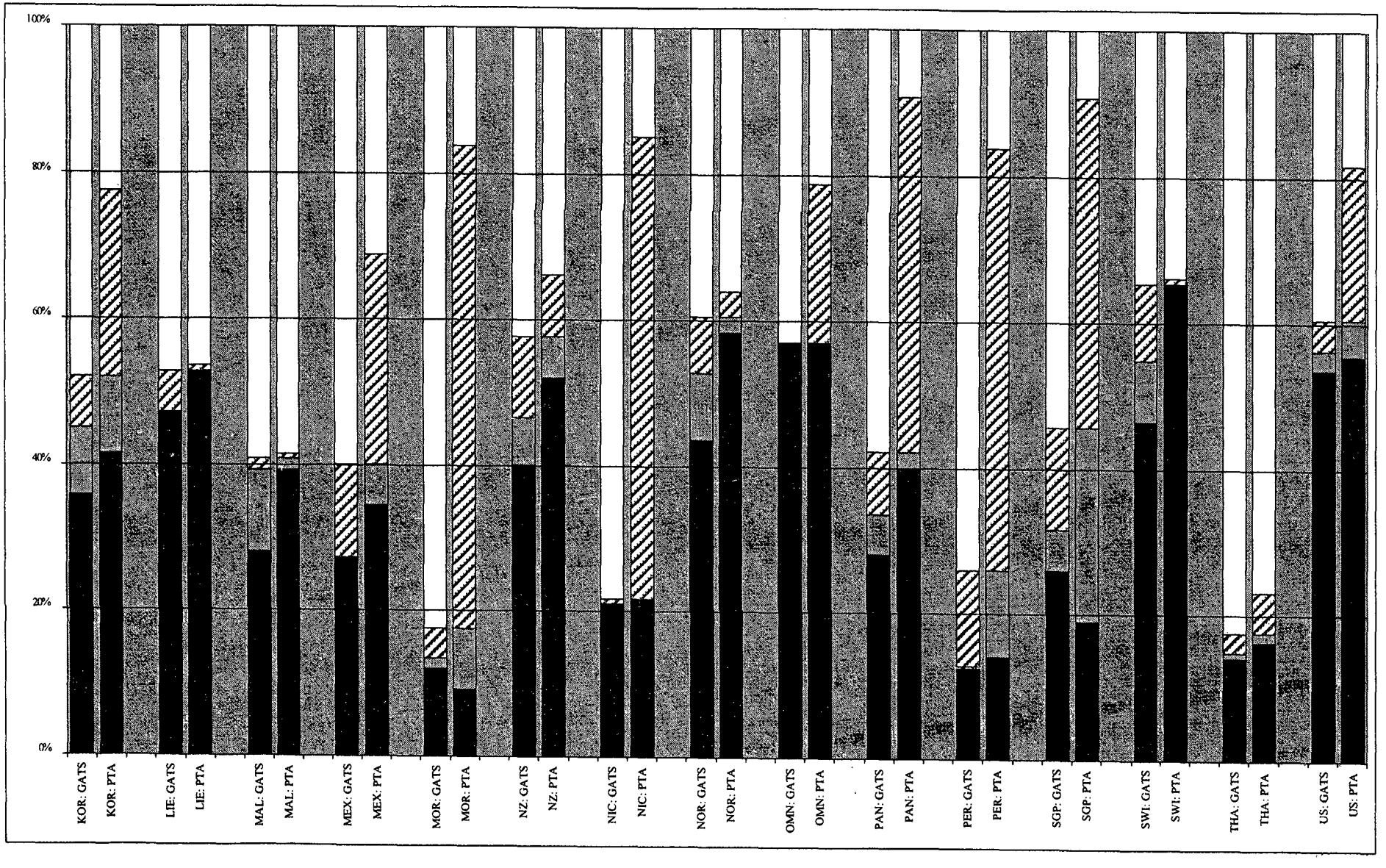
# ANNEX: Chart VI.2 (1/2): Proportion of Sub-Sectors with New and Improved Commitments under Mode 1, per WTO Member

**(when comparing the GATS offer to the GATS schedule ("GATS") and the PTA commitments to the GATS offer ("PTA"))**



# CHART VI.2 (2/2)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THA: PTA
US: GATS
US: PTA

# Chapter VII

## Conclusion

In a world with innumerable diversities, divided and sub divided according to geographical features, regionalism is a natural path of human civilization. Regionalism continues to influence every aspect of human life from culture to politics and to the economy. International trade is no exception. Regionalism in trade is not a new phenomenon, but could be traced back to the history of international trade. However, the impact of regionalism on international trade and economies is much pronounced recently since the emergence of the so called 'second' and 'third' wave of regionalism from the late eighties. The first wave of regionalism in trade in the 1960s could make limited impact as it could not generate large volumes of trade and failed in integrating economies. The Second Regionalism, which was unprecedented in its intensity, gave rise to the emergence of strong regional trading blocs across the globe. The present one has not only created integrated economic unions but features much advanced forms of regional integration.

Trade regionalism has created a plethora of trade agreements collectively known as RTAs. As RTAs are an exception to the MFN principle, which is the cornerstone of multilateral trading system, tensions have often arisen vis-à-vis the so called multilateralism represented by the GATT/WTO system. Scholars have expressed views and opinions for and against regionalism in trade. Some argue that being an exception to the fundamental principle of non-discrimination, regionalism is not the ideal route for trade liberalization, while some others hold the view that liberalization, whether it is bilateral, multilateral or regional is welcome because of its trade creating capacity. Similar divergent views exist on the impact of regionalism on multilateralism. Some are of the view that regionalism weakens multilateralism, while some others view regionalism as complementary to multilateral liberalization process. However, whether anybody likes it or not, the fact is that regionalism is there to stay and continue with more vigour. The trade relations of WTO Members are being increasingly influenced by regional trade agreements, which have expanded vastly in number, scope and coverage. In this context it is important to ensure that these RTAs do not supplant multilateral trade liberalization under the auspices of the WTO. RTAs should not be viewed or accepted as alternatives to the WTO. While accepting the fact

that a large number of RTAs do exist and many are coming up and a substantial volume of international trade happens in the regional route, still WTO is the main engine of trade liberalization, at least viewed as such. RTAs are to be complementary to the WTO and consistent with its rules. If RTAs are to be complementary to the WTO, the crucial task is to determine the yardstick against which these trade agreements are to be measured and to device a process to ascertain conformity to the set standards. Although RTAs are an economic phenomenon in the first place, a rigid legal framework and its strict compliance could only ensure healthy co-existence of both. Even while having legal provisions to regulate the formation of RTAs, it is undisputed that the RTAs are frustratingly undisciplined. The problem is two fold, inherently weak discipline and its poor compliance. The disciplines are weak in the sense of being ambiguous and therefore there is limited compliance in the absence of any effective mechanism to check and correct the abuse. It could be found that WTO Members have failed to carry out their obligations in good faith with respect to RTAs.

In the above background, the present study has examined the legal and policy conflict of regionalism within multilateralism. It starts with introduction of the subject and discussion on the conventional debate on the desirability of RTAs. The debate is divided, one favouring regionalism and the other rejecting the same. There is no consensus so far among the scholars on the effects of regionalism on multilateral liberalization process. However, what we could draw from the discussions is that there is a growing consensus on the need to regulate regionalism within the legal contours of multilateralism. The above argument is reinforced when empirical evidence is produced on the growing legal and policy challenges raised by the modern RTAs which tend to go much beyond the GATT/WTO framework in its content and spirit.

The present study has largely dealt with the evolution and history of RTAs in international trade. The evolution and growth of regionalism in trade could be analyzed in three phases. The first regionalism could make limited impact largely because the underlying theme of many of the initiatives in that period was political rather than economic. The failure of first regionalism prompted the countries to realize economic realities along with the political priorities while forging regional ties in trade. The second regionalism was unprecedented and aggressive compared to the

first. Its emergence was more a response to the slow progress of multilateralism and it resulted in the creation of a plethora of RTAs. The second regionalism with much economic sense resulted in the creation of many regional trading blocs capable of influencing the multilateral trading system. Trade blocs like NAFTA, EU and ASEAN with integrated economies and coherent structure were created. This in fact showed a new way for regionalism in trade. International trade community witnessed an explosion in the number of RTAs with varying size and levels of integration. Regionalism emerged as a challenge to multilateralism in trade. Even the creation of WTO could not stop the surge of RTAs which still continues unabated.

Further it could be found that regionalism in trade was neither a western phenomena nor could be attributed to the developed countries. Regionalism was experimented by countries in all parts of the world irrespective of their size and strength of economies. However, going by the history, it could be found that many of the early RTAs formed by the developing countries especially in Africa and Latin America could not survive or produce the desired results largely due to the lack of political will and economic instability. The recent decades have demonstrated renewed interest of developing countries in forming RTAs for their economic development and have resulted in the creation of many powerful regional blocs among developing countries. The possible conclusion that could be drawn from the historical analysis of RTAs is that any successful regional trade arrangement requires political will of the participating countries to raise above the bilateral issues to cooperate for a meaningful economic integration.

The above referred proliferation of RTAs triggered its need for regulation as well. The WTO as the multilateral trade body has realized the challenges raised by RTAs and the need to encompass the phenomena of regionalism within the multilateral framework. The attempt to enforce the multilateral disciplines governing RTAs proved unsuccessful for want of clarity and precision. The ambiguities in the interpretation of the provisions left the discipline inherently weak in its implementation and compliance. In view of the above the WTO attempted to strengthen the disciplines by providing clarity through the Understanding on the Interpretation of Article XXIV. The WTO also introduced New Transparency Mechanism on provisional basis, which required early and proper notification of

RTAs. Both the initiatives have substantially strengthened the disciplines. However, still a host of issues remain unaddressed with respect to the formation and operation of RTAs. WTO is still working on these issues in two tracks, viz. systemic issues and procedural issues. The Negotiating Group on Rules (NGR) is presently working on clarifying and improving the disciplines and procedures applying to RTAs. WTO has constituted the CRTA to comprehensively deal with the RTAs.

Any attempt to address the issues related to the interpretation of the provisions requires a sound understanding of the negotiating history of the regional exception provisions in the GATT/WTO. The study has provided a detailed analysis of the same. It could be found that the law and practice of regional preferences in international trade crystallized through the post-war trade negotiations. The negotiations and debate on the scope and application of the ambitious MFN principle essentially surrounded on the desirability of allowing or dismantling preference systems. The stand of the developed countries, especially of the US, was that any kind of preferential arrangement would weaken the non-discrimination principle. US asserted the view that the less developed countries could best develop by participating fully in a multilateral non-discriminatory system. However, it is ironical to note that today US is the leader and advocate of regionalism in trade. One may wonder how US logically explains the paradigm shift in their approach to regionalism except for their self interest. It was the developing countries (including India) who argued for regional exemption provisions in the GATT to address their developmental concerns. UK and France wanted to get exemption for their existing preference which they could save as exceptions in Article I. The demand for regional exception provisions to save the existing preferences as well as future preferences ultimately culminated in Article XXIV, however, devoid of the developmental preferences demanded by the developing countries. No palatable reasons are suggested for the non-inclusion of the developmental preferences. A close analysis of Article XXIV could reveal that the provisions miserably failed to create well defined procedures and rules for disciplining RTAs. The above weaknesses of the provisions became apparent with the failure of the Working Parties to make conclusive findings on the legality of RTAs in its review. RTAs mushroomed taking advantage of the inchoate nature of Article XXIV. There was also limited jurisprudence on the subject since GATT Panels were

of the view that the compatibility of the RTAs is rather a political decision than to be considered in a judicial scrutiny.

The present study has discussed the emerging jurisprudence on the subject by examining selected Panel and Appellate Body Reports which had the occasion to deal with the question of Article XXIV. Though the GATT era has not witnessed substantial jurisprudence on the subject, the GATT Panels have pronounced on the competency of the Panel to deal with the question of Article XXIV. The question of judicial competency was settled through the Understanding on Article XXIV which in clear terms provided that the Panel and Appellate Body have jurisdiction over any disputes concerning Article XXIV. However, there is a perceivable trend of reluctance by the Panel and Appellate Body to address many issues related to Article XXIV including the compatibility of RTAs. This is largely because there is a parallel system under CRTA to review RTAs. Apart from few other cases in which Panel and Appellate Body passively dealt with questions related to Article XXIV, *Turkey – Textiles* is the only available case in which Panel and Appellate Body have substantially dealt with the provisions of Article XXIV. There, the Panel and Appellate Body unequivocally upheld the competence of the Panels to review questions related to the legality of RTAs pursuant to Article XXIV. The Appellate Body narrowed down the room for interpretation of paragraphs 5 to 8 of Article XXIV by holding that it shall be interpreted in the light of the purpose and object laid down in paragraph 4 of Article XXIV. The above ruling provided much jurisprudential value to the object and purpose mentioned in paragraph 4 of Article XXIV. Though the Panel and Appellate Body could not clarify many of the key terms including 'substantially all' and 'substantially the same', still it shed some light on the possible interpretation of these terms by observing that the flexibility offered by these terms is limited. Thus, the emerging jurisprudence on the subject is gradually imparting clarity to the provisions in its application and interpretation.

Over the time, RTAs have also changed substantially in their nature and scope. Modern RTAs not simply confine themselves to tariff cutting measures, but engage in a variety of trade policy exercises including liberalization in sectors which are not yet addressed multilaterally. This WTO-Plus agenda is a common feature in many modern RTAs and gives rise to many legal and policy concerns. The study has

examined this WTO-Plus agenda of RTAs and has provided a detailed examination of TRIPS-Plus and GATS-Plus in various RTAs as a case study and also dealt with some other provisions like investment, subsidies, government procurement and competition policy in general. It could be found that the international IP policy making always remained a priority for the developed world and has witnessed a never ending cycle of multilateral standard setting followed by setting of increased bilateral and regional standards which are subsequently consolidated at the multilateral level. This trend was very much explicit during the 1980s in which the developed countries signed a number of bilateral treaties with improved IP protection. Finally, these standards were consolidated multilaterally in the Uruguay Round TRIPS Agreement. Even after the signing of TRIPS, the developed countries continued negotiating higher IPR standards in their bilateral and regional agreements and the trends still continue with more vigour. The higher IP standards committed in various regional and bilateral agreements have implications beyond those agreements and operate because of the TRIPS MFN clause. TRIPS in its Article IV provides for MFN treatment which states that any member which grants 'any advantage, favour, privilege or immunity' to the nationals of any other country (whether that country be a member of the WTO/ TRIPS or not) must accord the same treatment to the nationals of other members of TRIPS. It is important to note that the above MFN clause in TRIPS operates unlike in GATT which provides for MFN exception for regional trading arrangements under Article XXIV. TRIPS does not contain a similar provision and hence the TRIPS MFN operates without an expressed or implied legal exception for RTAs. The legitimate presumption regarding RTAs is that the commitments and preferences granted under the agreement are confined and limited to the member countries. But in the absence of an exemption provision for RTAs in TRIPS, the IPR commitments undertaken in the RTAs are to be given MFN treatment. This not only creates policy concerns but could also lead to legal issues as well. Many of these provisions are not only creating higher IP standards but also curtail many of the flexibilities available for developing countries. This has created serious social and economic issues for developing countries.

Similar approach could be found in other sectors like GATS, investment, subsidies, government procurement etc. Many RTAs have achieved liberalization much beyond the existing WTO GATS Schedule and even beyond the Doha offers submitted by

countries. These modern RTAs are also instrumental in making disciplines on the above sectors where so far no multilateral consensus has been arrived at. Discipline making at regional level raises serious concerns since it will have a bearing on the multilateral negotiations. This regional rule making hardly considers the multilaterally settled principles of trade liberalization including the Special and Differential Treatment and are matters of concern for developing countries. Countries may seek to achieve legal mandate for the above provisions multilaterally through the window of RTAs. The regional rule making could lead to the development of parallel bodies of law governing international trade, one being global under the auspices of WTO and other being more scattered at regional level under various RTAs.

Such creation of parallel systems of law governing global trade could also lead to potential conflict and overlapping of jurisprudence and jurisdiction in dispute settlement. WTO has a unified and robust system for the settlement of trade disputes while RTAs do not have a uniform pattern of dispute settlement mechanism. WTO Dispute Settlement works under a comprehensive code of laws and consistently applies a steadily growing and expanding jurisprudence on the subject. RTAs do not have a similar source of authority or discipline and a consistent jurisprudence to follow in dispute settlement. The option of multiple forums available for dispute resolution could lead to forum shopping. The parallel existence of dispute settlement systems creates the possibility, if not the likelihood of initiating legal proceedings on the same subject matter under two different forums. This could happen when there arise disputes based on claimed violation of or claimed failures to perform of provisions found not only in the RTA but also in a WTO Agreement. Some party may prefer RTA dispute settlement while the other invokes WTO dispute settlement. The Understanding on the Interpretation of Article XXIV, opens a wide room for this as it states that '[t]he provisions of Articles XXII and XXIII of the GATT 1994 as elaborated and applied by the Dispute Settlement Understanding may be invoked with respect to *any* matters arising from the application of those provisions of Article XXIV relating to....' (emphasis added). This could lead to a legal dilemma, and there is no existing legal provision or procedure to resolve such a situation.

The present study has also examined the Indian practice and approach towards regionalism. It could be noted that the Indian approach towards regionalism has

changed in the last decade. India has always remained a firm supporter of multilateralism and was not very enthusiastic in pursuing regionalism initially. However, India has engaged increasingly in bilateral and regional trade agreements in the recent years. This could be viewed as a shift in the Indian policy on international trade. India continues to attach primacy to the multilateral trading system. However it has considered RTAs as building blocs that supplement the multilateral trade liberalization. At the same time, India has cautioned against the inherent danger of possible discrimination in RTAs against third countries. India is negotiating and engaging in various RTAs with developed and developing countries. As a rapidly developing economy with a huge market, India needs to be extremely cautious in engaging in RTAs. India needs to evolve a negotiating position and strategy for engaging in RTAs. The present system of negotiating RTAs is under sharp criticism from various quarters. As a country with huge diversity and a federal constitution in place, India needs to ensure that various interests and concerns are addressed while negotiating the RTAs. The federal system of administration in the country provides for separation of powers for the Union Government and the State Governments under the Union List and the State List where the respective governments exercise power for policy planning and administration. But with the changing nature and scope of the RTAs, countries are forced to negotiate and liberalize many sectors beyond the tariff cuttings. In the Indian context, the Union Government has the power to enter into international agreements under Article 253 of the Constitution of India. Many times, the Union Government is under compulsion to liberalize and undertake commitments, which is also binding for the states, under various sectors falling under the State List. This leads to several policy and legal concerns and has raised criticism from various state governments for overlooking their interests and concerns. This issue has to be addressed from legal and policy perspectives for engaging in RTAs in a more meaningful manner to achieve the growth and development goals of the country.

An examination of the Indian RTAs in the study reveals that each agreement presents a different set of legal issues. India has notified most of its agreements under the Enabling Clause which is often considered as an attempt to retain the flexibilities available under it. It is often criticized that none of the Indian agreements would stand as against the stricter disciplines of Article XXIV. The India – Singapore CECA, which is the only agreement notified pursuant to Article XXIV, has been subject to

serious criticism in the CRTA for its insufficient coverage of the 'substantially all the trade' requirement. More recently, the debate on dual notification of RTAs is current with the India – Korea CEPA notified by India under the Enabling Clause and by Korea under Article XXIV. India's request to reflect the dual notification of such agreements in the WTO RTA Database has been accepted. India has argued that both the notifications are valid and has no hierarchial relationship. However the procedure to deal with dual notification is a pending issue in the WTO as there is no explicit provision in this regard.

Upon the above findings, the study proposes the following suggestions for more healthy legal interaction of regionalism with multilateralism and to ensure that RTAs are building blocs in the world trading system.

- The GATT Article XXIV and GATS Article V requires substantial strengthening and clarification. The essential legal requirements for qualifying as RTAs shall be defined in clear terms including the amount or volume of trade required to be liberalized under the definition of substantially all trade.
- There shall be provision for subsequent multilateralization of trade liberalization undertaken under RTAs after a certain period of time. In other words, RTAs shall not be permitted to be permanent exceptions to MFN principle.
- Notification and surveillance shall be made strict under the CRTA. RTAs notified under GATT Article XXIV shall limit itself to trade in goods and that are notified under GATS Article V shall limit itself to trade in services. Provisions which are not covered under any regional exception clause under WTO shall not be accepted or given effect under notified RTAs.
- The WTO shall lay down a uniform pattern of dispute settlement mechanism to be followed while forming the RTAs. There shall be mandatory Appeal provision to the WTO dispute settlement in every RTA.
- India needs to evolve a common trade policy and strategy for negotiating RTAs. This should address the divergent interests and concerns at play. There shall be a 'working system' in negotiating RTAs which respects the federal structure of the country.

# ANNEXURE - I

## Havana Charter: Article 15

*Article 15: Preferential Agreements for Economic Development and Reconstruction*

1. The Members recognize that special circumstances, including the need for economic development or reconstruction, may justify new preferential agreements between two or more countries in the interest of the programmes of economic development or reconstruction of one or more of them.

2. Any Member contemplating the conclusion of such an agreement shall communicate its intention to the Organization and provide it with the relevant information to enable it to examine the proposed agreement The Organization shall promptly communicate such information to all Members.

3. The Organization shall examine the proposal and, by a two-thirds majority of the Members present and voting, may grant, subject to such conditions as it may impose, an exception to the provisions of Article 16 to permit the proposed agreement to become effective.

4. Notwithstanding the provisions of paragraph 3, the Organization shall authorize, in accordance with the provisions of paragraphs 5 and 6, the necessary departure from the provisions of Article 16 in respect of a proposed agreement between Members for the establishment of tariff preferences which it determines to fulfil the following conditions and requirements:

(a) the territories of the parties to the agreement are contiguous one with another, or all parties belong to the same economic region;

(b) any preference provided for in the agreement is necessary to ensure a sound and adequate market for a particular industry or branch of agriculture which is being, or is to be, created or reconstructed or substantially developed or substantially modernized;

(c) the parties to the agreement undertake to grant free entry for the products of the industry or branch of agriculture referred to in sub-paragraph (b) or to apply customs duties to such products sufficiently

low to ensure that the objectives set forth in that subparagraph will be achieved;

(d) any compensation granted to the other parties by the party receiving preferential treatment shall, if it is a preferential concession, conform with the provisions of this paragraph;

(e) the agreement contains provisions permitting, on terms and conditions to be determined by negotiation with the parties to the agreement, the adherence of other Members, which are able to qualify as parties to the agreement under the provisions of this paragraph, in the interest of their programmes of economic development or reconstruction. The provisions of Chapter VIII may be invoked by such a Member in this respect only on the ground that it has been unjustifiably excluded from participation in such an agreement;

(f) the agreement contains provisions for its termination within a period necessary for the fulfilment of its purposes but, in any case, not later than at the end of ten years; any renewal shall be subject to the approval of the Organization and no renewal shall be for a longer period than five years.

5. When the Organization, upon the application of a Member and in accordance with the provisions of paragraph 6, approves a margin of preference as an exception to Article 16 in respect of the products covered by the proposed agreement, it may, as a condition of its approval, require a reduction in an unbound most-favoured-nation rate of duty proposed by the Member in respect of any product so covered, if in the light of the representations of any affected Member it considers that rate excessive.

6. (a) If the Organization finds that the proposed agreement fulfils the conditions and requirements set forth in paragraph 4 and that the conclusion of the agreement is not likely to cause substantial injury to the external trade of a Member country not party to the agreement, it shall within two months authorize the parties to the agreement to depart from the provisions of Article 16, as regards the products covered by the agreement. If the Organization does not give a ruling within the specified period, its authorization shall be regarded as having been automatically granted.

(b) If the Organization finds that the proposed agreement, while fulfilling the conditions and requirements set forth in paragraph 4, is likely to cause substantial injury to the external trade of a Member country not party to the agreement, it shall inform interested Members of its findings and shall require the Members contemplating the conclusion of the agreement to enter into negotiations with that Member. When agreement is reached in the negotiations, the Organization shall authorize the Members contemplating the conclusion of the preferential agreement to depart from the provisions of Article 16 as regards the products covered by the preferential agreement. If, at the end of two months from the date on which the Organization suggested such negotiations, the negotiations have not been completed and the Organization considers that the injured Member is unreasonably preventing the conclusion of the negotiations, it shall authorize the necessary departure from the provisions of Article 16 and at the same time shall fix a fair compensation to be granted by the parties to the agreement to the injured Member or, if this is not possible or reasonable, prescribe such modification of the agreement as will give such Member fair treatment. The provisions of Chapter VIII may be invoked by such Member only if it does not accept the decision of the Organization regarding such compensation.

(c) If the Organization finds that the proposed agreement, while fulfilling the conditions and requirements set forth in paragraph 4, is likely to jeopardize the economic position of a Member in world trade, it shall not authorize any departure from the provisions of Article 16 unless the parties to the agreement have reached a mutually satisfactory understanding with that Member.

(d) If the Organization finds that the prospective parties to a regional preferential agreement have, prior to November 21, 1947, obtained from countries representing at least twothirds of their import trade the right to depart from most-favoured-nation treatment in the cases envisaged in the agreement, the Organization shall, without prejudice to the conditions governing the recognition of such right, grant the authorization provided for in paragraph 5 and in sub-paragraph (a) of

this paragraph, provided that the conditions and requirements set out in sub-paragraphs (a), (e) and (f) of paragraph 4 are fulfilled. Nevertheless, if the Organization finds that the external trade of one or more Member countries, which have not recognized this right to depart from most-favoured-nation treatment, is threatened with substantial injury, it shall invite the parties to the agreement to enter into negotiations with the injured Member, and the provisions of sub-paragraph (b) of this paragraph shall apply.

# ANNEXURE - II

## Article XXIV

*Territorial Application - Frontier Traffic - Customs Unions and Free-trade Areas*

1. The provisions of this Agreement shall apply to the metropolitan customs territories of the contracting parties and to any other customs territories in respect of which this agreement has been accepted under Article XXVI or is being applied under Article XXXIII or pursuant to the Protocol of Provisional Application. Each such customs territory shall, exclusively for the purposes of the territorial application of this Agreement, be treated as though it were a contracting party; *Provided*, that the provisions of this paragraph shall not be construed to create any rights or obligations as between two or more customs territories in respect of which this Agreement has been accepted under Article XXVI or is being applied under Article XXXIII or pursuant to the Protocol of provisional Application by a single contracting party.

2. For the purposes of this Agreement a customs territory shall be understood to mean 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.

3. The provisions of this Agreement shall not be construed to prevent:

   (*a*) Advantages accorded by any contracting party to adjacent countries in order to facilitate frontier traffic;

   (*b*) Advantages accorded to the trade with the Free Territory of Trieste by countries contiguous to that territory, provided that such advantages are not in conflict with the Treaties of Peace arising out of the Second World War.

4. The contracting parties recognize the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration between the economies of the countries parties to such agreements. They also recognize that the purpose of a customs union or of a free-trade area should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories.

5. Accordingly, the provisions of this Agreement shall not prevent, as between the territories of contracting parties, the formation of a customs union or of a free-trade area or the adoption of an interim agreement necessary for the formation of a customs union or of a free-trade area; *Provided* that:

(*a*) with respect to a customs union, or an interim agreement leading to a formation of a customs union, the duties and other regulations of commerce imposed at the institution of any such union or interim agreement in respect of trade with contracting parties not parties to such union or agreement shall not on the whole be higher or more restrictive than the general incidence of the duties and regulations of commerce applicable in the constituent territories prior to the formation of such union or the adoption of such interim agreement, as the case may be;

(*b*) with respect to a free-trade area, or an interim agreement leading to the formation of a free trade area, the duties and other regulations of commerce maintained in each if the constituent territories and applicable at the formation of such free-trade area or the adoption of such interim agreement to the trade of contracting parties not included in such area or not parties to such agreement shall not be higher or more restrictive than the corresponding duties and other regulations of commerce existing in the same constituent territories prior to the formation of the free-trade area, or interim agreement as the case may be; and

(*c*) any interim agreement referred to in sub-paragraphs (*a*) and (*b*) shall include a plan and schedule for the formation of such a customs union or of such a free-trade area within a reasonable length of time.

6. If, in fulfilling the requirements of sub-paragraph 5 (*a*), a contracting party proposes to increase any rate of duty inconsistently with the provisions of Article II, the procedure set forth in Article XXVIII shall apply. In providing for compensatory adjustment, due account shall be taken of the compensation already afforded by the reduction brought about in the corresponding duty of the other constituents of the union.

7. (*a*) Any contracting party deciding to enter into a customs union or free-trade area, or an interim agreement leading to the formation of such a union or area, shall promptly notify the CONTRACTING PARTIES and shall make available to them

such information regarding the proposed union or area as will enable them to make such reports and recommendations to contracting parties as they may deem appropriate.

(*b*) If, after having studied the plan and schedule included in an interim agreement referred to in paragraph 5 in consultation with the parties to that agreement and taking due account of the information made available in accordance with the provisions of sub-paragraph (*a*), the CONTRACTING PARTIES find that such agreement is not likely to result in the formation of a customs union or of a free-trade area within the period contemplated by the parties to the agreement or that such period is not a reasonable one, the CONTRACTING PARTIES shall make recommendations to the parties to the agreement. The parties shall not maintain or put into force, as the case may be, such agreement if they are not prepared to modify it in accordance with these recommendations.

(*c*) Any substantial change in the plan or schedule referred to in paragraph 5 (*c*) shall be communicated to the CONTRACTING PARTIES, which may request the contracting parties concerned to consult with them if the change seems likely to jeopardize or delay unduly the formation of the customs union or of the free-trade area.

8. For the purposes of this Agreement:

(*a*) A customs union shall be understood to mean the substitution of a single customs territory for two or more customs territories, so that

(i) duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated with respect to substantially all the trade between the constituent territories of the union or at least with respect to substantially all the trade in products originating in such territories, and,

(ii) subject to the provisions of paragraph 9, substantially the same duties and other regulations of commerce are applied by each of the members of the union to the trade of territories not included in the union;

(*b*) A free-trade area shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles

XI, XII, XIII, XIV, XV and XX) are eliminated on substantially all the trade between the constituent territories in products originating in such territories.

9. The preferences referred to in paragraph 2 of Article I shall not be affected by the formation of a customs union or of a free-trade area but may be eliminated or adjusted by means of negotiations with contracting parties affected.* This procedure of negotiations with affected contracting parties shall, in particular, apply to the elimination of preferences required to conform with the provisions of paragraph 8 (*a*)(i) and paragraph 8 (*b*).

10. The CONTRACTING PARTIES may by a two-thirds majority approve proposals which do not fully comply with the requirements of paragraphs 5 to 9 inclusive, provided that such proposals lead to the formation of a customs union or a free-trade area in the sense of this Article.

11. Taking into account the exceptional circumstances arising out of the establishment of India and Pakistan as independent States and recognizing the fact that they have long constituted an economic unit, the contracting parties agree that the provisions of this Agreement shall not prevent the two countries from entering into special arrangements with respect to the trade between them, pending the establishment of their mutual trade relations on a definitive basis.*

12. Each contracting party shall take such reasonable measures as may be available to it to ensure observance of the provisions of this Agreement by the regional and local governments and authorities within its territories.

# ANNEXURE III

# UNDERSTANDING ON THE INTERPRETATION OF ARTICLE XXIV OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE 1994

*Members,*

*Having regard* to the provisions of Article XXIV of GATT 1994;

*Recognizing* that customs unions and free trade areas have greatly increased in number and importance since the establishment of GATT 1947 and today cover a significant proportion of world trade;

*Recognizing* the contribution to the expansion of world trade that may be made by closer integration between the economies of the parties to such agreements;

*Recognizing* also that such contribution is increased if the elimination between the constituent territories of duties and other restrictive regulations of commerce extends to all trade, and diminished if any major sector of trade is excluded;

*Reaffirming* that the purpose of such agreements should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other Members with such territories; and that 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;

*Convinced* also of the need to reinforce the effectiveness of the role of the Council for Trade in Goods in reviewing agreements notified under Article XXIV, by clarifying the criteria and procedures for the assessment of new or enlarged agreements, and improving the transparency of all Article XXIV agreements;

*Recognizing* the need for a common understanding of the obligations of Members under paragraph 12 of Article XXIV;

Hereby *agree* as follows:

1. Customs unions, free-trade areas, and interim agreements leading to the formation of a customs union or free-trade area, to be consistent with Article XXIV, must satisfy, *inter alia*, the provisions of paragraphs 5, 6, 7 and 8 of that Article.

*Article XXIV: 5*

2. The evaluation under paragraph 5(a) of Article XXIV of the general incidence of the duties and other regulations of commerce applicable before and after the formation of a customs union shall in respect of duties and charges be based upon an overall assessment of weighted average tariff rates and of customs duties collected. This assessment shall be based on import statistics for a previous representative period to be supplied by the customs union, on a tariff-line basis and in values and quantities, broken down by WTO country of origin. The Secretariat shall compute the weighted average tariff rates and customs duties collected in accordance with the methodology used in the assessment of tariff offers in the Uruguay Round of Multilateral Trade Negotiations. For this purpose, the duties and charges to be taken into consideration shall be the applied rates of duty. It is recognized that for the purpose of the overall assessment of the incidence of other regulations of commerce for which quantification and aggregation are difficult, the examination of individual measures, regulations, products covered and trade flows affected may be required.

3. The "reasonable length of time" referred to in paragraph 5(c) of Article XXIV should exceed 10 years only in exceptional cases. In cases where Members parties to an interim agreement believe that 10 years would be insufficient they shall provide a full explanation to the Council for Trade in Goods of the need for a longer period.

*Article XXIV: 6*

4. Paragraph 6 of Article XXIV establishes the procedure to be followed when a Member forming a customs union proposes to increase a bound rate of duty. In this regard Members reaffirm that the procedure set forth in Article XXVIII, as elaborated in the guidelines adopted on 10 November 1980 (BISD 27S/26-28) and in the Understanding on the Interpretation of Article XXVIII of GATT 1994, must be commenced before tariff concessions are modified or withdrawn upon the formation of a customs union or an interim agreement leading to the formation of a customs union.

5. These negotiations will be entered into in good faith with a view to achieving mutually satisfactory compensatory adjustment. In such negotiations, as required by paragraph 6 of Article XXIV, due account shall be taken of reductions of duties on the same tariff line made by other constituents of the customs union upon its formation. Should such reductions not be sufficient to provide the necessary compensatory adjustment, the customs union would offer compensation, which may take the form of reductions of duties on other tariff lines. Such an offer shall be taken into consideration by the Members having negotiating rights in the binding being modified or withdrawn. Should the compensatory adjustment remain unacceptable, negotiations should be continued. Where, despite such efforts, agreement in negotiations on compensatory adjustment under Article XXVIII as elaborated by the Understanding on the Interpretation of Article XXVIII of GATT 1994 cannot be reached within a reasonable period from the initiation of negotiations, the customs union shall, nevertheless, be free to modify or withdraw the concessions; affected Members shall then be free to withdraw substantially equivalent concessions in accordance with Article XXVIII.

6. GATT 1994 imposes no obligation on Members benefiting from a reduction of duties consequent upon the formation of a customs union, or an interim agreement leading to the formation of a customs union, to provide compensatory adjustment to its constituents.

*Review of Customs Unions and Free-Trade Areas*

7. All notifications made under paragraph 7(a) of Article XXIV shall be examined by a working party in the light of the relevant provisions of GATT 1994 and of paragraph 1 of this Understanding. The working party shall submit a report to the Council for Trade in Goods on its findings in this regard. The Council for Trade in Goods may make such recommendations to Members as it deems appropriate.

8. In regard to interim agreements, the working party may in its report make appropriate recommendations on the proposed time-frame and on measures required to complete the formation of the customs union or free-trade area. It may if necessary provide for further review of the agreement.

9. Members parties to an interim agreement shall notify substantial changes in the plan and schedule included in that agreement to the Council for Trade in Goods and, if so requested, the Council shall examine the changes.

10. Should an interim agreement notified under paragraph 7(a) of Article XXIV not include a plan and schedule, contrary to paragraph 5(c) of Article XXIV, the working party shall in its report recommend such a plan and schedule. The parties shall not maintain or put into force, as the case may be, such agreement if they are not prepared to modify it in accordance with these recommendations. Provision shall be made for subsequent review of the implementation of the recommendations.

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

*Dispute Settlement*

12. The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding may be invoked with respect to any matters arising from the application of those provisions of Article XXIV relating to customs unions, free-trade areas or interim agreements leading to the formation of a customs union or free-trade area.

*Article XXIV: 12*

13. Each Member is fully responsible under GATT 1994 for the observance of all provisions of GATT 1994, and shall take such reasonable measures as may be available to it to ensure such observance by regional and local governments and authorities within its territory.

14. The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding may be invoked in respect of measures affecting its observance taken by regional or local governments or authorities within the territory of a Member. When the Dispute Settlement Body has ruled that a provision of GATT 1994 has not been observed, the responsible Member shall take such reasonable measures as may be available to it to ensure its observance. The provisions relating to compensation and suspension of concessions or other obligations apply in cases where it has not been possible to secure such observance.

15. Each Member undertakes to accord sympathetic consideration to and afford adequate opportunity for consultation regarding any representations made by another Member concerning measures affecting the operation of GATT 1994 taken within the territory of the former.

## ANNEXURE IV - LIST OF ALL AGREEMENTS NOTIFIED TO THE GATT/ WTO (AS ON 31 MAY 2011)

| RTA Name | Coverage | Type | Date of notification | Notification | Date of entry into force | Status |
|---|---|---|---|---|---|---|
| Andean Community (CAN) | Goods | CU | 1-Oct-90 | Enabling Clause | 25-May-88 | In Force |
| Armenia - Kazakhstan | Goods | FTA | 17-Jun-04 | GATT Art. XXIV | 25-Dec-01 | In Force |
| Armenia - Moldova | Goods | FTA | 17-Jun-04 | GATT Art. XXIV | 21-Dec-95 | In Force |
| Armenia - Russian Federation | Goods | FTA | 17-Jun-04 | GATT Art. XXIV | 25-Mar-93 | In Force |
| Armenia - Turkmenistan | Goods | FTA | 17-Jun-04 | GATT Art. XXIV | 7-Jul-96 | In Force |
| Armenia - Ukraine | Goods | FTA | 17-Jun-04 | GATT Art. XXIV | 18-Dec-96 | In Force |
| ASEAN - Australia - New Zealand | Goods & Services | FTA & EIA | 8-Apr-10 | GATT Art. XXIV & GATS V | 1-Jan-10 | In Force |
| ASEAN - China | Goods & Services | PSA & EIA | 21-Sep-2005(G) / 26-Jun-2008(S) | Enabling Clause & GATS Art. V | 01-Jan-2005(G) / 01-Jul-2007(S) | In Force |
| ASEAN - India | Goods | FTA | 19-Aug-10 | Enabling Clause | 1-Jan-10 | In Force |
| ASEAN - Japan | Goods | FTA | 23-Nov-09 | GATT Art. XXIV | 1-Dec-08 | In Force |
| ASEAN - Korea, Republic of | Goods & Services | FTA & EIA | | | 01-Jan-2010(G) / 01-May-2009(S) | In Force |
| ASEAN Free Trade Area (AFTA) | Goods | FTA | 30-Oct-92 | Enabling Clause | 28-Jan-92 | In Force |
| Asia Pacific Trade Agreement (APTA) | Goods | PSA | 2-Nov-76 | Enabling Clause | 17-Jun-76 | In Force |
| Asia Pacific Trade Agreement (APTA) - Accession of China | Goods | PSA | 30-Apr-04 | Enabling Clause | 1-Jan-02 | In Force |
| Australia - Chile | Goods & Services | FTA & EIA | 3-Mar-09 | GATT Art. XXIV & GATS V | 6-Mar-09 | In Force |
| Australia - New Zealand (ANZCERTA) | Goods & Services | FTA & EIA | 14-Apr-1983(G) / 22-Nov-1995(S) | GATT Art. XXIV & GATS V | 01-Jan-1983(G) / 01-Jan-1989(S) | In Force |
| Australia - Papua New Guinea (PATCRA) | Goods | FTA | 20-Dec-76 | GATT Art. XXIV | 1-Feb-77 | In Force |

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|---|---|---|---|---|---|---|
| Brunei Darussalam - Japan | Goods & Services | FTA & EIA | 31-Jul-08 | GATT Art. XXIV & GATS V | 31-Jul-08 | In Force |
| Canada - Chile | Goods & Services | FTA & EIA | 30-Jul-97 | GATT Art. XXIV & GATS V | 5-Jul-97 | In Force |
| Canada - Costa Rica | Goods | FTA | 13-Jan-03 | GATT Art. XXIV | 1-Nov-02 | In Force |
| Canada - Israel | Goods | FTA | 15-Jan-97 | GATT Art. XXIV | 1-Jan-97 | In Force |
| Canada - Peru | Goods & Services | FTA & EIA | 31-Jul-09 | GATT Art. XXIV & GATS V | 1-Aug-09 | In Force |
| Caribbean Community and Common Market (CARICOM) | Goods & Services | CU & EIA | 14-Oct-1974(G) / 19-Feb-2003(S) | GATT Art. XXIV & GATS V | 01-Aug-1973(G) / 01-Jul-1997(S) | In Force |
| Central American Common Market (CACM) | Goods | CU | 24-Feb-61 | GATT Art. XXIV | 4-Jun-61 | In Force |
| Central European Free Trade Agreement (CEFTA) 2006 | Goods | FTA | 26-Jul-07 | GATT Art. XXIV | 1-May-07 | In Force |
| Chile - China | Goods & Services | FTA & EIA | 20-Jun-2007(G) / 18-Nov-2010(S) | GATT Art. XXIV & GATS V | 01-Oct-2006(G) / 01-Aug-2010(S) | In Force |
| Chile - Colombia | Goods & Services | FTA & EIA | 14-Aug-09 | GATT Art. XXIV & GATS V | 8-May-09 | In Force |
| Chile - Costa Rica (Chile - Central America) | Goods & Services | FTA & EIA | 16-Apr-02 | GATT Art. XXIV & GATS V | 15-Feb-02 | In Force |
| Chile - El Salvador (Chile - Central America) | Goods & Services | FTA & EIA | 29-Jan-2004(G) / 05-Feb-2004(S) | GATT Art. XXIV & GATS V | 1-Jun-02 | In Force |
| Chile - India | Goods | PSA | 13-Jan-09 | Enabling Clause | 17-Aug-07 | In Force |
| Chile - Japan | Goods & Services | FTA & EIA | 24-Aug-07 | GATT Art. XXIV & GATS V | 3-Sep-07 | In Force |
| Chile - Mexico | Goods & Services | FTA & EIA | 27-Feb-01 | GATT Art. XXIV & GATS V | 1-Aug-99 | In Force |

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|---|---|---|---|---|---|---|
| China - Hong Kong, China | Goods & Services | FTA & EIA | 27-Dec-03 | GATT Art. XXIV & GATS V | 1-Jan-04 | In Force |
| China - Macao, China | Goods & Services | FTA & EIA | 27-Dec-03 | GATT Art. XXIV & GATS V | 1-Jan-04 | In Force |
| China - New Zealand | Goods & Services | FTA & EIA | 21-Apr-09 | GATT Art. XXIV & GATS V | 1-Oct-08 | In Force |
| China - Singapore | Goods & Services | FTA & EIA | 2-Mar-09 | GATT Art. XXIV & GATS V | 1-Jan-09 | In Force |
| Colombia - Mexico | Goods & Services | FTA & EIA | 13-Sep-10 | GATT Art. XXIV & GATS V | 1-Jan-95 | In Force |
| Common Economic Zone (CEZ) | Goods | FTA | 18-Aug-08 | GATT Art. XXIV | 20-May-04 | In Force |
| Common Market for Eastern and Southern Africa (COMESA) | Goods | FTA | 4-May-95 | Enabling Clause | 8-Dec-94 | In Force |
| Commonwealth of Independent States (CIS) | Goods | FTA | 29-Jun-99 | GATT Art. XXIV | 30-Dec-94 | In Force |
| Costa Rica - Mexico | Goods & Services | FTA & EIA | 17-Jul-06 | GATT Art. XXIV & GATS V | 1-Jan-95 | In Force |
| Dominican Republic - Central America - United States Free Trade Agreement (CAFTA-DR) | Goods & Services | FTA & EIA | 17-Mar-06 | GATT Art. XXIV & GATS V | 1-Mar-06 | In Force |
| East African Community (EAC) | Goods | CU | 9-Oct-00 | Enabling Clause | 7-Jul-00 | In Force |
| EC - Albania | Goods & Services | FTA & EIA | 07-Mar-2007(G) / 07-Oct-2009(S) | GATT Art. XXIV & GATS V | 01-Dec-2006(G) / 01-Apr-2009(S) | In Force |
| EC - Algeria | Goods | FTA | 24-Jul-06 | GATT Art. XXIV | 1-Sep-05 | In Force |
| EC - Andorra | Goods | CU | 23-Feb-98 | GATT Art. XXIV | 1-Jul-91 | In Force |
| EC - Bosnia and Herzegovina | Goods | FTA | 11-Jul-08 | GATT Art. XXIV | 1-Jul-08 | In Force |
| EC - Cameroon | Goods | FTA | 24-Sep-09 | GATT Art. XXIV | 1-Oct-09 | In Force |
| EC - CARIFORUM States EPA | Goods & Services | FTA & EIA | 16-Oct-08 | GATT Art. XXIV & GATS V | 1-Nov-08 | In Force |

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|---|---|---|---|---|---|---|
| EC - Chile | Goods & Services | FTA & EIA | 03-Feb-2004(G) / 28-Oct-2005(S) | GATT Art. XXIV & GATS V | 01-Feb-2003(G) / 01-Mar-2005(S) | In Force |
| EC - Côte d'Ivoire | Goods | FTA | 11-Dec-08 | GATT Art. XXIV | 1-Jan-09 | In Force |
| EC - Croatia | Goods & Services | FTA & EIA | 17-Dec-2002(G) / 12-Oct-2009(S) | GATT Art. XXIV & GATS V | 01-Mar-2002(G) / 01-Feb-2005(S) | In Force |
| EC - Egypt | Goods | FTA | 3-Sep-04 | GATT Art. XXIV | 1-Jun-04 | In Force |
| EC - Faroe Islands | Goods | FTA | 17-Feb-97 | GATT Art. XXIV | 1-Jan-97 | In Force |
| EC - Former Yugoslav Republic of Macedonia | Goods & Services | FTA & EIA | 23-Oct-2001(G) / 02-Oct-2009(S) | GATT Art. XXIV & GATS V | 01-Jun-2001(G) / 01-Apr-2004(S) | In Force |
| EC - Iceland | Goods | FTA | 24-Nov-72 | GATT Art. XXIV | 1-Apr-73 | In Force |
| EC - Israel | Goods | FTA | 20-Sep-00 | GATT Art. XXIV | 1-Jun-00 | In Force |
| EC - Jordan | Goods | FTA | 17-Dec-02 | GATT Art. XXIV | 1-May-02 | In Force |
| EC - Lebanon | Goods | FTA | 26-May-03 | GATT Art. XXIV | 1-Mar-03 | In Force |
| EC - Mexico | Goods & Services | FTA & EIA | 25-Jul-2000(G) / 21-Jun-2002(S) | GATT Art. XXIV & GATS V | 01-Jul-2000(G) / 01-Oct-2000(S) | In Force |
| EC - Montenegro | Goods & Services | FTA & EIA | 16-Jan-2008(G) / 18-Jun-2010(S) | GATT Art. XXIV & GATS V | 01-Jan-2008(G) / 01-May-2010(S) | In Force |
| EC - Morocco | Goods | FTA | 13-Oct-00 | GATT Art. XXIV | 1-Mar-00 | In Force |
| EC - Norway | Goods | FTA | 13-Jul-73 | GATT Art. XXIV | 1-Jul-73 | In Force |
| EC – Overseas Countries and Territories (OCT) | Goods | FTA | 14-Dec-70 | GATT Art. XXIV | 1-Jan-71 | In Force |
| EC - Palestinian Authority | Goods | FTA | 29-May-97 | GATT Art. XXIV | 1-Jul-97 | In Force |
| EC - South Africa | Goods | FTA | 2-Nov-00 | GATT Art. XXIV | 1-Jan-00 | In Force |

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| EC - Switzerland - Liechtenstein | Goods | FTA | 27-Oct-72 | GATT Art. XXIV | 1-Jan-73 | In Force |
| EC - Syria | Goods | FTA | 15-Jul-77 | GATT Art. XXIV | 1-Jul-77 | In Force |
| EC - Tunisia | Goods | FTA | 15-Jan-99 | GATT Art. XXIV | 1-Mar-98 | In Force |
| EC - Turkey | Goods | CU | 22-Dec-95 | GATT Art. XXIV | 1-Jan-96 | In Force |
| EC (10) Enlargement | Goods | CU | 24-Oct-79 | GATT Art. XXIV | 1-Jan-81 | In Force |
| EC (12) Enlargement | Goods | CU | 11-Dec-85 | GATT Art. XXIV | 1-Jan-86 | In Force |
| EC (15) Enlargement | Goods & Services | CU & EIA | 15-Dec-1994(G) / 22-Dec-1994(S) | GATT Art. XXIV & GATS V | 1-Jan-95 | In Force |
| EC (25) Enlargement | Goods & Services | CU & EIA | 26-Apr-04 | GATT Art. XXIV & GATS V | 1-May-04 | In Force |
| EC (27) Enlargement | Goods & Services | CU & EIA | 27-Sep-2006(G) / 26-Jun-2007(S) | GATT Art. XXIV & GATS V | 1-Jan-07 | In Force |
| EC (9) Enlargement | Goods | CU | 7-Mar-72 | GATT Art. XXIV | 1-Jan-73 | In Force |
| EC Treaty | Goods & Services | CU & EIA | 24-Apr-1957(G) / 10-Nov-1995(S) | GATT Art. XXIV & GATS V | 1-Jan-58 | In Force |
| Economic and Monetary Community of Central Africa (CEMAC) | Goods | CU | 21-Jul-99 | Enabling Clause | 24-Jun-99 | In Force |
| Economic Community of West African States (ECOWAS) | Goods | CU | 6-Jul-05 | Enabling Clause | 24-Jul-93 | In Force |
| Economic Cooperation Organization (ECO) | Goods | PSA | 10-Jul-92 | Enabling Clause | 17-Feb-92 | In Force |
| EFTA - Albania | Goods | FTA | 7-Feb-11 | GATT Art. XXIV | 1-Nov-10 | In Force |
| EFTA - Canada | Goods | FTA | 4-Aug-09 | GATT Art. XXIV | 1-Jul-09 | In Force |
| EFTA - Chile | Goods & Services | FTA & EIA | 3-Dec-04 | GATT Art. XXIV & GATS V | 1-Dec-04 | In Force |
| EFTA - Croatia | Goods | FTA | 14-Jan-02 | GATT Art. XXIV | 1-Jan-02 | In Force |
| EFTA - Egypt | Goods | FTA | 17-Jul-07 | GATT Art. XXIV | 1-Aug-07 | In Force |

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| EFTA - Former Yugoslav Republic of Macedonia | Goods | FTA | 11-Dec-00 | GATT Art. XXIV | 1-Jan-01 | In Force |
| EFTA - Israel | Goods | FTA | 30-Nov-92 | GATT Art. XXIV | 1-Jan-93 | In Force |
| EFTA - Jordan | Goods | FTA | 17-Jan-02 | GATT Art. XXIV | 1-Jan-02 | In Force |
| EFTA - Korea, Republic of | Goods & Services | FTA & EIA | 23-Aug-06 | GATT Art. XXIV & GATS V | 1-Sep-06 | In Force |
| EFTA - Lebanon | Goods | FTA | 22-Dec-06 | GATT Art. XXIV | 1-Jan-07 | In Force |
| EFTA - Mexico | Goods & Services | FTA & EIA | 25-Jul-01 | GATT Art. XXIV & GATS V | 1-Jul-01 | In Force |
| EFTA - Morocco | Goods | FTA | 20-Jan-00 | GATT Art. XXIV | 1-Dec-99 | In Force |
| EFTA - Palestinian Authority | Goods | FTA | 23-Jul-99 | GATT Art. XXIV | 1-Jul-99 | In Force |
| EFTA - SACU | Goods | FTA | 29-Oct-08 | GATT Art. XXIV | 1-May-08 | In Force |
| EFTA - Serbia | Goods | FTA | 24-Nov-10 | GATT Art. XXIV | 1-Oct-10 | In Force |
| EFTA - Singapore | Goods & Services | FTA & EIA | 14-Jan-03 | GATT Art. XXIV & GATS V | 1-Jan-03 | In Force |
| EFTA - Tunisia | Goods | FTA | 3-Jun-05 | GATT Art. XXIV | 1-Jun-05 | In Force |
| EFTA - Turkey | Goods | FTA | 6-Mar-92 | GATT Art. XXIV | 1-Apr-92 | In Force |
| EFTA accession of Iceland | Goods | FTA | 30-Jan-70 | GATT Art. XXIV | 1-Mar-70 | In Force |
| Egypt - Turkey | Goods | FTA | 5-Oct-07 | Enabling Clause | 1-Mar-07 | In Force |
| EU - San Marino | Goods | CU | 24-Feb-10 | GATT Art. XXIV | 1-Apr-02 | In Force |
| EU - Serbia | Goods | FTA | 31-May-10 | GATT Art. XXIV | 1-Feb-10 | In Force |
| Eurasian Economic Community (EAEC) | Goods | CU | 21-Apr-99 | GATT Art. XXIV | 8-Oct-97 | In Force |
| European Economic Area (EEA) | Services | EIA | 13-Sep-96 | GATS Art. V | 1-Jan-94 | In Force |
| European Free Trade Association (EFTA) | Goods & Services | FTA & EIA | 14-Nov-1959(G) / 15-Jul-2002(S) | GATT Art. XXIV & GATS V | 03-May-1960(G) / 01-Jun-2002(S) | In Force |
| Faroe Islands - Norway | Goods | FTA | 12-Feb-96 | GATT Art. XXIV | 1-Jul-93 | In Force |
| Faroe Islands - Switzerland | Goods | FTA | 12-Feb-96 | GATT Art. XXIV | 1-Mar-95 | In Force |
| Georgia - Armenia | Goods | FTA | 8-Feb-01 | GATT Art. XXIV | 11-Nov-98 | In Force |
| Georgia - Azerbaijan | Goods | FTA | 8-Feb-01 | GATT Art. XXIV | 10-Jul-96 | In Force |

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| Georgia - Kazakhstan | Goods | FTA | 8-Feb-01 | GATT Art. XXIV | 16-Jul-99 | In Force |
| Georgia - Russian Federation | Goods | FTA | 8-Feb-01 | GATT Art. XXIV | 10-May-94 | In Force |
| Georgia - Turkmenistan | Goods | FTA | 8-Feb-01 | GATT Art. XXIV | 1-Jan-00 | In Force |
| Georgia - Ukraine | Goods | FTA | 8-Feb-01 | GATT Art. XXIV | 4-Jun-96 | In Force |
| Global System of Trade Preferences among Developing Countries (GSTP) | Goods | PSA | 25-Sep-89 | Enabling Clause | 19-Apr-89 | In Force |
| Gulf Cooperation Council (GCC) | Goods | CU | | | 1-Jan-03 | In Force |
| Honduras - El Salvador and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu | Goods & Services | FTA & EIA | 6-Apr-10 | GATT Art. XXIV & GATS V | 1-Mar-08 | In Force |
| Hong Kong, China - New Zealand | Goods & Services | FTA & EIA | 3-Jan-11 | GATT Art. XXIV & GATS V | 1-Jan-11 | In Force |
| Iceland - Faroe Islands | Goods & Services | FTA & EIA | 10-Jul-08 | GATT Art. XXIV & GATS V | 1-Nov-06 | In Force |
| India - Afghanistan | Goods | PSA | 8-Mar-10 | Enabling Clause | 13-May-03 | In Force |
| India - Bhutan | Goods | FTA | 30-Jun-08 | Enabling Clause | 29-Jul-06 | In Force |
| India - Nepal | Goods | PSA | 2-Aug-10 | Enabling Clause | 27-Oct-09 | In Force |
| India - Singapore | Goods & Services | FTA & EIA | 3-May-07 | GATT Art. XXIV & GATS V | 1-Aug-05 | In Force |
| India - Sri Lanka | Goods | FTA | 17-Jun-02 | Enabling Clause | 15-Dec-01 | In Force |
| Israel - Mexico | Goods | FTA | 22-Feb-01 | GATT Art. XXIV | 1-Jul-00 | In Force |
| Japan - Indonesia | Goods & Services | FTA & EIA | 27-Jun-08 | GATT Art. XXIV & GATS V | 1-Jul-08 | In Force |
| Japan - Malaysia | Goods & Services | FTA & EIA | 12-Jul-06 | GATT Art. XXIV & GATS V | 13-Jul-06 | In Force |
| Japan - Mexico | Goods & Services | FTA & EIA | 31-Mar-05 | GATT Art. XXIV & GATS V | 1-Apr-05 | In Force |
| Japan - Philippines | Goods & Services | FTA & EIA | 11-Dec-08 | GATT Art. XXIV & GATS V | 11-Dec-08 | In Force |
| Japan - Singapore | Goods & Services | FTA & EIA | 8-Nov-02 | GATT Art. XXIV & GATS V | 30-Nov-02 | In Force |

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| Japan - Switzerland | Goods & Services | FTA & EIA | 1-Sep-09 | GATT Art. XXIV & GATS V | 1-Sep-09 | In Force |
| Japan - Thailand | Goods & Services | FTA & EIA | 25-Oct-07 | GATT Art. XXIV & GATS V | 1-Nov-07 | In Force |
| Japan - Viet Nam | Goods & Services | FTA & EIA | 1-Oct-09 | GATT Art. XXIV & GATS V | 1-Oct-09 | In Force |
| Jordan - Singapore | Goods & Services | FTA & EIA | 7-Jul-06 | GATT Art. XXIV & GATS V | 22-Aug-05 | In Force |
| Korea, Republic of - Chile | Goods & Services | FTA & EIA | 8-Apr-04 | GATT Art. XXIV & GATS V | 1-Apr-04 | In Force |
| Korea, Republic of - India | Goods & Services | FTA & EIA | | | 1-Jan-10 | In Force |
| Korea, Republic of - Singapore | Goods & Services | FTA & EIA | 21-Feb-06 | GATT Art. XXIV & GATS V | 2-Mar-06 | In Force |
| Kyrgyz Republic - Armenia | Goods | FTA | 12-Dec-00 | GATT Art. XXIV | 27-Oct-95 | In Force |
| Kyrgyz Republic - Kazakhstan | Goods | FTA | 29-Jun-99 | GATT Art. XXIV | 11-Nov-95 | In Force |
| Kyrgyz Republic - Moldova | Goods | FTA | 15-Jun-99 | GATT Art. XXIV | 21-Nov-96 | In Force |
| Kyrgyz Republic - Russian Federation | Goods | FTA | 15-Jun-99 | GATT Art. XXIV | 24-Apr-93 | In Force |
| Kyrgyz Republic - Ukraine | Goods | FTA | 15-Jun-99 | GATT Art. XXIV | 19-Jan-98 | In Force |
| Kyrgyz Republic - Uzbekistan | Goods | FTA | 15-Jun-99 | GATT Art. XXIV | 20-Mar-98 | In Force |
| Lao People's Democratic Republic - Thailand | Goods | PSA | 26-Nov-91 | Enabling Clause | 20-Jun-91 | In Force |
| Latin American Integration Association (LAIA) | Goods | PSA | 1-Jul-82 | Enabling Clause | 18-Mar-81 | In Force |
| Melanesian Spearhead Group (MSG) | Goods | PSA | 3-Aug-99 | Enabling Clause | 1-Jan-94 | In Force |
| MERCOSUR - India | Goods | PSA | 23-Feb-10 | Enabling Clause | 1-Jun-09 | In Force |
| Mexico - El Salvador (Mexico - Northern Triangle) | Goods & Services | FTA & EIA | 23-May-06 | GATT Art. XXIV & GATS V | 15-Mar-01 | In Force |
| Mexico - Guatemala (Mexico - Northern Triangle) | Goods & Services | FTA & EIA | 3-Jul-06 | GATT Art. XXIV & GATS V | 15-Mar-01 | In Force |

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| Mexico - Honduras (Mexico - Northern Triangle) | Goods & Services | FTA & EIA | 10-Jul-2006(G) / 20-Jun-2006(S) | GATT Art. XXIV & GATS V | 1-Jun-01 | In Force |
| Mexico - Nicaragua | Goods & Services | FTA & EIA | 17-Oct-05 | GATT Art. XXIV & GATS V | 1-Jul-98 | In Force |
| New Zealand - Singapore | Goods & Services | FTA & EIA | 4-Sep-01 | GATT Art. XXIV & GATS V | 1-Jan-01 | In Force |
| Nicaragua and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu | Goods & Services | FTA & EIA | 9-Jul-09 | GATT Art. XXIV & GATS V | 1-Jan-08 | In Force |
| North American Free Trade Agreement (NAFTA) | Goods & Services | FTA & EIA | 29-Jan-1993(G) / 01-Mar-1995(S) | GATT Art. XXIV & GATS V | 1-Jan-94 | In Force |
| Pacific Island Countries Trade Agreement (PICTA) | Goods | FTA | 28-Aug-08 | Enabling Clause | 13-Apr-03 | In Force |
| Pakistan - China | Goods & Services | FTA & EIA | 18-Jan-2008(G) / 20-May-2010(S) | GATT Art. XXIV & GATS V | 01-Jul-2007(G) / 10-Oct-2009(S) | In Force |
| Pakistan - Malaysia | Goods & Services | FTA & EIA | 19-Feb-08 | Enabling Clause & GATS Art. V | 1-Jan-08 | In Force |
| Pakistan - Sri Lanka | Goods | FTA | 11-Jun-08 | Enabling Clause | 12-Jun-05 | In Force |
| Panama - Chile | Goods & Services | FTA & EIA | 17-Apr-08 | GATT Art. XXIV & GATS V | 7-Mar-08 | In Force |
| Panama - Costa Rica (Panama - Central America) | Goods & Services | FTA & EIA | 7-Apr-09 | GATT Art. XXIV & GATS V | 23-Nov-08 | In Force |
| Panama - El Salvador (Panama - Central America) | Goods & Services | FTA & EIA | 24-Feb-05 | GATT Art. XXIV & GATS V | 11-Apr-03 | In Force |
| Panama - Honduras (Panama - Central America ) | Goods & Services | FTA & EIA | 16-Dec-09 | GATT Art. XXIV & GATS V | 9-Jan-09 | In Force |

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| Panama - Singapore | Goods & Services | FTA & EIA | 4-Apr-07 | GATT Art. XXIV & GATS V | 24-Jul-06 | In Force |
| Panama and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu | Goods & Services | FTA & EIA | 28-Jul-09 | GATT Art. XXIV & GATS V | 1-Jan-04 | In Force |
| Pan-Arab Free Trade Area (PAFTA) | Goods | FTA | 3-Oct-06 | GATT Art. XXIV | 1-Jan-98 | In Force |
| Peru - China | Goods & Services | FTA & EIA | 3-Mar-10 | GATT Art. XXIV & GATS V | 1-Mar-10 | In Force |
| Peru - Singapore | Goods & Services | FTA & EIA | 30-Jul-09 | GATT Art. XXIV & GATS V | 1-Aug-09 | In Force |
| Protocol on Trade Negotiations (PTN) | Goods | PSA | 9-Nov-71 | Enabling Clause | 11-Feb-73 | In Force |
| Singapore - Australia | Goods & Services | FTA & EIA | 25-Sep-03 | GATT Art. XXIV & GATS V | 28-Jul-03 | In Force |
| South Asian Free Trade Agreement (SAFTA) | Goods | FTA | 21-Apr-08 | Enabling Clause | 1-Jan-06 | In Force |
| South Asian Preferential Trade Arrangement (SAPTA) | Goods | PSA | 21-Apr-97 | Enabling Clause | 7-Dec-95 | In Force |
| South Pacific Regional Trade and Economic Cooperation Agreement (SPARTECA) | Goods | PSA | 7-Jan-81 | Enabling Clause | 1-Jan-81 | In Force |
| Southern African Customs Union (SACU) | Goods | CU | 25-Jun-07 | GATT Art. XXIV | 15-Jul-04 | In Force |
| Southern African Development Community (SADC) | Goods | FTA | 2-Aug-04 | GATT Art. XXIV | 1-Sep-00 | In Force |
| Southern Common Market (MERCOSUR) | Goods & Services | CU & EIA | 17-Feb-1991(G) / 05-Dec-2006(S) | Enabling Clause & GATS Art. V | 29-Nov-1991(G) / 07-Dec-2005(S) | In Force |
| Thailand - Australia | Goods & Services | FTA & EIA | 27-Dec-04 | GATT Art. XXIV & GATS V | 1-Jan-05 | In Force |
| Thailand - New Zealand | Goods & Services | FTA & EIA | 1-Dec-05 | GATT Art. XXIV & GATS V | 1-Jul-05 | In Force |

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| Trans-Pacific Strategic Economic Partnership | Goods & Services | FTA & EIA | 18-May-07 | GATT Art. XXIV & GATS V | 28-May-06 | In Force |
| Turkey - Albania | Goods | FTA | 9-May-08 | GATT Art. XXIV | 1-May-08 | In Force |
| Turkey - Bosnia and Herzegovina | Goods | FTA | 29-Aug-03 | GATT Art. XXIV | 1-Jul-03 | In Force |
| Turkey - Chile | Goods | FTA | 25-Feb-11 | GATT Art. XXIV | 1-Mar-11 | In Force |
| Turkey - Croatia | Goods | FTA | 2-Sep-03 | GATT Art. XXIV | 1-Jul-03 | In Force |
| Turkey - Former Yugoslav Republic of Macedonia | Goods | FTA | 5-Jan-01 | GATT Art. XXIV | 1-Sep-00 | In Force |
| Turkey - Georgia | Goods | FTA | 18-Feb-09 | GATT Art. XXIV | 1-Nov-08 | In Force |
| Turkey - Israel | Goods | FTA | 16-Apr-98 | GATT Art. XXIV | 1-May-97 | In Force |
| Turkey - Jordan | Goods | FTA | 7-Mar-11 | GATT Art. XXIV | 1-Mar-11 | In Force |
| Turkey - Montenegro | Goods | FTA | 12-Mar-10 | GATT Art. XXIV | 1-Mar-10 | In Force |
| Turkey - Morocco | Goods | FTA | 10-Feb-06 | GATT Art. XXIV | 1-Jan-06 | In Force |
| Turkey - Palestinian Authority | Goods | FTA | 1-Sep-05 | GATT Art. XXIV | 1-Jun-05 | In Force |
| Turkey - Serbia | Goods | FTA | 10-Aug-10 | GATT Art. XXIV | 1-Sep-10 | In Force |
| Turkey - Syria | Goods | FTA | 15-Feb-07 | GATT Art. XXIV | 1-Jan-07 | In Force |
| Turkey - Tunisia | Goods | FTA | 1-Sep-05 | GATT Art. XXIV | 1-Jul-05 | In Force |
| Ukraine - Azerbaijan | Goods | FTA | 18-Aug-08 | GATT Art. XXIV | 2-Sep-96 | In Force |
| Ukraine - Belarus | Goods | FTA | 18-Aug-08 | GATT Art. XXIV | 11-Nov-06 | In Force |
| Ukraine - Former Yugoslav Republic of Macedonia | Goods | FTA | 18-Aug-08 | GATT Art. XXIV | 5-Jul-01 | In Force |
| Ukraine - Kazakhstan | Goods | FTA | 18-Aug-08 | GATT Art. XXIV | 19-Oct-98 | In Force |
| Ukraine - Moldova | Goods | FTA | 18-Aug-08 | GATT Art. XXIV | 19-May-05 | In Force |
| Ukraine - Russian Federation | Goods | FTA | 18-Aug-08 | GATT Art. XXIV | 21-Feb-94 | In Force |
| Ukraine - Tajikistan | Goods | FTA | 18-Aug-08 | GATT Art. XXIV | 11-Jul-02 | In Force |
| Ukraine - Uzbekistan | Goods | FTA | 18-Aug-08 | GATT Art. XXIV | 1-Jan-96 | In Force |
| Ukraine -Turkmenistan | Goods | FTA | 18-Aug-08 | GATT Art. XXIV | 4-Nov-95 | In Force |
| US - Australia | Goods & Services | FTA & EIA | 22-Dec-04 | GATT Art. XXIV & GATS V | 1-Jan-05 | In Force |
| US - Bahrain | Goods & Services | FTA & EIA | 8-Sep-06 | GATT Art. XXIV & GATS V | 1-Aug-06 | In Force |

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| US - Chile | Goods & Services | FTA & EIA | 16-Dec-03 | GATT Art. XXIV & GATS V | 1-Jan-04 | In Force |
| US - Israel | Goods | FTA | 13-Sep-85 | GATT Art. XXIV | 19-Aug-85 | In Force |
| US - Jordan | Goods & Services | FTA & EIA | 15-Jan-02 | GATT Art. XXIV & GATS V | 17-Dec-01 | In Force |
| US - Morocco | Goods & Services | FTA & EIA | 30-Dec-05 | GATT Art. XXIV & GATS V | 1-Jan-06 | In Force |
| US - Oman | Goods & Services | FTA & EIA | 30-Jan-09 | GATT Art. XXIV & GATS V | 1-Jan-09 | In Force |
| US - Peru | Goods & Services | FTA & EIA | 3-Feb-09 | GATT Art. XXIV & GATS V | 1-Feb-09 | In Force |
| US - Singapore | Goods & Services | FTA & EIA | 17-Dec-03 | GATT Art. XXIV & GATS V | 1-Jan-04 | In Force |
| West African Economic and Monetary Union (WAEMU) | Goods | CU | 27-Oct-99 | Enabling Clause | 1-Jan-00 | In Force |

Source: RTA Database (2011)

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WT/TPR/S/182 dated 18 April 2007
WT/REG228/N/1 dated 4 May 2007
WT/TPR/S/182/Rev.1 dated 24 July 2007
WT/COMTD/N/22 dated 27 July 2007
WT/COMTD/62/Add.1 dated 26 November 2007
WT/REG228/1 dated 27 February 2008
WT/COMTD/62/Add.2 dated 2 March 2008
WT/COMTD/62/Add.2 dated 7 March 2008
WT/COMTD/N/26 dated 24 April 2008
WT/COMTD/N/28 dated 2 July 2008
WT/REG228/2 dated 15 September 2008
WT/REG228/1/Rev.1 dated 1 October 2008
WT/REG228/3 dated 20 October 2008
WT/REG228/M/1 dated 27 October 2008
WT/COMTD/N/30 dated 14 January 2009
WT/GC/W/605 dated 3 July 2009
WT/GC/M/121 dated 7 October 2009
Director-General's letter to the Ministers, 18 November 2009
TN/RL/W/246 dated 27 November 2009
TN/RL/W/246 dated 27 November 2009
WT/MIN(09)/ST/35 dated 30 November 2009
WT/MIN(09)/18 dated 2 December 2009
WT/COMTD/N/31 dated 25 February 2010
WT/COMTD/N/32 dated 9 March 2010
TN/RL/W/248 dated 24 January 2011
TN/RL/W/249 dated 24 January 2011
TN/RL/W/250 dated 26 January 2011