

Proliferation of Bilateral and Regional Trade Agreements: Complementing or Supplanting Multilateralism?

By
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Abstract

With the creation of the World Trade Organization (WTO) in 1995, the pyramidal design of the international trading system placed multilateralism at the top of the pyramid, regionalism/bilateralism in the middle, and the domestic trade and economic policies of WTO Member States at the bottom of the pyramid. This paper questions whether this vertical structure is still the case today, given the tremendous proliferation of regional trade agreements (RTAs) in recent years and the fact that the WTO is losing its centrality in the international trading system. The thesis of this paper is that the multilateral trading system's single undertaking is no longer feasible, hence affirming RTA proliferation as the *modus operandi* for trade liberalization. This paper will also argue that RTA proliferation implies the erosion of the WTO law principle of non-discrimination, which endangers the multilateral trading system. RTAs can help countries integrate into the multilateral trading system, but are also a fundamental departure from the principle of non-discrimination. This raises the question of whether RTAs are a building block for further multilateral liberalization or a stumbling block.

After an overview of RTAs, the paper discusses the WTO rules that deal with RTAs (GATT Article XXIV, the Enabling Clause, and GATS Article V), the main trends identified in RTAs, the economic and political reasons why WTO Members engage in RTAs so frequently, as well as the positive and negative effects of regionalism on multilateralism. By doing so, the paper investigates whether it is RTAs or multilateralism that is the center of gravity of the international trading system, or whether we have a symbiosis between the two and, if not, how we can get there.

The paper concludes that the proliferation of RTAs implies the erosion of the principle of non-discrimination and wonders whether this means the beginning of the end of multilateralism. It also concludes that the single undertaking is no longer feasible and suggests variable geometry and sectoral agreements as the way forward in the multilateral trading system. Moreover, it concludes that bilateral and regional deals do not come close to matching the economic impact of agreeing to a global deal. Therefore, RTAs can complement but not supplant multilateralism.

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I. Introduction

With the creation of the World Trade Organization (WTO) in 1995, the pyramidal design of the international trading system placed multilateralism at the top of the pyramid, regionalism/bilateralism in the middle, and the domestic trade and economic policies of WTO Member States at the bottom of the pyramid. This paper questions whether this vertical structure is still the case today, given the tremendous proliferation of regional trade agreements (RTAs) in recent years and the fact that the WTO is losing its centrality in the international trading system.¹

¹ See for example “Everybody’s Doing it,” *The Economist*, 26 February 2004.

The thesis of this paper is that the multilateral trading system's single undertaking² is no longer feasible because the WTO has more Members than ever (and WTO membership is an ongoing process, with more Members to come in the near future) and covers more topics than ever, which, in turn, are more complex than ever.³ This explains RTA proliferation as the *modus operandi* for trade liberalization. This paper will also argue that RTA proliferation implies the erosion of the WTO law principle of non-discrimination, which endangers the multilateral trading system. RTAs can help countries integrate into the multilateral trading system, but are also a fundamental departure from the principle of non-discrimination. This raises the question whether RTAs are a building block for further multilateral liberalization or a stumbling block.⁴

This paper is divided into seven sections. After the introduction in Section I, Section II provides an overview of RTAs. Section III discusses the WTO rules that deal with RTAs (Article XXIV of the General Agreement on Tariffs and Trade (GATT), the 1979 GATT decision on differential and more favorable treatment, reciprocity, and fuller participation of developing countries (i.e., the so-called Enabling Clause), and Article V of the General Agreement on Trade in Services (GATS)). Section IV focuses on the main trends identified in RTAs, whereas Section V deals with the economic and political reasons why WTO Members engage in RTAs so frequently, and Section VI analyzes the positive and negative effects of regionalism on multilateralism. By doing so, the paper will investigate whether RTAs or multilateralism is the

² Single undertaking is a provision that requires countries to accept all the agreements reached during a round of multilateral trade negotiations as a single package, as opposed to on a case-by-case basis. It basically means that nothing is agreed until everything is agreed.

³ If ultimately successful, the Doha Round, as of 2010 with 153 countries at the negotiating table, would be the ninth Round since the Second World War. The previous rounds were, in chronological order: Geneva Round (1948), with 23 countries; Annecy Round (1949), with 13 countries; Torquay Round (1951), with 38 countries; Fourth Round (1956), with 26 countries; Dillon Round (1962), with 26 countries; Kennedy Round (1967), with 62 countries; Tokyo Round (1979), with 102 countries; and Uruguay Round (1994), with 123 countries. See Leal-Arcas, R. *Theory and Practice of EC External Trade Law and Policy*, London: Cameron May, 2008, pp. 486-87.

⁴ For further analysis on the link between regionalism and multilateralism, see generally Cho, S. "Breaking the Barrier between Regionalism and Multilateralism: A New Perspective on Trade Regionalism," *Harvard International Law Journal*, Vol. 42, No. 2, pp. 419-465, 2001.

center of gravity of the international trading system, or whether we have a symbiosis between regionalism and multilateralism and, if not, how we can get there. In Section VII, the paper concludes that the proliferation of RTAs implies the erosion of the WTO law principle of non-discrimination and wonders whether this means the beginning of the end of multilateralism.⁵

II. Overview of RTAs

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

Bilateral trade agreements and regional attempts at economic integration are facts that cannot be wished away, even though they complicate the rules that govern international trade. RTAs have become a distinctive feature of the international trading landscape. As a result, more and more international trade is covered by such preferential deals, to the extent that one wonders whether RTAs are becoming the norm rather than the exception.⁶ Many RTAs contain obligations that go beyond existing multilateral commitments (i.e., the so-called WTO plus⁷), whereas other RTAs deal with areas not yet included in the WTO agenda, such as investment

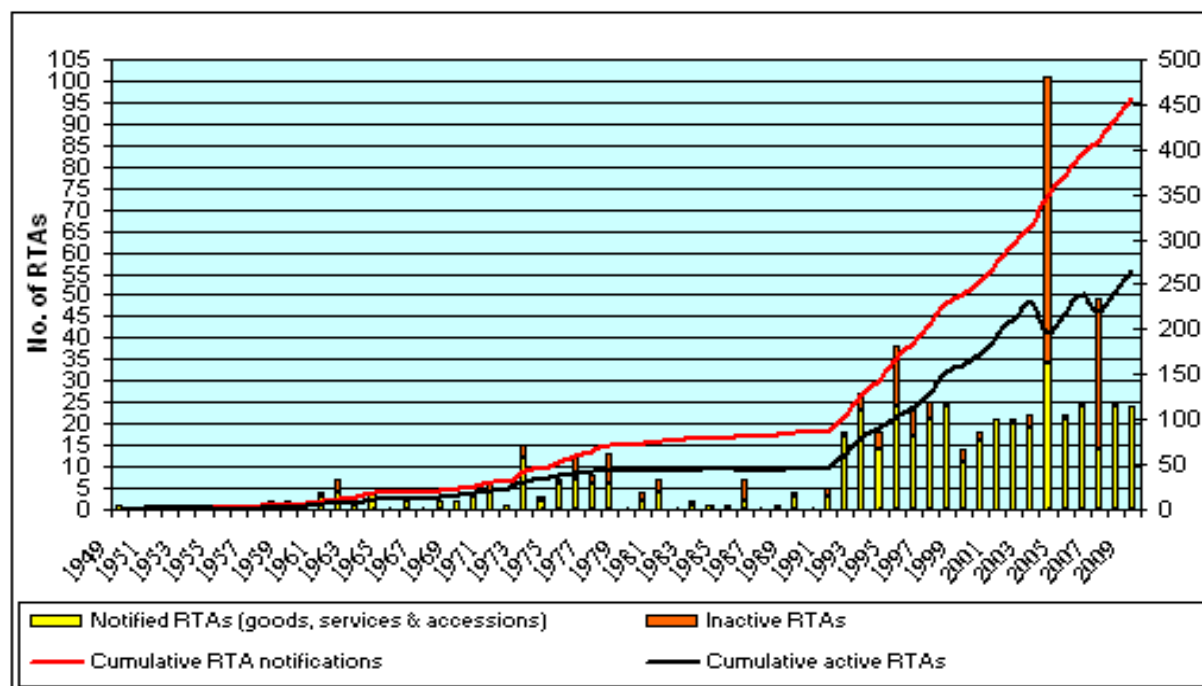
⁵ See Sutherland, P. "Political Challenges to the World Trading System," in Petersmann, E-U. (ed.), *Reforming the World Trading System: Legitimacy, Efficiency and Democratic Governance* (Oxford University Press, 2005), p. 39, at p. 42 and Dam, K.W. "Cordell Hull, Reciprocity and the WTO," in Petersmann, E-U. (ed.), *Reforming the World Trading System: Legitimacy, Efficiency and Democratic Governance* (Oxford University Press, 2005), p. 83, at p. 90.

⁶ See Sutherland Report, "The Future of the WTO: Addressing institutional challenges in the new millennium," World Trade Organization, 2004, Chapter II and recommendations.

⁷ The term *WTO plus* is used especially for provisions in FTAs and other economic cooperation agreements that go beyond the WTO framework of rules. For example, an agreement may contain provisions on competition policy. Although this expression is often used with great conviction, one may wonder whether an FTA is worth doing if it does not go beyond the WTO framework of rules. See Walter Goode, *Dictionary of Trade Policy Terms*, 5th ed., Cambridge University Press, 2007, p. 488.

and competition policies, as well as labor and environmental issues.⁸ The drive towards the conclusion of RTAs continues to be very prominent (see figure 1).

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



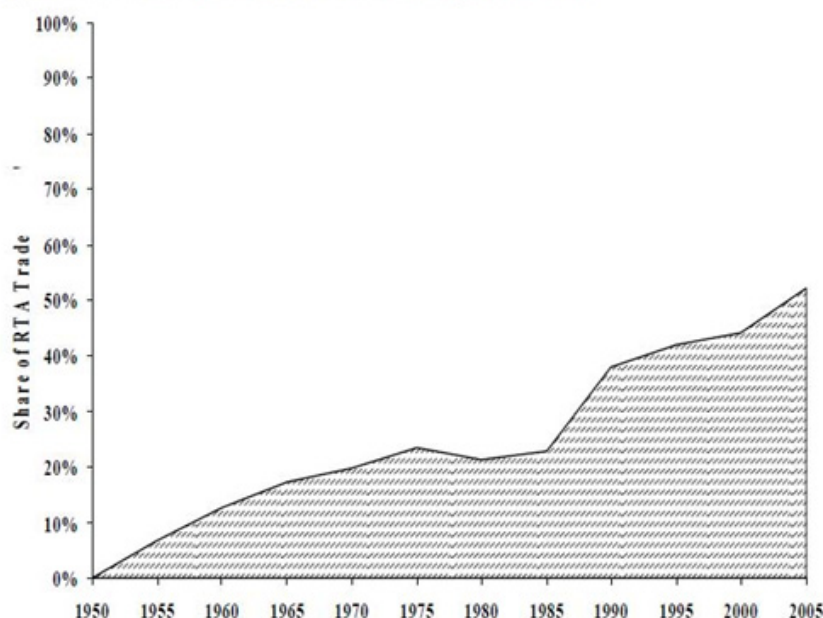
Source: WTO Secretariat

If one examines the share of international trade occurring under RTAs, one notes that already in 2005, around 50% of world trade came from RTAs, which demonstrates the quantitative relevance of RTAs in the international trading system (see figure 2). There are three types of RTAs: customs unions (CUs), free-trade agreements (FTAs), and preferential trade agreements

⁸ Ghosh and Yamarik have studied the impact of RTAs on the environment. They found that membership in an RTA reduces the amount of environmental damage by increasing the volume of trade and raising per capita income. They did not, however, find that RTAs directly impact the environment. These results suggest that the recent surge of regional trading arrangements will not increase the amount of pollution, but in fact may help the environment. See Ghosh, S. & Yamarik, S. "Do Regional Trading Arrangements Harm the Environment? An Analysis of 162 Countries in 1990," *Applied Econometrics and International Development*, Vol. 6, No. 2, 2006.

(PTAs).⁹ Already in the GATT era, there were 123 RTAs notified.¹⁰ Since the WTO creation in 1995, over 300 additional RTAs have been notified to the WTO Secretariat, of which about 90% are FTAs and around the remaining 10% are CUs.¹¹ As of 15 October 2009, 457 regional trade agreements had been notified to the WTO, 266 of which are currently in force.¹²

Figure 2. Share of International Trade Occurring under RTAs



Source: WTO Secretariat

⁹ Regarding all this international trade terminology, it is interesting to note that Jagdish Bhagwati prefers to use the terminology of PTA instead of RTA “because the PTAs are not always regional in any meaningful sense. For example, the U.S.-Israel FTA is not regional.” I share his views. Bhagwati, J. *Termites in the Trading System: How Preferential Agreements Undermine Free Trade*, New York: Oxford University Press, 2008, p. xi.

¹⁰ See World Trade Organization, “Regional Trade Agreements,” available at http://www.wto.org/english/tratop_e/region_e/region_e.htm.

¹¹ Ibid.

¹² World Trade Organization, “Report of the Committee on Regional Trade Agreements to the General Council,” WT/Reg/20, 16 October 2009.

RTAs can help countries integrate into the multilateral trading system, but at the same time they are a fundamental departure from the WTO principle of non-discrimination that obliges WTO Members to grant unconditionally to each other any benefit, favor, privilege, or immunity affecting customs duties, charges, rules, and procedures that they give to products originating in or destined for any other Member country. So RTAs are a fundamental departure from the WTO principle of non-discrimination because, by definition, they provide preferential treatment to the parties to the agreement.¹³ This means that a WTO Member would be in breach of its WTO obligations if it were to grant preferential treatment to products originating only from a selected group of countries. However, the WTO does allow its Members to enter into RTAs under three basic rules: GATT Article XXIV:4-10, the Enabling Clause, and GATS Article V. Therefore, the question is whether RTAs are a building block¹⁴ for further multilateral liberalization (one of the fundamental principles of WTO law) or a stumbling block.¹⁵

All WTO Members except for Mongolia participate in at least one RTA. The composition of RTAs can be bilateral, plurilateral, or arrangements in which one or more of the parties to the agreement is an RTA itself, such as the European Community-Mexico FTA¹⁶ or the European Community-CARIFORUM¹⁷ Economic Partnership Agreement.¹⁸ This last RTA, the EC-CARIFORUM Economic Partnership Agreement, is a pioneering agreement in the international

¹³ GATT Article I.

¹⁴ Bernhard Herz and Marco Wagner have studied regionalism in the context of multilateralism and concluded that RTAs do not undermine the multilateral trading system, but serve as building blocks to multilateral trade liberalization. See Herz, B. & Wagner, M. "Regionalism as a Building Block for Multilateralism," *Global Economy Journal*, Vol. 11, Issue 1, 2011.

¹⁵ See generally Baldwin, R. & Low, P. (eds.) *Multilateralizing Regionalism: Challenges for the Global Trading System*, Cambridge: Cambridge University Press, 2009.

¹⁶ WT/REG109.

¹⁷ The CARIFORUM (Caribbean Forum of African, Caribbean and Pacific States) is a regional grouping of 15 Caribbean countries: Antigua and Barbuda, Bahamas, Barbados, Belize, Dominica, the Dominican Republic, Grenada, Guyana, Haiti, Jamaica, Saint Lucia, Saint Vincent and the Grenadines, Saint Christopher and Nevis, Surinam, and Trinidad and Tobago.

¹⁸ WT/REG255.

trading system. It is the first genuinely comprehensive North-South trade agreement that promotes sustainable development, builds a regional market among developing countries, and helps eliminate poverty.¹⁹

In 1996, the WTO's General Council established the Committee on Regional Trade Agreements (CRTA).²⁰ The CRTA's main duties are: 1) to examine RTAs; 2) to consider how the reporting on the operation of agreements should be carried out and make recommendations in this regard; 3) to develop procedures to facilitate and improve the examination process; and 4) to provide a forum for the consideration of the systemic implications of RTAs, regional initiatives for the multilateral trading system, and the relationship between them.

III. The Mandate of Regional Integration

Suffice it to say that RTAs are an exception to the most-favored nation (MFN) rule of non-discrimination.²¹ Nevertheless, they are WTO-consistent as exemplified by GATT Article XXIV,²² the Enabling Clause, and GATS Article V. Let us provide an analysis of each of the three rules in the WTO law dealing with RTAs.

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

It is largely accepted that GATT Article XXIV, which regulates regional trade agreements, lacks clarity. There have been several attempts to clarify it and, although an Understanding on the

¹⁹ For further information on Economic Partnership Agreements, see European Commission, "Economic partnerships," available at <http://ec.europa.eu/trade/wider-agenda/development/economic-partnerships/>.

²⁰ For the CRTA's terms of reference, see document WT/L/127.

²¹ GATT Article I.

²² Note that when it comes to disputes settlement, the existence and nature of the dispute settlement provisions in many RTAs may raise questions about their consistency with the WTO, particularly DSU Article 23. For further detail, see generally Hillman, J. "Conflicts between Dispute Settlement Mechanisms in Regional Trade Agreements and the WTO—What Should the WTO Do?" *Cornell International Law Journal*, Vol. 42, No. 2, Spring 2009, pp. 193-208.

Interpretation of GATT Article XXIV has been reached,²³ questions remain. Arguably, the Understanding brings significant clarification of the text of GATT Article XXIV through legislative action only to the *internal* trade requirement in relation to customs unions.²⁴

The basic principle of GATT Article XXIV is the deepening of the process of economic integration through the elimination of barriers to trade within the CU or FTA in question.²⁵ This is so, provided it does not raise barriers to trade for third countries. GATT Article XXIV requires that duties be eliminated on “substantially all the trade”²⁶ between the parties of a customs union²⁷ or free-trade area,²⁸ or at least with respect to substantially all the trade in products originating in such territories. To qualify as a customs union, its members should apply “substantially the same duties and other regulations of commerce”²⁹ to trade with non-members of the customs union. This condition implies a common external tariff and trade policy.

²³ Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994.

²⁴ See Mavroidis, P.C. ‘If I Don’t Do It, Somebody Else Will (Or Won’t): Testing the Compliance of Preferential Trade Agreements With the Multilateral Rules,’ *Journal of World Trade* 40 (2006) 187, p. 197.

²⁵ GATT Article XXIV:4.

²⁶ GATT Article XXIV:8. Regarding the locution “substantially all the trade,” there is neither an agreed definition of the percentage of trade to be covered by a WTO-consistent agreement nor common criteria against which the exclusion of a particular sector from the agreement could be assessed. For more information, see submissions by Australia (TN/RL/W/173/Rev.1 and TN/RL/W/180), European Communities (TN/RL/W/179), China (TN/RL/W/185), and Japan (TN/RL/W/190).

²⁷ GATT Article XXIV:8(a) defines a customs union as “the substitution of a single customs territory for two or more customs territories, so that duties and other restrictive regulations of commerce [...] are eliminated with respect to substantially all the trade between the constituent territories of the union or at least with respect to substantially all the trade in products originating in such territories.” GATT Article XXIV:2 defines a customs territory as “any territory with respect to which separate tariffs or other regulations of commerce are maintained for a substantial part of the trade of such territory with other territories.”

²⁸ GATT Article XXIV:8(b) defines a free-trade area as “a group of two or more customs territories in which the duties and other restrictive regulations of commerce [...] are eliminated on substantially all the trade between the constituent territories in products originating in such territories.” So a free-trade area means a group of countries that have removed barriers to trade among them—barriers such as import tariffs and quotas. Several free-trade areas have been established around the world: Mercosur in South America, NAFTA in North America, CAFTA in Central America, ASEAN in South-East Asia, and EFTA in Europe, for example. The European Union is also a free-trade area, but it is much more than that, because it is built on a process of economic and political integration, with joint decision-taking in many policy areas. Not everyone agrees with the creation of free-trade areas. For an analysis in the global context, see Haight, F.A. “The Customs Union and Free-Trade Area exceptions in GATT: A Reappraisal,” (1972) 6 *Journal of World Trade Law* 391.

²⁹ GATT Article XXIV:8(a)(ii). Regarding the locution “other regulations of commerce,” there is no commonly agreed definition of its scope. For example, it is not clear whether this locution includes rules of origin. Some commentators argue that the Understanding on the Interpretation of Article XXIV of the General Agreement on

An exception is made for developing countries. GATT Article XXIV applies under certain conditions, which appear in paragraph 5. GATT Article XXIV is a violation of the MFN principle, classified as a regional integration exception to WTO law, which allows WTO Members to adopt measures taken in the context of the pursuit of regional economic integration.³⁰

A number of elements of Article XXIV are unclear and therefore allow for divergent interpretations of its disciplines.³¹ For example, there are two different views on the relationship between Article XXIV and other WTO provisions: 1) that Article XXIV should be considered as a derogation only from GATT Article I, which means that parties to RTAs must abide by all other WTO provisions; and 2) that Article XXIV should be considered as a derogation from all the provisions of the WTO and not just from the MFN principle.³²

As for the relationship between Article XXIV:4 and other provisions in Article XXIV, one interpretation is that paragraph 4 is just a general principle that summarizes the criteria which must be met for a customs union or free-trade area to be WTO-consistent. This basically means that RTAs which fulfill the requirements of paragraphs 5 to 9 of GATT Article XXIV are *ipso facto* WTO-consistent. The other main interpretation is that paragraph 4 is an additional requirement to those of paragraphs 5 to 9, and must also be satisfied.³³

Tariffs and Trade 1994 clarifies the issue of “the general incidence of duties and ORCs [other regulations of commerce].” See Crawford, J-A. and Laird, S. ‘Regional Trade Agreements and the WTO,’ *North American Journal of Economics and Finance*, 12 (2001) 193, p. 204.

³⁰ See, in this respect, McMillan, J. “Does Regional Integration Foster Open Trade? Economic Theory and GATT’s Article XXIV,” in Anderson, K. and Blackhurst, R. (eds.), *Regional Integration and the Global Trading System* (London, Harvester Wheatsheaf, 1993), p. 292.

³¹ For an overview of systemic issues related to GATT Article XXIV, see documents WT/REG/W/37 and TN/RL/W/8/Rev.1.

³² The Appellate Body report on *Turkey-Textiles* states that “Article XXIV may justify a measure which is inconsistent with certain other GATT provisions” provided very specific conditions are fulfilled. WT/DS34/AB/R, para. 58.

³³ In *Turkey-Textiles*, the Appellate Body report states that Article XXIV:4 “does not set forth a separate obligation itself but, rather, sets forth the overriding and pervasive purpose for Article XXIV which is manifested in operative language in the specific obligations that are found elsewhere in Article XXIV.” WT/DS34/AB/R, para. 57.

Moreover, on the relationship between Article XXIV:8 and GATT Article XIX, it is pertinent to note that Article XXIV:8(a)(i) and (b) both indicate that the obligation to eliminate duties and other restrictive regulations of commerce with respect to substantially all the trade between the constituent territories of a customs union or free-trade area does not extend to trade-restrictive measures permitted under certain GATT Articles (XI, XII, XIII, XV, and XX).³⁴ Whether this list is exhaustive or just illustrative, remains unclear.³⁵ The fact that GATT Article XIX is not mentioned as one of the exceptions in Article XXIV:8 may be interpreted to mean that, where a party to a customs union or free-trade area takes Article XIX safeguard action, it is entitled to exempt imports from partners in the customs union or free-trade area from the application of such trade-restrictive measures.³⁶

B. The Enabling Clause

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

³⁴ Arguably, regulatory barriers are the main obstacles to trade. See Maskus, K.E. and Wilson, J.S. (eds.), *Quantifying the Impact of Technical Barriers to Trade: Can it be done?* (Ann Arbor, University of Michigan Press, 2001). As for what happens to restrictive or higher measures which come into practice after the formation of a given RTA, see Bhala, R. "The Forgotten Mercy: GATT Article XXIV:11 and Trade on the Subcontinent," *New Zealand Law Review*, (2002) 301, p. 329; Pauwelyn, J. "The Puzzle of WTO Safeguards and Regional Trade Agreements," *Journal of International Economic Law*, 7 (2004) 109, pp. 131–38.

³⁵ See Trachtman, J.P. "Toward Open Recognition? Standardization and Regional Integration under Article XXIV of GATT," *Journal of International Economic Law*, 6 (2003) 459, p. 477.

³⁶ See World Trade Organization—Institute for Training and Technical Cooperation, "Regionalism," Geneva: WTO Secretariat, 2008, pp. 7–8.

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

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

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

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

1) Generalized System of Preferences (GSP)

The Preamble to the WTO Agreement states that “there is a need for positive efforts designed to ensure that developing countries [...] secure a share in the growth in international trade

commensurate with the needs of their economic development.” Almost all WTO agreements provide for special and differential treatment provisions for developing-country Members to facilitate their integration into the world trading system. An example of a special and differential treatment provision is the Generalized System of Preferences (GSP). The GSP is a mechanism used by certain developed countries to provide preferential tariff treatment to products from developing countries. These are unilateral measures and consist of the elimination or reduction of access barriers on products from developing countries. The GSP mechanism is a violation of the MFN principle.

2) Special and Differential Treatment with Respect to Non-tariff Measures

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

3) Regional Arrangements between Developing Countries

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

Russia-Ukraine FTA.³⁷ The goal is the elimination or reduction of access barriers on products from developing countries within the same region, and it is a violation of the MFN principle.

4) Special Treatment for Least-developed Countries

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

C. GATS Article V (economic integration)

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

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

³⁷ For further information on the Russia-Ukraine FTA, see <http://rtais.wto.org/UI/PublicShowMemberRTAIDCard.aspx?enc=KGX6+Y689oLHj5hwDR+2y224Vc8nZE6dvLuWA+VfURg=>.

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

As in the case of GATT Article XXIV, GATS Article V is a violation of the MFN principle, classified as a regional integration exception to WTO law, which allows WTO Members to adopt measures taken in the context of the pursuit of regional economic integration.³⁸

IV. Main Trends in RTAs

RTAs between countries at different stages of development have become commonplace, as have attempts to form region-wide economic areas, an objective that figures prominently in East Asian countries’ trade strategies. In this sense, it has been argued that China’s trade policy strategy is the creation of a powerful Asian trading bloc, given China’s strong position in Asia³⁹ and how difficult it is to move forward multilaterally.⁴⁰

³⁸ For further information on RTAs in the context of the GATS, see Adlung, R. & Morrison, P. “Less than the GATS: ‘Negative Preferences’ in Regional Services Agreements,” *Journal of International Economic Law*, 2010, first published online on 7 September 2010.

³⁹ Bergsten, F., Freeman, C., Lardy, N. & Mitchell, D. *China’s Rise: Challenges and Opportunities*, Peterson Institute for International Economics & Center for Strategic and International Studies, Washington, DC, 2008, p. 16.

⁴⁰ On China and international trade, see Cass, D., Williams, B., and Barker, G. (eds.) *China and the World Trading System: Entering the New Millenium*, Cambridge: Cambridge University Press, 2003; Zhang, X. *International Trade Regulation in China: Law and Policy*, Oxford and Portland, Oregon: Hart Publishing, 2006; Leal-Arcas, R. “China’s Attitude to Multilateralism in International Economic Law and Governance: Challenges for the World Trading System” *Journal of World Investment and Trade*, Vol. 11, No. 2, 2010, pp. 259-273.

If multilateral trade continues to weaken, and given that there are already many common interests in the Asian region, there is a very high likelihood for an East Asia Free Trade Area⁴¹ of a like-minded group of countries⁴² led by China acting as the *prima donna* or *prima inter pares*⁴³ within the next decade as part of China's strategy of promoting regional identity.⁴⁴ Should this materialize, one could envisage a tripolar global trade regime with a new Asian pole to counteract the already existing power centers in the European Union (EU) and the U.S. Moreover, it would most likely mean further deterioration of the multilateral trading system.⁴⁵ From a broader perspective, China's grand strategy is arguably about multi-polarity,⁴⁶ the acquisition of more power on the world stage, the protection of the Chinese national interest, and independence within interdependence.⁴⁷

There are four main trends identified in RTAs: a) from MFN liberalization to RTAs; b) a geographical shift to the Asia-Pacific region; c) cross-regional RTAs, and d) mega-bloc RTAs.

⁴¹ Urata, S. "Towards an East Asia Free Trade Area," *Policy Insights*, No. 1, OECD Development Centre, March 2004.

⁴² Here I am referring to China, Japan, South Korea, and Vietnam.

⁴³ On East and South Asian regionalism, see Wang, J.Y. "China, India, and Regional Economic Integration in Asia," *Singapore Yearbook of International Law*, Vol. 10, pp. 269-305, 2006; Kawai, M. & Wignaraja, G. "Asian FTAs: Trends and Challenges," *Asian Development Bank Institute Working Paper*, No. 144, August 2009.

⁴⁴ Bergsten, F., "China's Challenge to the Global Economic Order," in Bergsten, F., Freeman, C., Lardy, N. & Mitchell, D. *China's Rise: Challenges and Opportunities*, Peterson Institute for International Economics & Center for Strategic and International Studies, Washington, DC, 2008, p. 16.

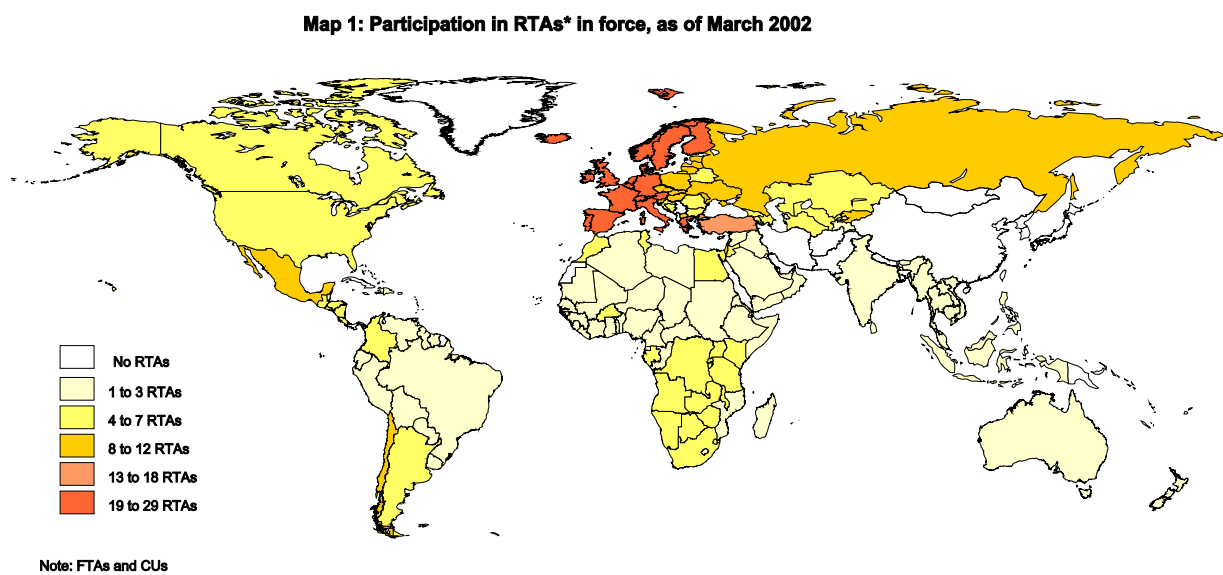
⁴⁵ According to Francis Snyder, China's policy towards regional trade agreements will have a major impact on the international trading system, the debate about regionalism and multilateralism, and the policy of the WTO concerning RTAs. See Snyder, F. "China, Regional Trade Agreements and WTO Law," *Journal of World Trade*, Vol. 43, No. 1, (2009), pp. 1-5; Snyder, F. *The EU, the WTO and China: Legal Pluralism and International Trade Regulation*, Oxford: Hart Publishing, 2010.

⁴⁶ On multi-polarity in the world trading system, see Narlikar, A. & Wickers, B. (eds.) *Leadership and Change in the Multilateral Trading System*, Dordrecht: Republic of Letters, 2009.

⁴⁷ On China's position in the multilateral trading system, see Leal-Arcas, R. "China's Attitude to Multilateralism in International Economic Law and Governance: Challenges for the World Trading System" *Journal of World Investment and Trade*, Vol. 11, No. 2, 2010, pp. 259-273.

A. From MFN Liberalization to RTA

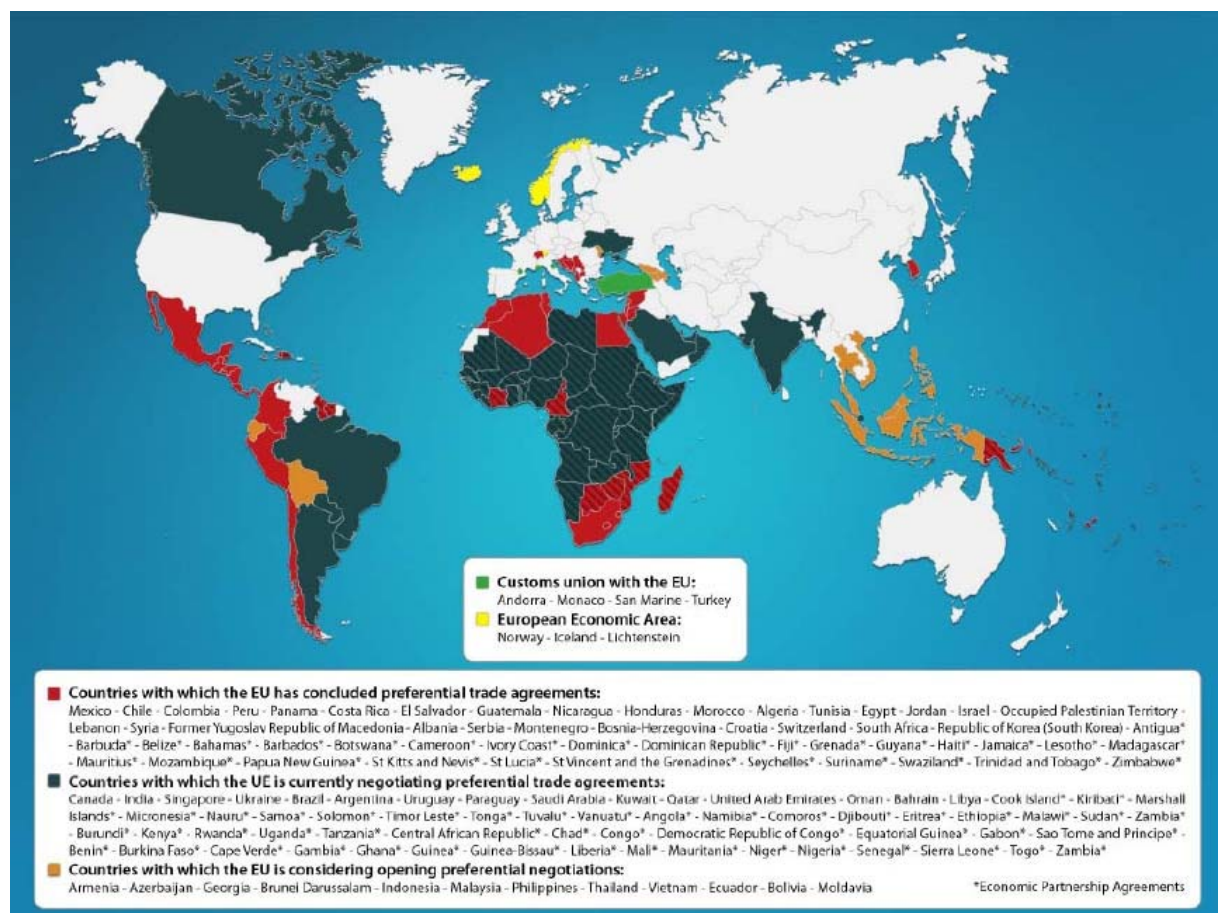
WTO Members that traditionally favored MFN liberalization are increasingly being drawn into RTAs. An example is Europe where, as of March 2010, almost one hundred RTAs were in force (see map 1).



Source: WTO Secretariat

Regarding the EU's RTAs, map 2 illustrates: a) countries with which the EU has concluded preferential trade agreements; b) countries with which the EU is currently negotiating preferential trade agreements; and c) countries with which the EU is considering opening preferential negotiations.

Map 2: The EU's RTAs



Source: Directorate General for Trade, European Commission

B. Geographical Shift

1995 marked the year of entry into force of the Marrakesh Agreement Establishing the WTO (i.e., the WTO Agreement).⁴⁸ Since then, the traditional trade actors—namely, the United States, Japan, the EU, and Canada (i.e., the original Quad⁴⁹)—have retained much of their leading roles

⁴⁸ The official version of the WTO Agreement and its Annexes is published by the WTO and Cambridge University Press as World Trade Organization, *The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts*, Cambridge, 1999.

⁴⁹ The Quadrilateral Trade Ministers' Meeting ("Quad"), an informal forum created in 1982 to explore major trade and investment issues, has been an important consultative mechanism. The Quad trade ministers from Canada, Japan, the European Union, and the United States would meet twice a year. One purpose of the original Quad was to see how key trade and investment matters could be moved forward. It was instrumental in achieving significant progress leading to the successful conclusion of the Uruguay Round of multilateral trade negotiations. Today, though, the new Quad is composed of the EU, the U.S., the agriculture G-20 (a group of developing countries led by Brazil), and

in the economic and political scene. While their influence on world affairs is irrefutable, over the years, their dominance has waned. Since 1995, the world has undergone major geopolitical changes and has witnessed the rise of new state actors who have asserted their own role in shaping the world's economic and political environment. Today, developing countries constitute two thirds of the WTO's membership. The introduction of the "development" dimension of the Doha Round clearly attests to a growing awareness of the ascendancy of developing and least-developed countries in recent years. Alongside developed countries, a number of fast-growing developing economies have acquired significant influence in international trade relations—namely, Brazil, Russia, India, and China, commonly known as the BRIC countries.⁵⁰

Although most RTAs were traditionally in Europe,⁵¹ the largest concentration of RTAs has shifted away from Europe toward the Asia-Pacific region in the last few years,⁵² where Asia-Pacific Economic Cooperation (APEC) Members, in particular, have been among the most active participants in RTAs (see map 3). One wonders whether the geopolitical shift of power in international politics has influenced the decision-making process at the WTO.

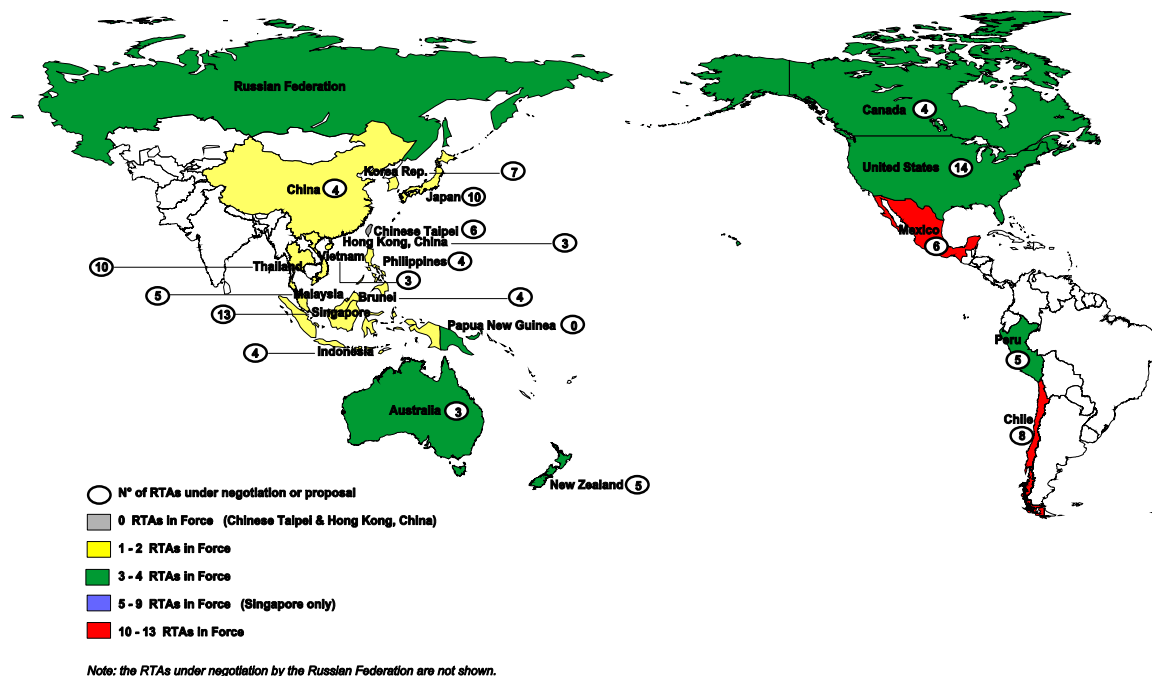
the G-90 (representing mostly very poor countries in Africa, Asia, and the Caribbean). See Leal-Arcas, R. *Theory and Practice of EC External Trade Law and Policy*, London: Cameron May, 2008, pp. 442-43.

⁵⁰ For a very detailed analysis of the BRIC countries in the world trading system, see Leal-Arcas, R. *International Trade and Investment Law: Multilateral, Regional and Bilateral Governance*, Cheltenham: Edward Elgar, 2010, Part 1.

⁵¹ For a study of Europe's RTAs, see Ahearn, R. "Europe's Preferential Trade Agreements: Status, Content, and Implications," Congressional Research Service Report, 7-5700, March 2011.

⁵² See for example Findlay, C. & Urata, S. (eds.) *Free Trade Agreements in the Asia Pacific*, World Scientific Publishing, 2009, who argue that FTAs have proliferated in East Asia as regional economies rush to catch up with the rest of the world—but what difference do FTAs make? The book answers that question by providing an up-to-date assessment of the quality and impact of FTAs in the region and presents a contemporary analysis and insights into the evolution of recent FTAs.

**Map 3: APEC Members' RTAs in force,
under negotiation or proposal
As of October 2003**



Source: WTO Secretariat

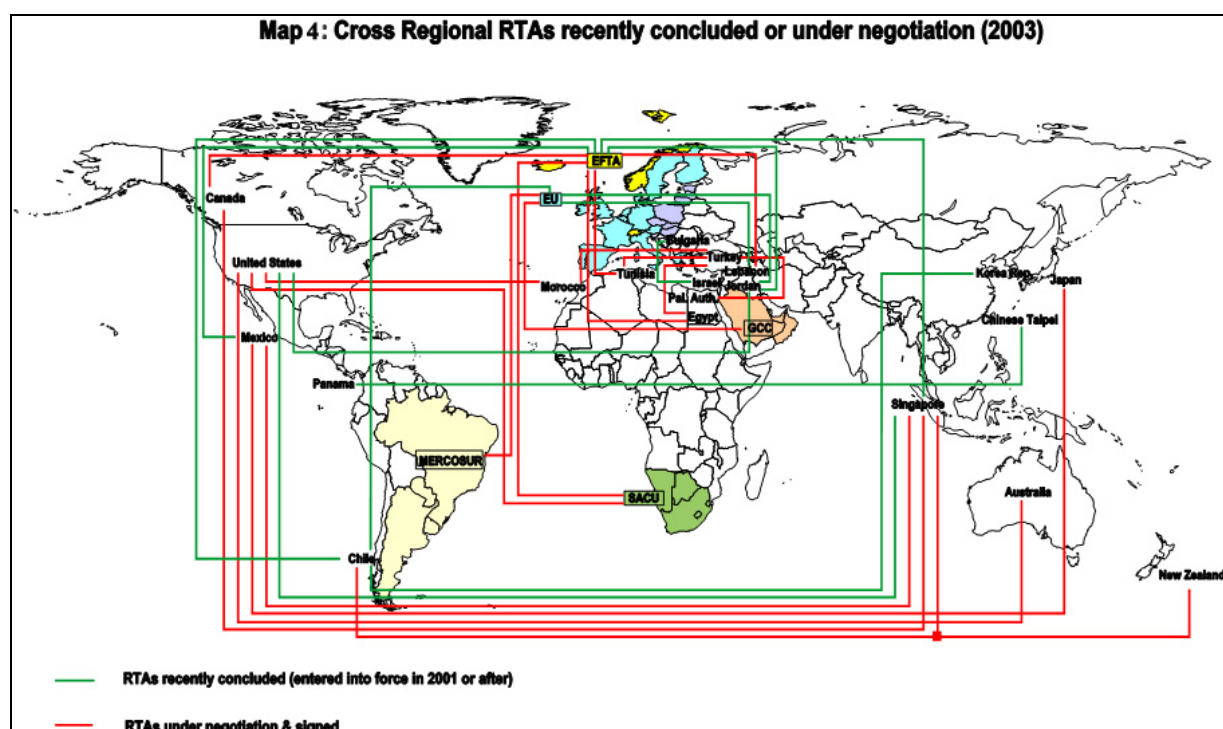
The following chart demonstrates that most RTAs are now concluded between developing countries:

RTAs notified to the WTO by type as of March 2007

	FTA, PTA	Customs unions	Services RTAs	Share
South-South	76	5	16	50%
North-South	44	1	20	34%
North-North	15	8	8	16%
Total	135	14	44	100%

C. Cross-regional RTAs

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



Source: WTO Secretariat

D. Mega-bloc RTAs

Another recent trend in RTAs is the conclusion, or negotiation toward the conclusion, of mega-bloc RTAs. An illustration of this trend is the FTA between China and the Association of South East Asian Nations (ASEAN), the largest FTA in the world by population coverage, with nearly

two billion people. This FTA is an example of China's strategy to shape a new regional structure of economic and political cooperation.⁵³ This has partly been triggered by the fact that Americans have left the region and China sees an opportunity for market access. China-ASEAN cooperation has brought a new type of intra-Asian regional cooperation, which reflects China's commitment to good-neighbor diplomacy. In November 2001, China and ASEAN began negotiations to set up a free-trade area. In 2002, a framework agreement for the planned free-trade area was signed. The new Asian regionalism stimulated by the China-ASEAN free-trade agreement would dominate the future economic landscape of Asia, although doubts remain as to whether the deal will have real teeth, given that there is no rigorous mechanism for settling disputes.⁵⁴ This China-ASEAN FTA took effect for China and six ASEAN countries (Brunei, Indonesia, Malaysia, the Philippines, Singapore, and Thailand) in January 2010, thereby eliminating barriers to investment and tariffs to trade on 90 per cent of products, and will expand to the remaining four ASEAN countries (Myanmar, Cambodia, Laos, and Vietnam) by 2015.⁵⁵ The goal behind all these efforts is, *inter alia*, to facilitate water transport along the Upper Lancang/Mekong River covering China, Myanmar, Laos, Thailand, and Vietnam, as well as rail and road links between Yunnan Province of China and Chiang Rai in Thailand.⁵⁶

Other examples of China's interest in Asian regionalism include China signing a bilateral FTA with Singapore⁵⁷ in October 2008, investment agreements with the Philippines, harmonizing food safety standards with Thailand (to facilitate agricultural trade), and concluding many

⁵³ See Sen, R. "New Regionalism in Asia: A Comparative Analysis of Emerging Regional and Bilateral Trading Agreements involving ASEAN, China and India," *Journal of World Trade*, 40(4): 553-596, 2006.

⁵⁴ The development of infrastructure also within China has been a key focus for the Chinese government in its economic development initiatives. See KPMG, "Infrastructure in China: Foundation for Growth," Hong Kong, September 2009.

⁵⁵ Bilaterals.org, "China-ASEAN," April 2009, available at http://www.bilaterals.org/rubrique.php3?id_rubrique=95.

⁵⁶ Asian Development Bank, "Greater Mekong Subregion Flagship Initiative: North-South Economic Corridor," 26 June 2005.

⁵⁷ WTO document WT/REG262/N/1 (4 March 2009) (Sino-Singaporean Free Trade Agreement).

agreements with the Mekong Delta countries (China, Cambodia, Laos, Myanmar, Thailand, and Vietnam). Politics around the various agreements between China and ASEAN (whether as a bloc or its Member States individually) are delicate, as ASEAN Member States want to avoid China's domination, but at the same time build their economies by interacting with China.⁵⁸

Another example of a mega-bloc RTA is the Mercosur-India PTA. Moreover, the EU-ASEAN RTA was initially meant to be an inter-regional RTA. However, Myanmar (one of the 10 ASEAN Member States) was and continues to be in violation of human rights, which made the Europeans stop the inter-regional negotiations. Instead, the European Commission is conducting bilateral negotiations with individual Member States of ASEAN. EU-Singapore FTA negotiations are currently underway, and Vietnam has shown an interest in starting technical negotiations with the European Commission for the conclusion of an RTA.⁵⁹

A further example of a mega-bloc RTA under negotiation is the EU-India FTA. According to a communication of the European Commission, "the focus of [EU-India] relations has shifted from trade to wider political issues."⁶⁰ However, trade continues to play a major role between the two parties. EU trade with India has more than doubled since 2000. India has significantly increased its number of trade diplomats in recent years, which shows its commitment to the world trading system.⁶¹ The EU and India hope to increase their trade in both goods and services through negotiations for a free-trade agreement. The negotiations over an EU-India FTA, whose parameters were set out in the report of the EU-India High Level Trade

⁵⁸ Bilaterals.org, "China-ASEAN," April 2009, available at http://www.bilaterals.org/rubrique.php?id_rubrique=95.

⁵⁹ Europa, Press releases RAPID, "EU and Vietnam to Launch Free Trade Negotiations," IP/10/219, Brussels, 3 March 2010, available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/219>.

⁶⁰ European Commission, "An EU-India Strategic Partnership," COM(2004) 430 final, 16 June 2004, p. 3.

⁶¹ For an overview of India's recent impressive performance in world affairs, see "The Rise of India," *Foreign Affairs*, Vol. 85, No. 4, July/August 2006, pp. 1-56.

Group,⁶² commenced in June 2007.⁶³ Parallel negotiations between the EU and India also include a maritime agreement, since maritime transport accounts for 53 per cent of the total transportation transactions and is unequivocally the major mode of transportation.⁶⁴ The main framework for trade dialogue between the EU and India is, nevertheless, the WTO. At the bilateral level, there is an India-EU Strategic Partnership⁶⁵ as well as its Joint Action Plan,⁶⁶ which outlines commitments to reciprocally tackle existing barriers to trade and increase bilateral trade flows.⁶⁷

The potential EU-India FTA has been progressing increasingly slowly for some months, but continues to represent a major opportunity for European firms.⁶⁸ There are still some key barriers to doing business in India and national treatment⁶⁹ concerns, which European companies wish to

⁶² European Commission, "Report of the EU-India High Level Trade Group to the EU-India Summit," 13 October 2006.

⁶³ For further information on this, see Rollo, J. "Spice Route to Europe? Prospects for an India-EU Free Trade Area," Chatham House, IEP/JEF BP 07/02, October 2007; see also the report prepared by the Centre for the Analysis of Regional Integration at Sussex and CUTS International, "Qualitative Analysis of a potential Free Trade Agreement between the European Union and India".

⁶⁴ Eurostat.

⁶⁵ European Commission, "An EU-India Strategic Partnership," SEC(2004) 768, Brussels, 16 June 2004, COM(2004) 430 final.

⁶⁶ EU Council, "The India-EU Strategic Partnership: Joint Action Plan," 7 September 2005, 11984/05 (Presse 223).

⁶⁷ For an analysis of technical barriers to trade in the WTO context, see Wolfrum, R., Stoll, P.-T., & Seibert-Fohr, A. (eds.) *WTO-Technical Barriers and SPS Measures*, Leiden, Martinus Nijhoff, 2007.

⁶⁸ See report by Ecorys, "Global Analysis Report for the EU-India TSIA," Draft Version, TRADE07/C1/C01-Lot 1, 21 May 2008.

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

overcome.⁷⁰ In fact, in 2008 the World Bank ranked India 120 (out of 181 economies) in terms of “ease of doing business.”⁷¹ This difficulty of doing business with India is the case with telecoms and courier services, the latter being a service where India has not yet made any offers or commitments within the GATS. Several sectors, including maritime transportation, construction, and telecommunications, require the approval of the Foreign Investment Promotion Board⁷² prior to establishment in India. In distribution services, where the EU has taken a leading role in advocating the liberalization of market access, there are currently no retail commitments, and in some sectors, including express delivery, draft legislation currently threatens existing market access.

Another example of a potential mega-bloc RTA is the EU-Mercosur FTA. Since 2000, the EU and Mercosur have been in the process of negotiating a bi-regional Association Agreement,⁷³ including a free-trade area. This will be the backbone of future bilateral trade relations.⁷⁴ Substantial progress in the trade chapter of the agreement allowed both parties to realistically envisage a conclusion of negotiations by the end of October 2004. However, on 20 October 2004, at an EU-Mercosur trade negotiators meeting at the ministerial level in Lisbon, trade ministers concurred that the offers on the table did not reach the degree of ambition that both

specific perks, such as road access, that are granted to one service provider, but not another, could be considered a trade barrier for altering the conditions of competition between foreign and domestic service suppliers.

⁷⁰ See International Financial Services London, “EU-India talks, IFSL to consult on City views,” available at <http://bit.ly/aqMqW5>.

⁷¹ See The World Bank, “Doing Business,” available at <http://www.doingbusiness.org/ExploreEconomies/?economyid=89>.

⁷² The Foreign Investment Promotion Board is the only governmental Indian agency dealing with matters relating to foreign direct investment (FDI) as well as promoting investment into the country. Its objective is to promote FDI into India undertaking investment promotion activities in India and abroad by facilitating investment in the country through international companies, non-resident Indians, and other foreign investors. See Leal-Arcas, R. *International Trade and Investment Law: Multilateral, Regional and Bilateral Governance*, Cheltenham: Edward Elgar 2010, p. 93.

⁷³ For an overview of association agreements concluded by the European Communities with third parties, see Leal-Arcas, R. *Theory and Practice of EC External Trade Law and Policy*, London: Cameron May, 2008, pp. 282-88.

⁷⁴ On the bilateral relations between the EU and Mercosur, see Doctor, M. “Why Bother With Inter-Regionalism? Negotiations for a European Union-Mercosur Agreement,” *Journal of Common Market Studies*, Vol. 45, Issue 2, pp. 281-314, 2007.

parties expected from this agreement and decided to give negotiations more time. Following a number of technical contacts in 2005 to discuss ways to re-engage the process, trade ministers met again on 2 September 2005 to discuss a way forward.⁷⁵

In 2005, Brazil represented 80 per cent of Mercosur's GDP and is critical to Mercosur's further integration.⁷⁶ In my opinion, in addition to Brazil's interest in the EU's agricultural liberalization, this intra-Mercosur disparity is one of the reasons why the EU-Mercosur negotiations for the conclusion of a bi-regional Association Agreement, including a free-trade area, which began in April 2000, have not been successful. At the South American end, there is a tremendous imbalance of power within Mercosur; Brazil is an enormous market of 190 million people, whereas the Uruguayan market—the smallest in Mercosur—is of insignificant interest to Brazil, with a total population of 3.5 million people. This market asymmetry makes Mercosur's search for a common position vis-à-vis the EU very difficult. Another factor that has complicated Brazil's efforts to negotiate trade agreements with third parties is Mercosur's multiple tariffs policy on imports, which impedes the free flow of goods within the Mercosur's Members States. Imports into Mercosur are subject to the Mercosur common external tariff when they enter any Mercosur Member State and again if they are re-exported to another Mercosur Member State. The EU has explicitly stated that if Mercosur wishes to negotiate an FTA with the EU, the multiple tariffs policy on imports must be eliminated.⁷⁷ In 2010, the bilateral inter-regional negotiations were resumed.

⁷⁵ European Commission, "Mercosur," available at http://ec.europa.eu/trade/issues/bilateral/regions/mercosur/index_en.htm#top.

⁷⁶ World Bank's World Development Indicators.

⁷⁷ BNA WTO Reporter, "Paraguay Blocks Brazilian Proposal to End Mercosur's Multiple Import Tariffs," 17 December 2008, No. 242.

There are also mega-bloc RTAs under consideration, such as ASEAN + 3⁷⁸ and ASEAN + 6.⁷⁹

V. Motivations for RTA Conclusion

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

The development of new technologies has also contributed toward shaping international trade by changing the way business is conducted and the way people interact. The rapid development of technology has generated both new challenges and new opportunities for economic agents worldwide. WTO Director-General Pascal Lamy recently said that “it now costs less to ship a container from Marseille to Shanghai—half way around the world—than to move it from Marseille to Avignon—100 kilometers away. A phone call to Los Angeles [from Europe] is as inexpensive as a phone call next door.”⁸⁰ What are then the main economic, political, and technological factors shaping world trade? What is the potential of technological progress and innovation for improving the trading position of the poorest countries? What is the

⁷⁸ ASEAN + 3 comprises ASEAN plus China, Japan, and South Korea.

⁷⁹ ASEAN + 6 comprises ASEAN plus China, Japan, South Korea, India, New Zealand, and Australia.

⁸⁰ Lamy, P. “The Doha Round marks a transition from the old governance of the old trade order to the new governance of a new trade order,” Speech at the World Trade Institute, 1 October 2010, available at http://www.wto.org/english/news_e/sppl_e/sppl173_e.htm.

role of the WTO rules-based multilateral system in contributing to the global economic recovery?

Might these be reasons why countries engage in RTAs so frequently?⁸¹

There are both economic and political reasons why countries engage in RTAs so frequently. One of the economic reasons for the conclusion of RTAs is that countries are in constant search for larger markets since they feel the pressure of competitive regional liberalization. The negotiations of Economic Partnership Agreements (EPAs)⁸² between the African, Caribbean and Pacific (ACP)⁸³ countries and the EU are of particular relevance in this process, not least because of their importance for LDCs. EPAs have been negotiated with ACP regions engaged in a regional economic integration process. EPAs are thus intended to consolidate regional integration initiatives within the ACP. They are also aimed at providing an open, transparent, and predictable framework for goods and services to circulate freely, thus increasing the competitiveness of the ACP and ultimately facilitating the transition towards their full participation in a liberalizing world economy—thereby complementing any initiative taken in the multilateral context.⁸⁴ Formal negotiations started in September 2002 and EPAs entered into force on 1 January 2008.

⁸¹ For an analysis of why countries engage so frequently in RTAs and the relation of RTAs to multilateral negotiations at the WTO, see Buckley, R., Lo, V. & Bouille, L. (eds.) *Challenges to Multilateral Trade: The Impact of Bilateral, Preferential and Regional Agreements*, The Hague: Kluwer Law International, 2008.

⁸² Economic partnership agreements are bilateral or plurilateral agreements. The content of such agreements varies greatly. Some merely promote voluntary economic cooperation between the partners. Others are proper free-trade agreements. See Walter Goode, *Dictionary of Trade Policy Terms*, 5th ed., Cambridge University Press, 2007, p. 145.

⁸³ The African, Caribbean and Pacific countries (ACP) Group was formed when the first Lomé Convention was signed with the European Economic Community in 1975. In 2002, it encompassed 78 states (48 African states, 16 Caribbean states, 14 Pacific states), which all had preferential trading relation with the European Community. See Leal-Arcas, R. *Theory and Practice of EC External Trade Law and Policy*, London: Cameron May 2008, p. 283.

⁸⁴ Not everyone is of the view that Economic Partnership Agreements are fair or beneficial for ACP countries. See Sanders, R. “A New Colonialism? EU Trade Demands and ACP Countries,” *Huntington News*, 16 June 2007, available at <http://www.huntingtonnews.net/columns/070616-sanders-columnseutrade.html>; Oengoh, P. “East Africa: EPA Controversy Continues,” Trade Law Centre for Southern Africa, 29 May 2007, available at <http://www.tralac.org/scripts/content.php?id=6488>.

Moreover, deeper integration is always much easier at the regional level than it is at the multilateral level. Furthermore, as we know from previous experience, multilateral negotiations can take a very long time and are very complex, whereas RTAs move much faster.⁸⁵ Despite repeated statements of support and of engagement, WTO Members seem incapable of marshalling the policies and political will needed to move the multilateral trade agenda forward. A worrying leadership vacuum has opened that has so far proven difficult to fill. A very good example is the Doha Round of multilateral trade negotiations, which started in November 2001 in the Qatari capital. A WTO mini-ministerial conference took place in July 2008 composed of a trade G-7.⁸⁶ Governments' attempt to salvage a deal in the Doha Round of multilateral trade negotiations broke down on 29 July 2008, as trade ministers acknowledged that they were unable to reach a compromise after nine days of a WTO mini-ministerial summit. This raises the question of how to move forward in this complex international trade negotiations scenario.⁸⁷ Given how difficult it is to move forward multilaterally, there has been in recent years a proliferation of RTAs. Trade powers want to gain greater access to one another's markets but, at the same time, have struggled to lower their own trade barriers.⁸⁸

⁸⁵ On the issue that decision-making in the WTO has become ever more difficult as the number of WTO Members rises and the range of issues tackled broadens, see Low, P. "WTO Decision-Making for the Future," paper prepared for the Inaugural Conference of Thinking Ahead on International Trade (TAIT): Challenges Facing the World Trade System, organized by the Graduate Institute of International and Development Studies (Geneva), in collaboration with the Economic Research and Statistics Division of the Secretariat of the World Trade Organization. The conference was held at the WTO, 17-18 September 2009.

⁸⁶ This trade G-7 should not be confused with the finance G-7 representing the most industrialized nations in the world. The trade G-7 has replaced the so-called 'Quadrilateral Trade Ministers' Meeting' or Quad and is composed of the U.S., the EU, Canada, Japan, China, India, and Brazil. Its purpose is to see how key trade and investment matters can be moved forward.

⁸⁷ Mercurio argues that systemic 'institutional impediments still exist, which not only hinder the successful conclusion of the Doha Round, but also prevent effective long-term institutional governance and vision.' B. Mercurio 'The WTO and its Institutional Impediments', *University of New South Wales Faculty of Law Research Series*, Working Paper 46, (2007), available online at <http://law.bepress.com/unswwps/flrps/art46/>.

⁸⁸ Bull, A., Zengerle, P. Ljunggren, D., & McCrank, J. "G20 leaders drop Doha target, see smaller deals," *Reuters*, 26 June 2010, available at <http://www.reuters.com/article/idUSTRE65P27P20100627>.

At the G8 Summit in Muskoka in June 2010, world leaders dropped a commitment to complete the troubled Doha Round in 2010 and vowed to push forward on bilateral and regional trade talks until a multilateral deal could be finalized.⁸⁹ This decision demonstrates that bilateralism/regionalism is the natural consequence of failed or troubled multilateralism.⁹⁰ This decision to move forward bilaterally/regionally certainly has dangerous repercussions for weak economies.⁹¹ Assuming that the Doha Round will be concluded in 2011, it will then take another four years to ratify the multilateral agreements that will come out of the Round, which means that it will have taken at least fourteen years for these new multilateral agreements to see the light of day.

There are several political reasons for countries to engage in RTAs: they ensure or reward political support; regulatory cooperation is easier regionally than it is multilaterally; there is less scope for free riding on the MFN principle; and there are always geopolitical as well as security interests for the conclusion of RTAs. Thus, while most countries continue to formally declare their commitment to the successful conclusion of the Doha Round—which would contribute toward enhancing market access and strengthening the rules-based multilateral trading system—

⁸⁹ See the 2010 G8 Summit Muskoka Declaration: Recovery and New Beginnings, para. 26, available at <http://www.g8.utoronto.ca/summit/2010muskoka/communiqué.html>.

⁹⁰ On the dilemma of bilateralism versus multilateralism, see G. Glania and J. Matthes, *Multilateralism or Regionalism? Trade Policy Options for the European Union* (Centre for European Policy Studies, 2005). However, see views by Dahrendorf in the context of intellectual property protection, arguing that the strategy of forum-shifting suggests that bilateralism/regionalism and multilateralism alternate and will continue to do so. Despite alternation of *fora*, it is acknowledged that WTO law efficiency will suffer from the proliferation of preferential trade agreements (PTAs). Dahrendorf, A. "Global Proliferation of Bilateral and Regional Trade Agreements: A Threat for the World Trade Organization and/or for Developing Countries?" *Maastricht Faculty of Law Working Papers*, 2009-6. See also Leal-Arcas, R. "The Resumption of the Doha Round and the Future of Services Trade" *Loyola of Los Angeles International and Comparative Law Review*, Volume 29, Issue 3, 2007, pp. 339-461, at 409-415. It is therefore necessary to investigate further what the possibilities are to mitigate the negative effects of PTAs for the multilateral system. Some examples include the use of the WTO dispute settlement mechanism as a venue for resolving RTAs disputes and the development of a body of common law on RTAs. See generally Gao, H. & Lim, C.L. "Saving the WTO From the Risk of Irrelevance: The WTO Dispute Settlement Mechanism as a 'Common Good' for RTA Disputes," *Journal of International Economic Law* 11 (2008).

⁹¹ Trakman, however, claims that bilateralism can actually help developing countries in the world trading system. See Trakman, L. "The Proliferation of Free Trade Agreements: Bane or Beauty?" *Journal of World Trade*, Vol. 42, No. 2, pp. 367-388, at 383, 2008.

for many countries, bilateral deals have taken precedence and their engagement at the multilateral level is becoming little more than just a theoretical proposition. The emergence of rapidly growing economies and new forms of South-South relations, as illustrated by the case of China in Africa, further complicates the equation and renders the need for empirical research, information, and dialogues in this area even more acute.

VI. Effects of Regionalism on Multilateralism

The effects of RTAs on the multilateral trading system remain unclear, as is their impact on trade and sustainable development. While preferential deals can contribute to strengthening regional integration,⁹² some RTAs have generated negative effects on regional integration schemes as was the case of the Andean Community-U.S. RTA⁹³ and certain Economic Partnership Agreements (EPAs) signed with individual countries and not with the region as a whole.

The effects of RTAs on the multilateral trading system are manifold. One of the positive effects is that RTAs allow for greater efficiency gains thanks to the elimination of barriers to trade, which is key to achieving economies of scale.⁹⁴ RTAs are also laboratories for change (a very good example being that of the European Union (EU), whose transformation since its inception in the 1950s has been absolutely remarkable⁹⁵). In addition, RTAs provide competition and attract foreign direct investment (FDI). An example of this last point is Spain in the case of

⁹² For an analysis of RTA proliferation from the perspective of non-state actors, see Capling, A. & Low, P. (eds.) *Governments, Non-State Actors and Trade Policy-Making: Negotiating Preferentially or Multilaterally?* Cambridge University Press, 2010.

⁹³ <http://www.comunidadandina.org/ingles/documentos/documents/ActEEUU.htm>.

⁹⁴ Crawford, J-A & Laird, S. "Regional Trade Agreements and the WTO," *CREDIT Research Paper*, No. 00/3, p. 4, 2000.

⁹⁵ For a historical account of the impact of the European integration project on the drafting of GATT Article XXIV, particularly the views expressed by the United States, see Chase, K. 'Multilateralism Compromised: The Mysterious Origins of GATT Article XXIV,' *World Trade Review*, 5 (2006) 1.

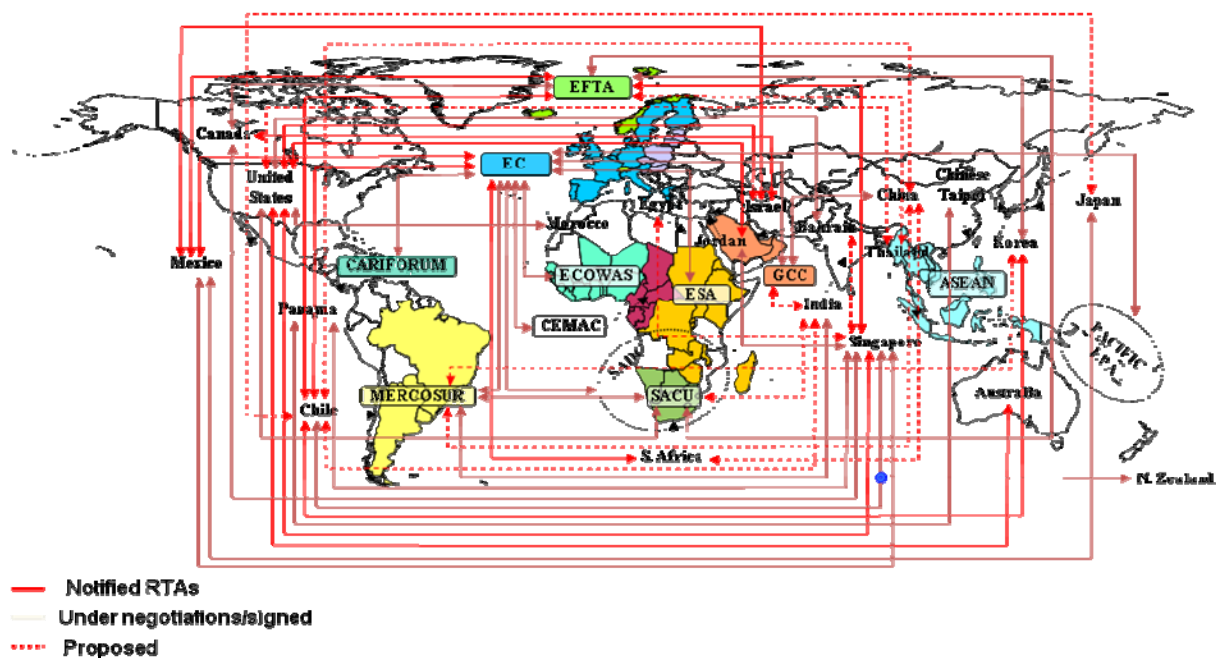
the EU, or Mexico in the case of the North American Free Trade Agreement (NAFTA).⁹⁶ In both cases, Spain and Mexico benefited very much from FDI thanks to the EU and NAFTA, respectively.

However, there are also negative effects of RTAs on the multilateral trading system. There is less enthusiasm for multilateral trade negotiations (like that of the Doha Round) when regionalism is doing well, which is currently the case. The current proliferation of RTAs also creates less transparency in the multilateral trading system and rules (i.e., the so-called spaghetti bowl, as can be seen in map 5 below), because it is not clear who is doing what with whom, given that everyone is concluding RTAs with everyone.⁹⁷ This lower level of transparency in the multilateral trading rules results in traders being subject to multiple, sometimes conflicting, requirements.

⁹⁶ The North American Free Trade Agreement (NAFTA) was a radical experiment in rapid deregulation of trade and investment among the U.S, Mexico, and Canada. Since 1995, NAFTA has been considered the symbol of the failed corporate globalization model because its results for most people in all three countries have been negative: real wages are lower and millions of jobs have been lost; farm income is down and farm bankruptcies are up; environmental and health conditions along the US-Mexico border have declined; and a series of environmental and other public interest standards have been attacked under NAFTA. NAFTA's agricultural provisions have been so extreme that Mexican family farmers are demanding a re-negotiation or nullification of the treaty, after its first phase of initial implementation led to the displacement of millions of Mexican farmers. See Wallach, L. *Public Citizen Pocket Trade Lawyer: The Alphabet Soup of Globalization*, Washington, D.C.: Public Citizen's Global Trade Watch, 2005.

⁹⁷ Much literature has argued that RTA proliferation may undermine the multilateral trading system. See for example Bhagwati, J. *Termites in the Trading System: How Preferential Agreements Undermine Free Trade*, Oxford University Press, 2008; Baldwin, R. & Low, P. *Multilateralizing Regionalism: Challenges for the Global Trading System*, New York: Cambridge University Press, World Trade Organization, 2009; Baldwin, R. "Multilateralizing Regionalism: Spaghetti Bowls as Building Blocks on the Path to Global Free Trade," *The World Economy*, Vol. 29, 2006, pp. 1451-1518; Horn, H., Mavroidis, P. & Sapir, A. "Beyond the WTO? An Anatomy of EU and US Preferential Trade Agreements," Bruegel Blueprint Series, 7, 2009; Hillman, J. "Saving Multilateralism: Renovating the House of Global Economic Governance for the 21st Century," *Brussels Forum Paper Series*, Washington, DC: The German Marshall Fund of the United States, March 2010.

Map 5: The spaghetti bowl phenomenon (February 2005)



Source: WTO Secretariat

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

generate more trade with the rest of the world.⁹⁸ In this respect, after analyzing a report by the Asian Development Bank published in 2008,⁹⁹ Masahiro Kawai and Ganeshan Wignaraja found “that business in the [Asian] region tend to view FTAs as a benefit rather than a burden, and that they use them to expand trade to a far greater degree than had been previously thought.”¹⁰⁰ That said, economic studies of FTAs have shown that the trade-creation effects may often be smaller than the trade-diversion effects, given that trade between the participants replaces trade between the participants and non-participants. It seems, therefore, that it is not clear whether RTAs create or divert trade.¹⁰¹

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

⁹⁸ Van den Bossche, P. *The Law and Policy of the World Trade Organization: Text, Cases and Materials*, 2nd ed., Cambridge: Cambridge University Press, 2008, p. 696.

⁹⁹ “Emerging Asian Regionalism: A Partnership for Shared Prosperity,” Mandaluyong City: Asian Development Bank, 2008.

¹⁰⁰ Kawai, M. & Wignaraja, G. “Free trade Agreements in East Asia: A Way toward Trade Liberalization?” *Asian Development Bank Briefs*, No. 1, June 2010, p. 5.

¹⁰¹ See for example the views expressed in the Sutherland Report, “The Future of the WTO: Addressing Institutional Challenges in the New Millennium,” World Trade Organization, 2004, para. 85.

¹⁰² Assessing the compatibility of the Treaty of Rome with the requirements of GATT Article XXIV was politically complicated. See Von Bogdandy, A. and Makatsch, T. ‘Collision, Co-existence or Co-operation? Prospects for the Relationship between WTO Law and European Union Law,’ in De Búrca, G. and Scott, J. (eds.), *The EU and the WTO: Legal and Constitutional Issues* (Oxford and Portland OR, Hart Publishing, 2001), p. 131, at p.137.

¹⁰³ MERCOSUR stands for Mercado Común del Sur (Common Market of the Southern Cone) and is composed of Brazil, Argentina, Paraguay, and Uruguay. On 9 December 2005, Venezuela was accepted as a new member, but not scheduled to be made official until later. It was founded in 1991 by the Treaty of Asunción, which was later amended and updated by the 1994 Treaty of Ouro Preto (December 17, 1994). Its purpose is to promote free trade and the fluid movement of goods, peoples, and currency. See Leal-Arcas, R. *International Trade and Investment Law: Multilateral, Regional and Bilateral Governance*, Cheltenham: Edward Elgar, 2010, p. 88.

¹⁰⁴ The Andean Community is a trade bloc comprising, until recently, five South American countries: Venezuela, Colombia, Peru, Ecuador, and Bolivia. In 2006, Venezuela announced its withdrawal, reducing the Andean Community to four Member States. The trade bloc was called the Andean Pact until 1996, and came into existence with the signing of the Cartagena Agreement in 1969. Its headquarters are located in Lima, Peru. See Leal-Arcas, R. *International Trade and Investment Law: Multilateral, Regional and Bilateral Governance*, Cheltenham: Edward

Community (CARICOM)¹⁰⁵, 3) the Asia-Pacific RTA network,¹⁰⁶ and 4) the African RTA network.

Having said all this, multilateralism and regionalism/bilateralism are not mutually exclusive. As a matter of fact, several countries in different regions of the world work intensively on regional treaties about integrating regional markets and free trade. The EU is one example. Even though European countries have worked for European integration in several areas, such as market integration, for more than fifty years, European countries—with the European Community on the sideline with wide influence in the GATT and now the EU as a Member of the WTO—have worked to improve the multilateral system.¹⁰⁷

In the case of Africa, there is the African Economic Community (AEC),¹⁰⁸ and in South America there is the Union of South American Nations (Unión de Naciones Suramericanas—UNASUR),¹⁰⁹ the Andean Community, and Mercosur. Those organizations all work for a deeper integration of regional markets, but the various countries that belong to these regional organizations are making serious efforts on the multilateral level as well.¹¹⁰ Although the Doha Round has been quite challenging, making only slow progress since its inception, it must be

Elgar, 2010, p. 28.

¹⁰⁵ The Caribbean Community (CARICOM) is a regional grouping of 15 Caribbean countries: Antigua and Barbuda, Bahamas, Barbados, Belize, Dominica, the Dominican Republic, Grenada, Guyana, Haiti, Jamaica, Saint Lucia, Saint Vincent and the Grenadines, Saint Christopher and Nevis, Surinam, and Trinidad and Tobago.

¹⁰⁶ On the new trend of bilateralism and RTAs in the Asia-Pacific region, see Ravenhill, J. “The new Bilateralism in the Asia Pacific,” *Third World Quarterly*, Vol. 24, No. 2, pp. 299-317, 2003 (arguing that this new interest in bilateralism is explained by: an increasing awareness of the weakness of existing regional institutions and initiatives; perceptions of positive demonstration effects from regional agreements elsewhere; and changing configurations of domestic economic interests).

¹⁰⁷ For an overview of the EU in the world trading system, see generally Leal-Arcas, R. *Theory and Practice of EC External Trade Law and Policy*, London: Cameron May, 2008; Leal-Arcas, R. “50 Years of Trade Policy: Good Enough or as Good as it Gets?” *Irish Journal of European Law*, Vol. 15, No. 1 and 2, 2008, pp. 157-182.

¹⁰⁸ For more information, see <http://www.uneca.org/itca/ariportal/abuja.htm>.

¹⁰⁹ For more information, see <http://www.comunidadandina.org/ingles/sudamerican.htm>.

¹¹⁰ See Estevadeordal, A., Shearer, M. and Suominen, K. “Regional Integration in the Americas: State of Play, Lessons, and Ways Forward,” *ADB Working Paper No. 277*, Asian Development Bank Institute, April 2011 (which considers the effect of RTAs on trade liberalization, and the lessons that this offers for other parts of the world, notably Asia).

noted that several agreements are being negotiated, and 153 WTO Members, all with different interests, are taking part in these multilateral negotiations. Looking historically at the GATT/WTO, the number of multilateral agreements has increased, even though regional agreements have been concluded by GATT/WTO Members.

One possible way to bridge the gap between multilateralism and regionalism/bilateralism is by making more use of plurilateral agreements,¹¹¹ which allow smaller groups of WTO Members to move forward, outside the single undertaking, on issues important to them. An example of a successful plurilateral agreement is the 1996 Information Technology Agreement—dependent on a critical (but not universal) mass of signatories. Another example is the plurilateral Government Procurement Agreement,¹¹² which is one of the most relevant agreements in the WTO today, with potential for membership expansion.

VII. Conclusion

One wonders whether RTAs are the center of gravity of the international trading system, whether the multilateral trading system is the center of gravity, or whether we have a symbiosis between regionalism and multilateralism in the international trading system and, if not, how we can get there, given that they coexist. RTAs might certainly allow developing countries to secure preferential treatment *vis-à-vis* their competitors. An example is the European Community-

¹¹¹ For further details on plurilateralism, see Leal-Arcas, R. *International Trade and Investment Law: Multilateral, Regional and Bilateral Governance*, Cheltenham: Edward Elgar, 2010, pp.63-68.

¹¹² An agreement on Government Procurement was first negotiated during the Tokyo Round and entered into force on 1 January 1981. The present agreement and commitments were negotiated in the Uruguay Round. The new agreement took effect on 1 January 1996. This is a plurilateral agreement—only some countries (Members of the WTO) are parties to the agreement. Its purpose is to open up as much of the government procurement business as possible to international competition. It is responsible for improving the transparency of the government procurement laws, regulations, procedures and practices. It also has to ensure that these laws do not protect domestic products or suppliers, or discriminate against foreign products or suppliers. See Leal-Arcas, R. *Theory and Practice of EC External Trade Law and Policy*, London: Cameron May, 2008, p. 170.

Mexico RTA, whereby the Europeans provide preferential treatment to Mexico.¹¹³ This may provoke the Brazilians to try to conclude an RTA with the EU in order to obtain preferential treatment from the Europeans.

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

This paper concludes that the proliferation of RTAs implies the erosion of the WTO law principle of non-discrimination and wonders whether this means the beginning of the end of multilateralism. It also concludes that the single undertaking—which seems too ambitious in today’s multilateral trading system—is no longer feasible because the WTO has more Members than ever (and WTO membership is an ongoing process, with more Members to come in the near future) and covers more topics than ever, which are more complex than ever. As an alternative, this paper suggests variable geometry (i.e., the idea that only a few WTO Members will benefit from plurilateral agreements on several topics on the agenda) and sectoral agreements (i.e., all WTO Members participate in negotiations and benefit from the agreed outcomes, but only one topic is discussed at a time, as was the case of the WTO Telecoms Agreement) as a way forward to unblock the multilateral trading system. The variable-geometry approach has the advantage of

¹¹³ For further information on the EC-Mexico RTA, see <http://rtais.wto.org/UI/PublicShowMemberRTAIDCard.aspx?enc=qNV0+U1t9KyuQXRIWBPAB3jPjTMk8Cdqi5yHzKblzCk=>.

removing the current frustration at the WTO negotiating table—and sometimes violent protests organized by civil society—with its slow negotiating pace. However, one disadvantage is that developing countries at the WTO might feel marginalized.

In relation to the Doha Round—or any round, for that matter—there is a need for serious political will if we want it to succeed. It is evident that there is currently an institutional fatigue. This paper therefore proposes a Doha-light option, i.e., lowering the expectations of the Doha Round. This translates into less market opening for agricultural products. Nevertheless, it should be made clear that the big trade challenges of today, whether climate change or energy resource scarcity, cannot be solved without multilateralism. Bilateral and regional agreements offer no substitute for global rule-making and coherent governance of a globalized economy. Moreover, bilateral and regional deals do not come close to matching the economic impact of agreeing to a global deal. Therefore, RTAs can be a complement but not an alternative to multilateralism.